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251	Jawala Singh v. Madan Gopal	...	1 L. C. 7; 27 Cr. L. J. 75.
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257	Balaram Paramsukdass Firm v. Gudiyatam Govinda Chetty	...	49 M. L. J. 200; A. I. R. 1925 Mad. 1232.

258	Abu Jafar v. Ragoindra Partab Sahai ...	2 O. W. N. 826; A. I. R. 1926 Oudh 113.
264	Papakannu Errappa Reddi v. Mutcheli Peddamunniswami Setti	49 M. L. J. 560; A. I. R. 1926 Mad. 161; 23 L. W. 411; (1926) M. W. N. 325.
265	Amarsangji Indrasangji v. Ranchhod Jethabhai ...	27 Bom. L. R. 267; A. I. R. 1925 Bom. 294.
270	Ramasami Reddi v. Rajagopalachariar ...	22 L. W. 518; (1925) M. W. N. 789; A. I. R. 1926 Mad. 29.
272	Juvansingji Motisingji v. Dola Chhala ...	27 Bom. L. R. 890; A. I. R. 1925 Bom. 390.
280	Trustee of Vijianagaram Estate v. Paila Achanah ...	22 L. W. 522; (1925) M. W. N. 771; A. I. R. 1926 Mad. 140.
280	Fateh Singh v. Jagannath Baksh Singh ..	A. I. R 1925 P. C. 55; 48 M. L. J. 64; 2 O. W. N. 25 12 O. L. J. 117; L. R. 6 A. (P. C.) 50; 27 O. C. 334; 27 Bom. L. R. 725; 29 C. W. N. 749; 47 A 158; 23 A. L. J. 739; 22 L. W. 58; 52 I. A. 100 P. C.
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288	Rajendra Narayan Bhanja Deo, *In the matter of* ...	(1925) Pat. 217; A. I. R. 1925 Pat. 581; 5 Pat. 13; 7 P. L. T. 269.
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292	Naimathulla Khan v. Abdul Razack ..	22 L. W. 535; A. I. R. 1925 Mad. 1268.
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295	Purshottam v. Sahu ...	A. I. R. 1926 Nag. 90; 9 N. L. J. 34; 22 N. L. R. 23.
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299	Usaf Dadabhai v. Chand Mahomed ..	27 Bom. L. R. 1273; A. I. R. 1926 Bom. 51.
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302	Kaman Mada v. Mallai ...	49 M. L. J. 538; 22 L. W. 732; A. I. R. 1926 Mad. 159.
303	Parankusam Venkayya v. Bandaru Satyanarayanamurthi ..	49 M. L. J. 271; 22 L. W. 208; A. I. R. 1925 Mad. 1235.
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305	Hanmavva Adiveppa Somraddi v. Venkappa Govindappa Kademan ...	27 Bom. L. R. 1331; A. I. R. 1926 Bom. 26.
307	Devabhaktuni Butchamma v. Devabhaktuni Punamma ..	21 L. W. 698; A. I. R. 1925 Mad. 896.
308	Hia Lal Kumar v. Ganu Mahto ...	(1925) Pat. 224; A. I. R. 1925 Pat. 585; 4 Pat. 844; 7 P. L. T. 209.
310	Niqlakanta Sarma v. Ganesha Iyer ...	(1925) M. W. N. 43; A. I. R. 1925 Mad. 469; 21 L. W. 685.
312	Ekabbar Ali Sha v. Alim ...	*Calcutta High Court
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316	Marath Veetil Kallianni Amma v. Cochin Sircar ...	22 L. W. 473; A. I. R. 1926 Mad. 143.
317	Pirthipal v. Bhaskor ...	A. I. R. 1926 Oudh 195.
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319	Nalakkakan Ambalam v. Kallalagar Devasthanam..	49 M. L. J. 628; 22 L. W. 622; (1925) M. W. N. 865; A. I. R. 1926 Mad. 156
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345	Wali Mohamad v. Bengal North-Western Ry. Co. ...	*Nagpur Judicial Commissioner's Court.
347	Ramchandra Trimbak Mantri v. Dattu Rama Patil...	27 Bom. L. R. 1258; A. I. R. 1926 Bom. 55.
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351	Maya Ram v. Tulsi Ram ..	1 L. C. 13; A. I. R. 1926 Lah. 184.
352	Faizuddin Ali v. Iyahiya Siraji ...	*Calcutta High Court.

353	Narayan Keshav Vagle v. Gulam Mohidin	...	27 Bom. L. R. 1210; 49 B. 832; A. I. R. 1926 Bom. 115.
355	Arulanandam Pillai v. Malaya Pillai Nadan	..	A. I. R. 1926 Mad. 101
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394	Dyta Seetharamayya, *In re*	...	27 Cr. L. J. 90; 23 L. W. 537; A. I. R. 1926 Mad. 351.
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411	Manohar Das Mahanta v. Brojendra Lal Das	...	A. I. R. 1926 Cal. 552.
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507	Raja Ram v. Jagannath	...	A. I. R. 1926 Oudh 209.
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536	Fazal Ahmed v. Abdullah Khan	...	7 L. L. J. 571; 27 Cr. L. J. 101; A. I. R. 1926 Lah. 151.
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565	Maringanti Ramanujcharyulu v. Pudiprolu Buchi Mangarao	..	22 L. W. 485; A. I. R. 1925 Mad. 1279.
566	Salig Ram v. Bakhtawar Singh	...	1 L. C. 400; A. I. R. 1926 Lah. 187.
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BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DATE

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 744 OF 1921.

October 7, 1924.

Present:—Mr. Justice Krishnan.

NATESA THEVAN—DEFENDANT No. 1—APPELLANT

versus

THE DISTRICT BOARD OF TANJORE—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 51—Sale by public auction—Delivery of excess land—Bona fide *improvements—Suit in ejectment as to excess—Compensation, right to—General principles.*

The defendant purchased a large plot of land in public auction from a District Board. In being given possession of the land purchased, he was given 2 acres and odd of land more than what he purchased. But he was not aware there was any such mistake and took possession of the whole of the land as being the land that he had purchased and made improvements thereon. In a suit by the District Board to eject the defendant from the excess area of land:

Held, (1) that the defendant was a transferee of the property as a whole and he believed in good faith that he was absolutely entitled to the whole and made the improvements *bona fide* on the property, and s. 51, Transfer of Property Act, applied and the defendant on ejectment was entitled to be paid compensation for the improvements; [p. 3, col. 2.]

(2) that even apart from s. 51, on general principles of equity, the defendant's claim to improvements could be supported, especially since the plaintiff knowing that the defendant was making improvements on land did nothing to prevent it. [*ibid.*]

Second appeal against a decree of the Court of the Subordinate Judge, Tanjore, in Appeal Suit No. 4 of 1920 (A. S. No. 174 of 1919, on the file of the District Court, Tanjore), preferred against that of the Court of the District Munsif, Pattukota, in Original Suit No. 565 of 1917.

This second appeal coming on for hearing on the 12th February 1924, the Court delivered the following

JUDGMENT.—The first point taken in this second appeal is that the lower Courts had no jurisdiction to try the case as the plaint land is *raiyati* land and, therefore, governed by the Madras Estates Land Act. I think that the decision of the lower Courts is correct on the point, for they find that the land was tank-bed land and is still tank-bed land. The evidence is clear on the point and the finding come to by the lower Courts is a finding of fact, which I must accept in second appeal. Nothing turns upon the definition of the words "tank-bed" in the Estates Land Act, so far as this case is concerned. That being so, the plea of no jurisdiction fails, and must be rejected.

The next question argued before me is as regards the compensation which the defendants claim for improvements made on the land. That, no doubt, depends on the application of s. 51 of the Transfer of Property Act. The District Munsif has found that the defendant did not act *bona fide* in making the improvements; but the Subordinate Judge has not discussed the point at all. The Subordinate Judge has disposed of the matter by merely saying that he thinks that the learned District Munsif has dealt with the point correctly. I cannot accept that as a proper disposal of the question. I must, therefore, ask the Subordinate Judge to consider the matter on the evidence in the case and return a revised finding on the question whether the defendants are entitled to improvements and, if so, what the value of the improvements is. The finding will be on the evidence already on record, and will be returned in six weeks from this date. Objections in ten days thereafter.

In compliance with the order contained in the above judgment, the Subordinate Judge of Tanjore submitted the following

FINDING.—In this case I am asked to submit a revised finding on the following issue:—

"Whether the defendants are entitled to improvements and, if so, what the value of the improvements is."

The evidence shows that the District Board sold certain plots of land by public auction (*vide* Ex. F). The 1st defendant purchased 6 acres and 24 cents of land out of the total area (*vide* Ex. G). In taking possession he seems to have entered also on the suit land which immediately adjoins on the south the land purchased by him. It is on this piece of land that cocoanut trees have been planted. It has been found that the suit land has been encroached upon by him and that it must be restored to the District Board. The question is whether he is entitled to the value of the improvements made by him in the shape of the cocoanut trees mentioned in the evidence.

If s. 51 governs the case the answer to the issue must be in the negative. That section deals with improvements effected on property which has been transferred to the person effecting the improvements. The language of the section is "When the transferee of immoveable property makes any improvement on *the property* . . . " (The italics are mine.) This makes it clear that the first pre-requisite for the application of the section is that the improvement must be made on the very property conveyed. But in the present case, the improvement has been made not on any portion of the 6 acres and 24 cents. conveyed to the 1st defendant but on land not included in the same. The case, therefore, does not come within the purview of s. 51 and if the section were to be held to be exhaustive of cases of claims for improvements by transferees there is at once an end of the 1st defendant's claim.

The facts as I find them are these. The 1st defendant after purchasing the 6 acres and 24 cents of land at the public sale by the District Board went and took possession of not only the above land but also of the land in suit. I am satisfied on the evidence that he did not deal with the additional land with knowledge that he was committing a trespass, but owing to his confusion as to the correct boundaries. The plan prepared by the District Board shows how hopeless it would be for a purchaser to identify the particular extent of land conveyed to him (*vide* Ex. H). That the District Board was conscious that there was likely to be confusion and mistake in the ascertainment of the boundaries of the several plots sold by public auction is apparent from one of the conditions fixed by it for sale (Ex. F, condition IV). The *karnam* states that previous to the sale the land was plotted by means of pegs driven into the land (this statement is badly misprinted in the printed record), but he was not considered to be a satisfactory witness by the Trial Court and I am not prepared to accept his statement. Even if pegs had been placed I do not think in a large extent of land like that sold the pegs would have served to dispel the confusion. The *karnam* also says that when 1st defendant trespassed upon the suit land he made a report to the District Board. But the report is not produced and I do not believe the *karnam's* testimoney on this point. I take it then that the 1st defendant entered on the disputed land in the belief that it was part of the property purchased by him at the auction. That the District Board did not take steps at once to disabuse him of his mistake (as it could and ought to have done) served to confirm the 1st defendant's belief in his own right; and in this belief he proceeded to plant cocoanut trees and incurred expense.

I am further of opinion that in making the improvements it cannot be said that the 1st defendant was wanting in "good faith." This expression occurring in s. 51 has been the subject of judicial consideration in *Narayana Aiyar* v. *Sankaranaryana Aiyar* (1) and this case shows that want of good faith cannot be attributed to the 1st defendant. If the latter knew that he was committing trespass it is scarcely likely that he would have spent a large amount in making permanent improvements knowing all the time that he was liable to be turned out at any moment.

That s. 51 cannot be held to include all possible cases of the kind now under consideration appears from the fact that the Transfer of Property Act itself has not been held to be exhaustive: *Amir Bi Bi* v. *Arokiam* (2), per Seshagiri Ayyar, J., and *Subbaraya Rowther Minda Nainar* v. *Kuppusami Aiyangar* (3). I would also refer to the standard work of Dr. Gour on the Law of Transfer in British India, Volume I, s. 687, wherein there is a discussion and

(1) 24 Ind. Cas. 940; 1 L. W. 369.
(2) 45 Ind. Cas. 813; 34 M. L. J. 184.
(3) 1 Ind. Cas. 535; 5 M. L. T. 278; 34 M. 442.

classification of cases of improvements not coming under s. 51 of the Act.

If, therefore, the 1st defendant's claim can be considered as not coming under s. 51 but that it is governed by general rules of equity, then it appears to me that as he entered on the suit land in the *bona fide* belief that it formed part of the land purchased by him, and the improvements were made by him under such a belief, and the District Board did not promptly take steps to disabuse him he would be entitled to the value of his improvements. The witnesses give different figures regarding the value ranging from Rs. 200 to Rs. 1,000. Making allowances for error and exaggeration on both sides I would assess the value at Rs. 300.

On the question remitted my finding is that the 1st defendant is not entitled to any compensation for improvements if the case is governed by s. 51 and that if s. 51 be held not to cover this case he is entitled to recover Rs. 300 for the value of improvements on the principle enunciated in *Ramsden* v. *Dayson* (4).

Mr. *N. R. Govindachariar*, for the Appellant.

Mr. *K. S. Ramachandra Iyer*, for the Respondent.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—In this case a finding was called for from the lower Appellate Court on the question whether the defendant was entitled to improvements on the portion of the land from which he was being ejected and, if he was entitled, what the value of those improvements was. The Subordinate Judge has returned a finding in which he seems to think that s. 51 of the Transfer of Property Act would not apply, but he says that, on general principles of equity, the defendant would be entitled to the improvements made by him. He assesses the value of those improvements at Rs. 300.

This is a case where the defendant purchased a large plot of land in public auction when the District Board was selling certain plots of land. In being given possession of the land that he had purchased, he seems to have been given 2 acres and odd of land more than what he purchased; but the Subordinate Judge finds that he was not conscious that there was any such mistake and that he took possession of the whole of the land as being the land that he purchased. He made improvements on the whole land and now the District Board, the plaintiff, finding that the defendant has in his possession more land than 6 acres 24 cents which he purchased, has brought this suit to eject him from the rest of the land.

The question is whether the defendant is entitled to compensation for the improvements that he has made. The Subordinate Judge finds that he made the improvements *bona fide* and I accept that finding in second appeal. To my mind, this is a case to which s 51 of the Transfer of Property Act can be properly applied; because the defendant was a transferee of the property as a whole and he believed, in good faith, that he was absolutely entitled to the whole and made the improvements *bona fide* on the property. When he is ejected he must, therefore, be paid compensation for the improvements. Even apart from s. 51 of the Transfer of Property Act, I think, as the Subordinate Judge states, that, on general principles of equity, his claim could be supported, more especially as the District Board, knowing that the defendant was making improvements on the land, did nothing to prevent it. I find that the defendant is entitled to the value of the improvements he has made. I accept the finding of the Subordinate Judge that their value should be assessed at Rs. 300.

The decree of the lower Court will, therefore, be modified by directing the plaintiff to pay the defendant a sum of Rs. 300 with interest thereon at 6 per cent. from the date on which the plaintiff took possession of the improvements up to the date of payment. There will be proportionate costs for each side so far as the second appeal is concerned. The order as regards costs in the lower Courts will not be interfered with.

V. N. V.
N. H.

Decree modified.

(4) (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 627 OF 1921.
February 26, 1925.
Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Martineau.
DURGA DAS—PLAINTIFF—
APPELLANT
versus
KUNDAN LAL AND OTHERS—DEFENDANTS
—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 36—Mortgage executed by insolvent within two years prior to insolvency—Consideration, proof of—Burden of proof.

Where a mortgage executed by a person who is subsequently adjudged an insolvent, within two years of the date of the mortgage, is questioned in the insolvency proceedings, the onus is on the mortgagee to prove that the mortgage was effected in good faith and for valuable consideration. [p. 4, col. 2.]

First appeal from a decree of the Senior Subordinate Judge, Hoshiarpur, dated the 23rd December 1920.

Pandit *Sheo Narain*, R. B., and Lala *Badri Das*, R. B., for the Appellant.

Lala *Fakir Chand* for Lala Kundan Lal, R. S., and Lala *Sardha Ram*, R. S., for Lala Parsa Das, R. S., for the Respondents.

JUDGMENT.—Sunder Singh of Bhairowal in the Hoshiarpur District applied to be adjudicated insolvent on the 21st of July 1915, and was so adjudicated on the 1st of December of the same year. In the insolvency proceedings Durga Das plaintiff-appellant claimed to be a secured creditor of Sunder Singh under a mortgage-deed relating to two houses and two shops for Rs. 3,825 dated the 9th of May 1914. The creditors opposed this application saying that the mortgage was without consideration and had been effected in order to defraud the other creditors. A full enquiry was not made into the parties' allegations in those proceedings and the Court referred Durga Das to a civil suit. He accordingly brought the suit out of which the present appeal arises in order to establish his claim on the mortgage-deed in question as a secured creditor.

The lower Court found that with the exception of Rs. 602 paid before the Sub-Registrar at the time of registration the rest of the consideration was not proved. It accordingly gave him a declaratory decree to the effect that the property was under mortgage with appellant for Rs. 602 only with interest at 8 per cent. per annum less Rs. 12 as the annual rent of the property plus Rs. 50 on account of repairs.

From this decree the plaintiff appeals and asks that the whole of the amount due under the mortgage-deed be declared to be a valid charge upon the property together with interest and Rs. 175 on account of repairs. The appeal as regards the additional sum claimed for repairs was, however, not pressed in arguments before us.

The consideration for the mortgage-deed was (1) Rs. 2,000 due on a promissory note said to have been executed by Sunder Singh on the 10th of February 1912 and (2) Rs. 800 due on a second promissory note said to have been executed by him on the 13th of November 1913 and (3) Rs. 360 on account of a third promissory note being the interest due on the former two executed by him on the 10th of February 1914. In addition to this there was (4) a sum of Rs. 63 due on account of interest on the three promissory notes up to the date of the execution of the mortgage together with (5) Rs. 602 paid before the Sub-Registrar. The deed was written by a petition-writer at Hoshiarpur. The attesting witnesses and the scribe have been examined as witnesses and it has been found by the lower Court that the mortgage-deed was only executed and this point has not been disputed before us. The lower Court has, in its judgment, fully described the financial position of plaintiff-appellant and his father Khurram Rai (D. W. No. 7) before, and at or about the time when the promissory notes are said to have been executed. It is perfectly clear that the income of these two persons had not been such as would probably have enabled them to save sufficient sums from which advances of Rs. 2,800 in cash could have been made in the year 1912. It is contended by Counsel for the appellant that it is not proved that the plaintiff and his father had not other income. In this connection, however, we must remember that the mortgage-deed was executed within two years of the date upon which Sunder Singh was adjudged insolvent, and, therefore, having regard to s. 36 of the Provincial Insolvency Act of 1907 the onus was on the plaintiff to prove that the mortgage was effected in good faith and for valuable consideration. We, therefore, are of opinion that it was for the plaintiff to show conclusively that he was in a position to lend the money which he says he lent in 1912 to Sunder Singh.

Counsel contends that consideration for the promissory notes of 10th of February

and 13th of November 1912, is proved by Sunder Singh's statement in the insolvency case and by the incorporation of the sums due on the promissory notes as part of the consideration for the mortgage-deed. Sunder Singh is dead and his statement made in the insolvency proceedings has, therefore, been admitted in evidence under ss. 32 and 33 of the Indian Evidence Act. It is marked as Ex. P-7 and is printed at pages 8 and 9 of the paper-book. In this he has stated that the promissory notes are in his own handwriting and that the amount entered therein was taken by him in cash. In cross-examination he said that he possessed a *rokar bahi* but had not got it at that time, *i. e.*, on the 5th of June 1916 when his statement was recorded. He admitted that the amounts of all the three promissory notes were entered in his *bahi*.

As regards the promissory note for Rs. 360 we have the evidence of Uttam Singh (P. W. No. 5). His statement was that five or six years ago Sunder Singh asked him to get the matter of interest due on the other promissory notes settled with Durga Das. He accordingly took Sunder Singh to Durga Das in Rajpur quarter at Delhi where he lived at the time and there Sunder Singh executed a promissory note for Rs. 360 on account of interest due in favour of Durga Das. This witness has been disbelieved by the lower Court for reasons fully given in its judgment at page 38 of the paper-book, and we agree that his evidence is not entitled to credit. There is no other evidence that consideration for these promissory notes was really paid except this statement of Sunder Singh.

The lower Court in its judgment (see page 37) has shown how on the 13th of June 1914 a decree for Rs. 1,476 was passed against Sunder Singh and also how in the beginning of 1915 two suits were instituted against him in which decrees for over Rs. 18,000 and over Rs. 11,000 were passed against him. Counsel for the appellant contends that these decrees do not show that Sunder Singh was financially embarrassed in May 1914, when the mortgage-deed was written. It is, however, *prima facie* probable that the debts about which these decrees were passed were incurred sometime previously and appellant has not shown by the production of any evidence that the debts were incurred subsequent to the execution of the mortgage-deed. It is, however, further contended by Pandit Sheo Narain on behalf of the appellant that, even if Sunder Singh was financially embarrassed in 1914, it is not proved that he was so embarrassed at the time when the promissory notes were executed in 1912. It is true that there is no evidence on this point but on the other hand there is no evidence that the promissory notes were executed on the dates on which they purport to have been executed beyond the statement of Sunder Singh himself. They could have been executed at any time and antedated. It must also be remembered that Sunder Singh's good faith was being challenged in the insolvency proceedings and there his statement must be received with caution. Again it is a very significant fact which is strongly pressed by Counsel for the respondents, that Durga Das himself has not gone into the witness-box. He could have done this and could have deposed to having advanced the money on the two promissory notes. He could have explained where he got the money from. Another important point is that Sunder Singh's account books have never been produced either in the Insolvency Court or in the lower Court. It has been said that Durga Das had no power to produce them. He might, however, have called Sunder Singh's sons as witnesses and given them notices to produce the account books if they had them. He made no attempt to do this. It is not proved that plaintiff or his father possessed any land or other immoveable property from which they derived any income. Plaintiff could have materially assisted the Court by tendering himself as a witness but he has not done this. In other words he has not produced the best evidence which could have been produced in support of his case. In our opinion the lower Court has rightly held that he has not discharged the onus which lay upon him in regard to the promissory notes of 1912, and we dismiss his appeal with costs.

Appeal dismissed.

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 71 OF 1924.
September 11, 1925.
Present:—Mr. Dalal, J. C.
BISRAM SINGH—PLAINTIFF—APPELLANT
versus
BHAGWANT SINGH—DEFENDANT—RESPONDENT.

Pleadings—Mortgage—Suit for possession—Alternative relief—Simple money-decree.

Where a plaintiff prays for a decree for possession as a mortgagee and in the alternative for any equitable relief, the Court is bound to pass a simple money-decree on the failure of the mortgage for want of attestation.

First appeal against the judgment and decree of the Subordinate Judge, Sitapur, dated the 15th of November 1924.

Messrs. *M. Wasim*, *N. C. Dutt* and *Tinkauri Mohan Ghose*, for the Appellant.

Messrs. *Niamat Ullah* and *Muhammad Ayub*, for the Respondent.

JUDGMENT.—The plaintiff Bisram sued for possession on foot of a mortgage on breach of a condition of the mortgage. His prayer was in cl. (*a*) "The plaintiff prays that a decree for possession as mortgagee over *haqqiat* mortgaged as specified in para. 2 of the plaint, be passed in favour of the plaintiff against the defendant, or any other relief which may be equitable on the merits of the case or which the merits of the case may admit, be granted." The learned Judge of the lower Court held that the deed was not attested in the sense of both the attesting witnesses being present when the executant put his signature on the deed [*Shamu Patter* v. *Abdul Kadir Rowthan* (1).] He held correctly that the document would not operate as a mortgage and promptly proceeded to dismiss the suit.

In this appeal it is argued that the conflict of evidence may be due to the time that had elapsed between the execution of the document and the date when the witnesses give evidence and that the executant really did sign in the presence of the two witnesses Raghubar and Baley. I had not the opportunity of seeing the wintesses and hence the lower Court was in a better position to judge their reliability and demeanour. I am not prepared to disagree with the opinion of the lower Court specially as I hope to do equitable justice between the parties. I agree with the lower Court that the mortgage is not enforceable.

The alternative relief escaped the notice of the lower Court. In ground of appeal No. 5 it is urged that at any rate the lower Court ought to have passed a simple money decree in favour of the plaintiff. My opinion is that it ought to have done so. The cause of action as asserted by the defendant himself is the same and the alternative relief can mean nothing if it excludes a money-decree. It was a slip on the part of the plaintiff's Counsel in the lower Court that he did not insist upon a money-decree when the mortgage failed. The suit for the money-decree was still within time.

The money claimed was Rs. 8,475. As, however, the plaintiff's Counsel made a slip I shall not allow the bond rate of interest on this sum after the date of the institution of the suit in the lower Court. I decree the appeal for Rs. 8,475 with simple interest at 6 per cent. per annum till the date of realization from 13th March 1924.

Parties shall bear their own costs of both the Courts.

N. H. *Appeal decreed.*

(1) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 105 OF 1924.
March 23, 1925.
Present:—Mr. Justice Abdul Raoof.
MADAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
PURAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 5, 12—Appeal, delay in filing—Copies delivered late owing to mistake of office—Extension of time.

Where an appeal is filed beyond time owing to the fact that delivery of the necessary copies to the appellant is delayed as the result of the failure of the Copying Department to inform the appellant as to the date on which he must take delivery of the copies, the appellant is entitled to the indulgence of the Court under s. 5 of the Limitation Act.

Second appeal from a decree of the District Judge, Ludhiana, dated the 15th October 1924, affirming that of the Subordinate Judge, Second Class, Ludhiana, dated the 7th June 1924.

Mr. *B. A. Cooper*, for the Appellants.

Mr. *D. S. Chand*, for the Respondents.

JUDGMENT.—In my opinion the appellant has not been treated properly in this case. He made his first application for a copy of the decree in Urdu on the 3rd of July 1924. On the 10th July 1924 an intimation was sent to him by post telling him that he could not get a copy in Urdu and enquiring whether he wanted a copy in English. The appellant then on the 15th July 1924 expressed his willingness to take a copy in English. He was not told when the copy would be ready and when he should attend the office to take delivery of it. The learned Judge of the Court below remarks that the copy was ready by the 18th idem and finds fault with the appellant that he did not turn up to take delivery of the copy on that date. This remark would have been justified if the appellant had been told to come within three days or thereabout. He is an ignorant villager not quite conversant with the ways of the office of the Court and cannot rightly be blamed for not turning up on the 18th. Then again the office took another 15 days for deciding to send the copy by post which was eventually received by the appellant on the 25th and put in Court that very day. This was primarily a case in which the Judge should have exercised his discretion under s. 5 of the Indian Limitation Act and ought to have extended the period of limitation. I now do what the learned Judge of the Court below ought to have done and extend the period of limitation. The appeal is accepted and the case is remanded under O. XLI, r. 23 for decision on the merits. I make no order as to costs.

Appeal accepted.

Z. K.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 140 OF 1923.

March 10, 1925.

Present:—Mr. Justice Phillips.

K. S. SUPPUSWAMI IYER———PLAINTIFF—APPELLANT

versus

THE CORPORATION OF MADRAS—DEFENDANT—RESPONDENT.

Madras City Municipal Act (IV of 1919), ss. 169 cl. (5), 355—Standing Committee of Madras Corporation—Regulation of free supply of water—Publication of regulations, meaning of.

Under s. 169, cl. (5) of the Madras City Municipal Act, the Standing Committee of the Madras Corporation has power to determine what shall be the free supply of water to a house under varying conditions. The maximum fixed for a particular house need not be the same for all purposes.

Where the Council of the Corporation decides to publish and accordingly publishes regulations generally in a particular manner, the provisions of s. 355 of the Madras City Municipal Act are complied with. It is not necessary that to every regulation should be appended the manner in which the Council determines to publish that particular regulation.

Appeal against a decree of the City Civil Court, Madras, dated the 16th August 1923, in O. S. No. 204 of 1923.

Mr. *K. Bhashyam Iyengar*, for the Appellant.

Mr. *S. Rangaswami Iyengar*, for the Respondent.

JUDGMENT.—The main point argued in this appeal is that the regulations passed by the Standing Committee of the Madras Corporation in respect of the rates levied for the supply of water are *ultra vires*. Under s. 169, cl. (5) "for all water supplied under this section, in excess of a maximum determined by regulations of the Standing Committee, payment shall be made * * * * *". The section relates to water supply for domestic consumption and the contention for the appellant is that there can only be one maximum for the supply of such water. He takes no objection to the regulation in so far as it provides a varying maximum in accordance with the rental value but yet he contends that there can be only one maximum. The very fact of the word "a" being used before "maximum" would show that there was not intended to be one only maximum; otherwise the words would be the "maximum." If the latter were the wording it might possibly be contended that the maximum must be a definite number of gallons for every consumer irrespective of the size of the house he occupies. That is not the contention now raised and, in fact, it would reduce the case to an absurdity. I am satisfied that, on the language of the section the Standing Committee has power to determine what shall be the free supply under varying conditions. They have determined this by regulations framed on the 15th of April 1921 and these have been communicated to the plaintiff. As these regulations are not *ultra vires* of the Standing Committee, the plaintiff cannot object to their enforcement.

The next point raised is that these regu-

lations were not approved by the Council. The evidence of the only witness examined shows that the regulations were put before the Council and it is clear even from the extract from the minutes which is now before me that the Council did not take any objection to these regulations. The power of framing them is vested in the Standing Committee and that this was done is proved by the proceedings of the body.

A further objection is taken that the regulations have not been published in the manner determined by the Council. This point was not raised in the plaint but apparently was taken at the time of argument. It is contended that to every regulation should be appended the manner in which the Council determines to publish that particular regulation. Such a proposition I think requires no argument, for obviously, if the Council decides to publish regulations generally in a particular manner, that complies with the provisions of s. 355 of the Act. There is evidence that this regulation was published in the usual manner ordered by the Commissioner and there is no evidence to show that it was not the way in which the Council determined that it should be published. If really this objection were to be pressed, it should have been mentioned in the plaint for it is a question of fact to be determined by evidence which evidence was naturally not available at the hearing. As this point was not raised in the plaint or in the issues, I think that the learned Judge was wrong to consider it at all without an amendment of the plaint.

The appeal is accordingly dismissed with costs.

V. N. V. *Appeal dismissed.*
N. H.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL
No. 2270 OF 1924.
March 17, 1925.

Present:—Mr. Justice Martineau.

DIWAN SINGH—DEFENDANT—APPELLANT

versus

JIRAM AND ANOTHER MINORS THROUGH THEIR MOTHER *Musammat* MANBHARI—PLAINTIFFS, SURAJ BHAN AND ANOTHER—*Pro forma* DEFENDANTS—RESPONDENTS.

Bengal Land Redemption and Foreclosure Regulation (XVII of 1806), ss. 7, 8—Notice of foreclosure, contents of.

Under s. 8 of Bengal Land Redemption and Foreclosure Regulation XVII of 1806 the mortgagor must be notified that if he does not redeem the property mortgaged in the manner provided for by section 7 within one year from the date of the notification the mortgage will be finally foreclosed. The requirements of s. 8 are fulfilled if the notice to the mortgagor gives the full purport of s. 7 of the Regulation even though s. 7 is not expressly mentioned in the notice.

Miscellaneous second appeal from an order of the District Judge, Hissar, dated the 28th June 1924, reversing that of the Subordinate Judge, Fourth Class, Hissar, dated the 12th November 1923.

Mr. *R. C. Soni*, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The plaintiffs sued for the redemption of property mortgaged by their father in 1917. The defendant pleaded that they had lost their right of redemption in consequence of foreclosure proceedings taken by him in 1921. The first Court upheld that plea and dismissed the suit, but the District Judge, following *Ram Chand* v. *Sandal Khan* (1), *Balwant Singh* v. *Ram Das* (2) and *Bulanda* v. *Fateh Din* (3) held that the foreclosure proceedings were invalid because no mention was made of s. 7 of Regulation XVII of 1806 in the notice of foreclosure, and he, therefore, remanded the case to the first Court for decision on the remaining issues. The defendant has appealed to this Court from the order of remand.

In *Ram Chand* v. *Sandal Khan* (1), the notice of foreclosure was headed "Application for issue of a notice of foreclosure under ss. 7 and 8 of Regulation XVII of 1806," but in the body of the notice the mortgagor was only informed that the mortgage would be foreclosed if he did not pay the mortgage-money and redeem the property in the manner provided for in the foregoing section, without it being stated which of the two sections, mentioned in the heading was referred to, and it was, therefore, held that the omission to specify s. 7 in the body of the notice was a fatal defect. That case is not similar to the present one.

In the other two cases followed by the learned District Judge, in which the omission in the notice of a reference to s. 7 of the Regulation was held to be fatal, it is not stated how the notices were worded.

Now in the present case, although the

(1) 21 P. R. 1903; 83 P. L. R. 1903.
(2) 26 P. R. 1908; 141 P. L. R. 1908; 41 P. W. R. 1908.
(3) 25 Ind. Cas. 504; 57 P. R. 1914; 256 P. L. R. 1914.

notice of foreclosure issued under s. 8 of the Regulation made no mention of s. 7, it contained all the particulars set forth in s. 7 as to the manner in which the property was to be redeemed, and this was all that was necessary. Under s. 8 the mortgagor is to be notified that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification the mortgage will be finally foreclosed. That requirement is fulfilled if the notice to the mortgagor gives the full purport of s. 7 even though s. 7 is not expressly mentioned in the notice. Therefore the notice of foreclosure which was issued at the instance of the defendant in 1821, was not defective by reason of the omission to mention s. 7 of the Regulation therein.

I accordingly accept the appeal, set aside the order of the lower Appellate Court, and remand the case to that Court under O. XLI, r. 23, C. P. C., for a fresh decision after it has been determined whether the foreclosure proceedings were in other respects regular. The Court-fee paid on the appeal in this Court will be refunded and other costs will be costs in the case.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPLICATION IN APPEAL FROM ORIGINAL DECREE No. 114 OF 1925.

August 26, 1925.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Graham.

JOGENDRA NATH MAITI AND OTHERS—PETITIONERS

versus

BHAGAWAT DAS AND OTHERS—OPPOSITE PARTY.

Appeal—Suit for possession and mesne profits—Decree, value of, in excess of Rs. 5,000—Forum *of appeal.*

Plaintiff instituted a suit for recovery of possession of land valued at Rs. 2,800 and mesne profits for a period prior to the institution of the suit tentatively valued at Rs. 1,200, the total value being Rs. 4,000. A decree was passed in his favour for possession with a direction for determination of mesne profits and on the mesne profits being ascertained the total amount of the decree exceeded in valuation the amount of Rs. 5,000:

Held, that an appeal against the decree lay to the High Court and not to the District Judge.

Ijjatulla Bhuyan v. *Chandra Mohan Banerjee*, 34 C. 954; 6 C. L. J. 255; 11 C. W. N. 1133 (F. B.), followed.

Bidyadhar Bachar v. *Manindra Nath Das*, 89 Ind. Cas. 726; 42 C. L. J. 49; 29 C. W. N. 869 (F. B.), distinguished.

Application against a decree of the Subordinate Judge, dated the 30th July 1924.

Mr. *Gunada Charan Sen* and Babu *Someshwar Prosad Mukherjee*, for the Petitioners.

Mr. *Maity* and Babu *Apurba Chandra Mookerjee*, for the Opposite Party.

JUDGMENT.—The plaintiffs-opposite parties instituted a suit for recovery of possession of land valued at Rs. 2,800 and mesne profits tentatively valued at Rs. 1,200, the total value being Rs. 4,000. A decree was passed for possession with a direction for determination of mesne profits at "a further stage of the suit." The mesne profits were subsequently ascertained and the Trial Court gave a decree for Rs. 3,116-8-0 with interest thereon. The defendants appealed to the District Judge while the plaintiffs appealed to this Court valuing their appeal at Rs. 5,500. The plaintiffs then applied to the District Judge for dismissal of the petitioners' appeal on the ground that the appeal lay to the High Court and not to the District Judge. While the application of the plaintiffs was pending before the District Judge, the petitioners submitted an application on the 20th July last to us to decide the question of the *forum* of appeal, and if it was held that the appeal lies to this Court then to treat the application as one under s. 5 of the Limitation Act. The application was ordered by this Court to be kept pending until the decision of the question by the District Judge.

The District Judge on the 29th July last held relying upon the Full Bench decision in the case of *Ijjattulla Bhuyan* v. *Chandra Mohan Banerjee* (1), that the appeal lies to this Court as the land had been valued at Rs. 2,800 and the mesne profits which had been tentatively valued in the plaint at Rs. 1,200 had been found to be Rs. 2,300, the total being Rs. 5,100.

Our attention has been drawn to the case of *Bidyadhar Bachar* v. *Manindra Nath Das* (2). That case, however, related to mesne profits *pendente lite*. In the present case

(1) 34 C. 954; 6 C. L. J. 255; 11 C. W. N. 1133 (F. B.).

(2) 89 Ind. Cas. 726; 42 C. L. J. 49; 29 C. W. N. 869 (F. B.).

mesne profits were claimed prior to the suit and is thus governed by Full Bench decision in *Ijjatulla's case* (1). It is to be noted that *Ijjatulla's case* (1) was not referred to in the judgment in the later Full Bench decision: *Bidyadhar Bachar* v. *Manindra Nath Das* (2).

We accordingly hold that the appeal lies to this Court. We think, however, that there was sufficient cause for not presenting the appeal in this Court in time, and we accordingly direct that the appeal be admitted though out of time. The petitioners, however, must pay costs to the opposite party one gold *mohur*.

Z. K. *Application granted.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 74 OF 1925.

March 26, 1925.

Present:—Mr. Justice LeRossignol.

FATEH ULLAH AND OTHERS—PLAINTIFFS—PETITIONERS

versus

ABDUL RAHIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 15—Arbitration—Award set aside—Revision, whether lies.

An arbitration proceeding entered upon by the parties in the course of the trial of a suit is a proceeding in the suit itself and does not constitute a separate case, within the meaning of s. 115 of the C. P. C. Therefore, an order of a Trial Court setting aside an award made in the course of an arbitration proceeding entered into during the pendency of a suit is not open to revision.

Petition, under s. 44 of the Punjab Courts Act, for revision of an order of the Senior Subordinate Judge, Lyallpur, dated the 1st December 1924.

Sir *Muhammad Shafi* and Mr. *Muhammad Rafi*, for the Petitioners.

Bakshi *Tek Chand* and Lala *Mehar Chand*, *Mahajan*, for the Respondents.

JUDGMENT.—This is an application for the revision of an order of the Senior Subordinate Judge setting aside an award on various grounds, and a preliminary objection is raised by the respondents that the application is not competent, inasmuch as the Senior Subordinate Judge's order is an interlocutory order and, therefore, not subject to revision *Lal Chand-Mangal Sen* v. *Behari Lal-Mehar Chand* (1).

(1). 84 Ind. Cas. 259; 5 L. 288; (1924) A. I. R. (L.) 425; 6 L. L. J. 558; 1 L. C. 36.

On behalf of the petitioners it is retorted that the ruling cited by the respondents does not apply to this case, inasmuch as arbitration proceedings are special proceedings which take place before special Tribunal and, therefore, are not merely proceedings in the suit but constitute a "case" by themselves. In support of his argument the learned Counsel has referred me to the "contents" table of the C. P. C., and has dilated on the fact that arbitration is dealt with under Part V of the Code which is entitled "special proceedings" and he has also referred me to certain reported cases in which Courts have interfered in revision in such cases.

The real issue is whether arbitration proceedings entered upon by the parties in the course of a trial of a suit are proceedings in that suit, or within the meaning of s. 115 of the Code constitute a separate case, and, in my opinion, the answer must be that they are merely proceedings in the suit. The fact that Part V of the Code is entitled "special proceedings" is of no significance in this connection, for we find under the same part that certain suits also are dealt with. Section 89 of the Code reads as follows:—

"All references to arbitration whether by an order in a suit or otherwise." * * *

These words clearly contemplate that the arbitration proceedings shall be considered as a proceeding in the suit. In the Second Schedule to the C. P. C., cl. (2) of para. 3 runs:—

"Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit."

These words clearly mean that to the extent provided in the Schedule the arbitration proceedings form an integral part of the suit. Indeed, the whole scheme of the Schedule is that all references to arbitration shall be treated as suits, for we find that when any party wishes to enforce an agreement to refer to arbitration, he may apply to the Court for the filing of that agreement and his application shall be numbered and registered as a suit (para. 19). A similar provision is made in para. 20 that after an award has been made without the intervention of the Court any person interested may apply to the Court to have the award filed in Court. In the two latter cases there is no suit apart from the pro-

ceedings in arbitration, and it is significant that in those cases an appeal against the order is allowed by s. 104. It is otherwise when the reference is made to arbitration in a suit already pending before a Court. In such a case for an obvious reason no appeal against an order is allowed, and it can never have been contemplated by the Legislature that the refusal of this right could be made good by an application in revision.

For the foregoing reasons I have no hesitation in holding that arbitration proceedings in a suit instituted in a Court are not proceedings independent of the suit but are merely proceedings in the case and do not in themselves constitute a separate case. This case, therefore, in which the Senior Subordinate Judge has set aside the award and directed that the suit shall proceed before him is an undecided case and not open to revision. I uphold the preliminary objection and dismiss the petition with costs.

Z. K. *Petition dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 226 OF 1923.

May 1, 1925

Present :—Mr. Justice Krishnan.

SUBRAMANIA CHETTY—PETITIONER

versus

RAMASWAMI CHETTI AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 73, 115—Rateable distribution—Conditions, requisite—Manifest error—Interference—Revision.

Section 73, C. P. C., is intended to distribute equitably the assets of the common debtor realised by the Court among the decree-holders, and to entitle a creditor to benefit under the section, the only two conditions necessary are that he must have a money-decree against the same judgment-debtor and that he must have applied for execution of that decree before the assets were realised. If these two conditions are fulfilled, he is entitled to join in the rateable distribation. It is not necessary that the execution application put in by the party should be such as would have ended in his successfully obtaining satisfaction of his decree. [p. 12, col. 1.]

Bando Krishna Kambargi v. *Narasimha Konher Deshpande*, 17 Ind. Cas. 210; 37 B. 42; 14 Bom. L. R. 861, relied on.

Although under s. 73, C. P. C., there is a special remedy provided, namely, that of a suit, that provision does not prevent a Court from interfering under s. 115, C. P. C., where there is a manifest error in the order under s. 73 and putting that error correct, as otherwise the parties will be driven to unnecessary litigation. [p. 12, col. 2.]

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the District Munsif, Devakotta, dated the 27th of October 1922, in E. A. No. 439 of 1922, in E. P. No. 66 of 1922, in O. S. No. 582 of 1921.

Mr. *M. Patanjali Sastry*, for the Petitioner.

Messrs. *B. Sitaram Rao* and *S. R. Muthusami Iyer*, for the Respondents.

JUDGMENT.—This is an application to revise an order passed under s. 73 of the C. P. C. by the District Munsif of Devakottai. The petitioner before me was one of the decree-holders against a common judgment-debtor, whose assets had been realised within the meaning of s. 73 of the C. P. C. and were held by the Court. Section 73 says "Where assets are held by a Court and more persons than one have before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization shall be rateably distributed among all such persons." Now, the petitioner before me put in an application for execution of his decree which was a decree for payment of money passed against the same judgment debtor, to arrest him, and this application had been admittedly made before the receipt of the assets with which we are concerned in this case. His application to be paid rateably from the assets had, however, been rejected on the ground that, when he applied for the arrest of the judgment-debtor, that man was not living within the jurisdiction of the Munsif's Court but was living in Penang, where the District Munsif, of course, had no jurisdiction and could not, therefore, have ordered his arrest. This finding of fact has been arrived at mainly on the ground that, in another petition for execution by the same decree-holder he has stated that the man was living at Penang; but he has explained it by saying that that statement was wrongly put in by the Vakil's clerk who drafted that application. It is, therefore, doubtful whether the judgment-debtor was, on the date on which the application was made, in Penang. Assuming, however, that the judgment-debtor was at Penang at the time of this decree-holder's application for arrest, the question is, does that prevent him from obtaining the advantage of rateable dis-

tribution? The section is intended to distribute equitably the assets of the common debtor realised by the Court among the decree-holders and the one condition that is laid down to make sure of the fact that those creditors have been diligent is that the creditors must have previously applied for execution of their decrees, this condition excluding creditors who have taken no steps to realise their debts; but there is no condition that the execution application put in by the party should be such as would have ended in his successfully obtaining satisfaction of his decree. The only two conditions laid down are that he must have a money-decree against the same person and that he must have applied for execution of that decree before the assets were realised. If these two conditions are fulfilled, he is entitled to join in the rateable distribution. In the present case, I see no reason to exclude the decree-holder on the finding of the District Munsif. The fact that his application was for the arrest of a person who could not have been arrested is quite immaterial so far as s. 73 is concerned. It is even possible to imagine that, though the judgment-debtor was not, on the date when the execution application was put in, living within the jurisdiction of the District Munsif, he might come there before the order is passed by the District Munsif passing the order, if, by the time he passes his order, the judgment-debtor is within his jurisdiction, although at the time the application was made, he was not within his jurisdiction. But these questions are outside the scope of s. 73. All that the Court has to be satisfied about is that there is a money-decree of which satisfaction has not been obtained against a judgment-debtor and that the decree-creditor has shown his diligence by applying for execution of that decree before the assets were realised. On these conditions being fulfilled the decree-holder-creditor is entitled to join in the rateable distribution. No case exactly in point has been brought to my notice, but some cases have been cited with reference to Art. 182 of the Limitation Act which speaks of applications for execution made in accordance with law. Even according to those cases which construe those words "Applications in accordance with law", an application like the present one would be fully in conformity with the requirements of the law; thoughit prayed for a relief which perhaps the Court could not have granted, it is still treated as an application in accordance with law for the purpose of Art. 182 of the Limitation Act: see *Bando Krishna Kanbargi* v. *Narasimha Konber Deshpande* (1). I hold, therefore, that the petitioner before me was entitled to join in the rateable distribution.

It has been urged befere me by the learned Vakil for the respondent that, as under s. 73 of the C. P. C. there is a special remedy provided, namely, that of a suit, I should not interfere in revision at all. No doubt, in some instances, Courts have held that it will be convenient to make the parties adopt that remedy, but that provision does not prevent a Court from interfering under s. 115 where there is a manifest error in the order under s. 73, and putting that error correct, as otherwise the parties will be driven to unnecessary litigation. I think this is a case in which a manifesterror has been made by the District Munsif and I feel, therefore, justified in interfering with the order of the lower Court and I modify that order by directing the District Munsif to make a fresh order under s. 73 giving rateable distribution to the petitioner before me for both of his decrees. The case will be remitted to the District Munsif for the purpose of passing fresh orders. Each party will bear their own costs of this petition.

V. N. V.

N. H. *Case remitted.*

(1) 17 Ind. Cas. 210; 37 B. 42; 14 Bom. L. R. 861.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2298 OF 1922.

July 29, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

TARAPROSAD SAW—DEFENDANT—APPELLANT

versus

MADHU SUDAN GIRI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow, alienation by—Necessity—Burden of proof—Enquiry by creditor, scope and extent of—Amount of loan in excess of necessity, effect of—Procedure—Interest, high rate of.

A person taking a mortgage from a Hindu widow of property forming part of the estate of her deceased husband must prove that legal necessity existed for the transfer or that he made proper and *bona fide* enquiries as to the existence of such necessity and

satisfied himself by all reasonable means as to its existence. He is not, however, bound to see to the application of the money borrowed by the widow provided the money was lent for legal necessity. The enquiry which he has to make is as to the existence of the necessity and also as to the debts which the widow has incurred for legal necessity and the amount she is in need of for meeting such necessity. In order to uphold the transaction the Court must be satisfied that legal necessity existed and that the sum lent was not unreasonably large. The transaction should be shown to be genuine and free from doubts of collusion between the creditor and the widow for raising a sum larger than is really needed. The interests of the reversioner should be protected but at the same time the widow should not be hampered by unreasonable restrictions in raising money when legal necessity exists. [p. 15, cols. 1 & 2.]

In cases where it is shown that the amount of the loan is in excess of that which the necessity justified, the Court should find whether the creditor knew or could have known by means of enquiries then available that the money was in excess of the necessity, and if the finding is in the affirmative then the Court should allow the reversioner to recover the property on payment of the sum really justified by the necessity. If, on the other hand, the finding of the Court is in the negative the transaction should be upheld in its entirety. The mere fact, however, that the amount borrowed is to some extent larger than the sum actually needed ought not to vitiate the transaction. In the absence of fraud or collusion between the widow and the creditor, when the necessity for the loan is established, mere excess of the amount lent should not be held to vitiate the validity of the transaction. Where, however, the excess is disproportionately large, that itself is evidence of collusion and the Court should not uphold the transaction in such a case. In a case where the Court finds that the necessity was inadequate for the entire loan, the reversioner should be put to terms. [p. 15, col. 2; p. 16, col. 1.]

Where it is found that the main necessity for the loan was brought about by the wrongful act of the reversioner himself, he may not be heard to complain of the high rate of interest charged for the loan, more especially when he makes no attempt to show that money was available to the widow at a lower rate of interest than is charged in the bond. [p. 15, col. 2.]

[Case-law referred to.]

Appeal against a decree of the Second Additional District Judge, Midnapur, dated the 28th June 1922, affirming that of the Subordinate Judge, Second Court at Midnapur, dated the 12th January 1921.

Babu *Santosh Kumar Pal*, for the Appellant.

Babu *Apurba Charan Mukerji*, for the Respondents.

JUDGMENT.

Chakravarti, J.—The suit out of which this appeal arises was brought by the reversionary heir of one Govinda Giri on the death of his widow Kausalya in the year 1916 for a declaration that the defendant No. 1 had acquired no title by his purchase at the sale in execution of a mortgage-decree against the widow.

The facts shortly stated are these. One Govinda Giri died in the year of 1868 sonless leaving a widow Kausalya; she lived with Govinda's cousin Tulsaram who was her next reversioner, in her husband's house but Tulsaram drove her away from her house in the year 1891. She brought a suit against Khirode grandson of Tulsaram and recovered a decree for the share of the land which was left by her husband, and it appears that in that suit she was assisted by the present plaintiff and his brothers who were the sister's sons of Govinda.

In execution of a decree for mesne profits against Khirode she purchased Khirode's half share in 1896, and was since then in possession of the entire property consisting of 20 *bighas* 2 *cottahs* and 13 *chittaks* of land. But she was again disturbed in her possession by the present plaintiff and his brothers and was dispossessed of 7 *bighas* out of 10 *bighas* of lands which were left to her after she had sold other lands. Then she brought a suit for possession of those 7 *bighas* against the present plaintiff and his brothers in 1908 and obtained a decree for possession on the 8th December of that year.

Now it appears, that Kausalya mortgaged the lands in suit for Rs. 500 in favour of the defendant No. 1 in the *benami* of one Harnarain on the 25th *Sraban* 1314 *B. S.*, and then a second bond was executed by her in favour of Taraprosad defendant No. 1 for Rs. 795 on the 13th *Magh* 1315 *B. S.* and out of the money so borrowed the money due under the first bond was paid. Taraprosad obtained a mortgage-decree on compromise against Kausalya in August 1909 and the mortgaged properties were sold in execution of the mortgage-decree. This is the sale which the plaintiff challenges in this suit as not binding on him.

On the death of Kausalya Madhu Sudan Giri the only surviving son of Govind's sister brought this suit as the reversionary heir of Govinda Giri for recovery of possession of the lands sold in execution of the mortgage-decree on the allegation that the defendants Nos. 1 and 2 had kept him out of possession of the lands without any right.

The defendant No. 1 contested the suit and his main defence was that the mortgages in his favour were executed by Kausalya for legal necessity and, therefore, the sale thereunder binds the plaintiff, the

reversionary heir, and he further contended that half share of the properties which Kausalya purchased in execution of her decree against Khirode was her *stridhan* property to which the reversioner had no claim as it was sold in execution of a decree against Kausalya.

The Court of first instance found that there was legal necessity for a portion of the money advanced by the defendant No. 1 but decreed the suit holding that the defendant No. 1 was like a mortgagee in possession and as he had rendered no account of the rents and profits he could claim no right to retain possession against the plaintiff.

On appeal by the defendant No. 1 the Additional District Judge affirmed the decree of the Munsif and dismissed the appeal although he found that the amount for which legal necessity was established was larger than the amount found by the learned Munsif. The defendant No. 1 has preferred this second appeal against the decree of the Additional District Judge.

Before I deal with the main question as to whether the learned Additional District Judge has properly applied the principle which applies to a case of legal necessity for alienation by a Hindu widow I shall refer to some of the salient facts which have been found by the Court below.

Kausalya inherited about 10 *bighas* of land left by her husband and led a peaceful life till she was dispossessed by Tulsaram in the year 1891. She was then plunged in litigation on account of dispossession by her then reversionary heir and it was in 1894 that she recovered a decree for possession and she was again dispossessed by the present plaintiff at about that time. The learned Munsif to quote his own words found that "Kausalya Bewa got possession of a half share after April 1894, and of the remaining half share after 1896. She was, however, not allowed by her husband's nephew to be in peaceful possession of the entire land for any long time. She was dispossessed from 7 *bighas* out of the 10 *bighas* that was left to her."

In 1908 the present plaintiff asserted in the suit brought by Kausalya against him and others that she was in possession of only 3 *bighas* of land and they were in possession of 7 *bighas* from 1896 down to 1908. The mortgage-bonds in favour of the defendant No. 1 were executed in 1907 and beginning of 1909. It is clear, therefore, that before the mortgages she had in her possession only 3 *bighas* of land even after she had recovered the land from Khirode and she had to carry on litigation with the plaintiff for the recovery of the 7 *bighas* in his hand, and she obtained her decree in 1908. It is is quite clear, therefore, that she was kept out of possession of her lands successively by her reversioners. The plaintiff himself kept her out of possession for about 12 years when she executed her first mortgage-bond in favour of defendant No. 1. The legal necessities for the sum of Rs. 500 covered by the bond of 1907 were 1st Rs. 130 for payment of earlier debts due under a mortgage which was satisfied by defendant No. 1, and Rs. 370 taken in cash were said to have been spent:—1st, to meet the expenses of litigations both criminal and civil. 2nd, medical treatment. 3rd, pilgrimage to Gaya. 4th, payment of arrears of rents.

The 2nd bond which the defendant No. 1 took was for Rs. 795 out of which Rs. 220 were paid in cash and the balance went in satisfaction of the previous bond. The creditor, therefore, has to establish the legal necessity for Rs 220 paid in cash. Now the learned Additional District Judge has found that when the 1st bond was taken Kausalya had been dispossessed of the major part of her lands but has taken no notice of the helpless condition in which the woman found herself on account of the conduct of her reversioners, the plaintiff being one of them. The learned Additional District Judge has found that all the items of legal necessities except the 4th item did exist but has assessed the amount of such necessities according to his own view as to the amounts which ought to have been spent for the necessities so found.

The total expenses for which the estate was legally chargeable according to the learned Judge amounted to Rs. 350.

Agreeing with the Munsif that as the defendant No. 1 was in possession of the land and had not accounted for the rents, profits thereof the plaintiff should get a decree for possession, the learned Judge dismissed the appeal.

The points urged in this appeal are 1st: That the Courts below have erred in holding that the defendant No. 1 the creditor was bound to show what the actual amount spent by the widow was.

2ndly: That the Court of Appeal below was in error in holding that the creditor

was entitled to credit not for the sum actually spent but which according to the decision of the Court ought to have been spent by the widow.

3rdly: That the Court below having found that legal necessity for the loan existed should not have passed an unconditional decree for possession without directing a refund of the money found to have been borrowed for legal necessity.

We think that the judgment of the learned Additional District Judge is vitiated by the erroneous principles which he has applied in the decision of this case.

It is now well-settled that a creditor as in this case must prove that legal necessity did exist or that he made proper and *bona fide* enquiries as to the existence of such necessity and satisfied himself by all reasonable means as to its existence.

The creditor is not bound to see to the application of the money borrowed by a widow when the money was lent for legal necessity: see *Kameswar Pershad* v. *Run Bahadur Singh* (1). On the question of *bona fide* enquiries by the defendant No. 1 the learned Judge says "I am not satisfied that the defendant acted *bona fide*." Then the learned Judge gives his reasons for this view. He thinks that the criminal case could not require Rs. 110 and the *kabiraj* who treated Kausalya was not so highly qualified as to deserve a fee of Rs. 50 although the *kabiraj* swore that he did receive that sum as his fees. The enquiries which a creditor can make is as to the existence of the necessity and also as to the debts she has incurred for a legal necessity and the amount she is in need of for meeting a necessity. It is impossible for a widow in the position of Kausalya to satisfy the creditor as to the actual amount she must borrow for meeting the future expenses of litigations to which she was driven by the plaintiff himself. In a case like this the Court should be satisfied that legal necessity existed and that the sum lent was not unreasonably large. The transaction should be shown to be genuine and free from doubts of collusion between the creditor and the widow for raising larger sum than was really needed. The interest of the reversioner should, no doubt, be protected but at the same time the widow should not be hampered by unreasonable restrictions in raising money when legal necessity exists.

The learned Judge observes that the interest was high but does not take into account the risk which the creditor took and the helpless condition in which the widow was. When the main necessity for the loan was brought about by the wrongful act of the reversioner himself he should not be heard to complain of the high rate of interest more especially when he made no attempt to show that money was available to the widow at a lower rate of interest than was charged in the bond.

The existence of the necessities have been established by the creditor and as the learned Judge does not find that the consideration money was not paid, the creditor in a case like this has *prima facie* discharged the burden which lay on him.

After finding that the legal necessities alleged by the creditor did exist both Courts enquired not as to what was the money actually needed or was spent by the widow but as to what she ought to have spent. For instance in trying the question as to what was the amount necessary for the litigation to which the lady was driven by the plaintiff, the learned Judge takes the amount allowed to her in the decree which she eventually got against the plaintiff for possession of the land as the sum needed for litigation. Every one acquainted with the costs of litigation in this country knows that the actual amount which a successful litigant gets as costs allowed by the Courts is much less than the actual amount spent by him.

In cases where it is shown that the money borrowed was more than the necessity justified then the Court should find whether the creditor knew or could have known by means of enquiries then available that the money was in excess of the necessity and if the finding is in the affirmative then the Court should allow the reversioner to recover the property on payment of the sum really justified by the necessity. If, on the other hand, the finding of the Court is in the negative, the transaction should be upheld in its entirety. In this connection see the cases of *Deputy Commissioner of Kheri* v. *Khanjan Singh* (2), *Singam Setti Sanjivi Kondaya*

(1) 8 I. A. 8; 6 C. 843; 8 C. L. R. 361; 4 Shome L. R. 81; 4 Sar. P. C. J. 210; 5 Ind. Jur. 157; 3 Ind. Dec. (N. S.) 545 (P. C.).

(2) 34 I. A. 72; 29 A. 331; 5 C. L. J. 344; 11 C. W. N. 474; 4 A. L. J. 232; 2 M. L. T. 145; 17 M. L. J. 233; 9 Bom. L. R. 591; 10 O. C. 117 (P. C.).

v. *Draupadi Bayamma* (3), *Ram Dei Kunwar* v. *Abu Jafar* (4).

In the circumstances of the present case the reversioner, the plaintiff who drove the lady to the litigation for which the money was borrowed must show that the sum which the lady borrowed for the necessity which really existed was in excess of the necessity or that there were means available to the creditor for making an enquiry as to the actual amount needed by the lady or that the amount was excessive to his knowledge. The mere fact that the amount borrowed is to some extent larger than the sum actually needed ought not to vitiate the mortgage. It is impossible to draw a line as to what extent an excess should be held not to vitiate the transaction. In the absence of fraud or collusion between the widow and the creditor, when the necessity for the loan is established, mere excess of the amounts lent should not be held to vitiate the validity of the transaction. When the excess is disproportionately large, that itself is evidence of collusion then the Court should not uphold the transaction. In cases where the Court finds, that the necessity was inadequate for the entire loan, the reversioner should be put to terms. The decree for possession should be subject to payment of the sum paid to the widow without interest, the usufruct of the property being set off against the interest. The lower Appellate Court was in error in treating the defendant No. 1 as a mortgagee in possession and in awarding an unconditional decree for possession to the plaintiff.

The judgment and decree of the lower Appellate Court are set aside, the case sent back to that Court so that the appeal may be re-heard in the light of the above observations. The appellant is entitled to the costs of this appeal, the other costs will abide the result.

Cuming, J.—I agree.

Appeal allowed; *Case remanded.*

Z. K.

(3) 31 M. 153; 3 M. L. T. 251; 18 M. L. J. 11.
(4) 27 A. 494; A. W. N. (1905) 68.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEAL No. 104 OF 1922.

January 15, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

CHINNA VAVANAN *alias* KANAKATHU MEERA LEVAI ROWTHER, BY THE OFFICIAL RECEIVER, MADURA —PETITONER—DEFENDANT No. 1—APPELLANT

versus

CHETTIAPPA CHETTY BY THE AUTHORIZED AGENT LAKSHAMANA CHETTY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 144—Restitution—Decree, execution of—Purchase by party to suit but not decree-holder—Subsequent reversal of decree—Sale, whether can be set aside.

In a suit on a mortgage, the mortgagor was *ex parte* in the Trial Court. A subsequent mortgagee was impleaded as 2nd defendant. A decree was passed in favour of the plaintiff and in execution thereof the hypotheca was sold and purchased by the 2nd defendant. The *ex parte* decree was then reversed on appeal and the mortgagor thereupon applied to have the sale set aside:

Held, that the sale was liable to be set aside since the 2nd defendant was a party to the suit and decree, though no relief was granted to him under the decree. [p. 17, col. 1.]

The protection which is given to a *bona fide* purchaser in execution of a decree which is subsequently reversed on appeal should not be extended to a defendant or a party to the suit, even though he gets no benefit directly under the decree; in other words, it is only a *bona fide* purchaser, who is not a party to the suit or proceeding, that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected. [p. 19, col. 1.]

A party to a suit cannot be said not to be a party to the decree if he gets no relief under it. [p. 17, col. 2.]

Zainul Abdin Khan v. *Muhammad Asghar Ali Khan*, 10 A. 166; 15 I. A. 12; 5 Sar. P. C. J. 129; 6 Ind. Dec, (N. s.) 112 (P. C.), *Rewa Mahton* v, *Ram Kishen Singh*, 13 I. A. 106; 14 C. 18; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746; 7 Ind. Dec. (N s.) 13 (P. C.), *Yellappa* v. *Ramachandra*, 21 B. 463; 11 Ind. Dec. (N. s.) 310 and *Krishna Chandra Mandal* v. *Jogendra Narain Roy*, 27 Ind. Cas. 139; 20 C. L. J. 469; 19 C. W. N. 537, relied on.

Appeal against a decree of the Court of the Subordinate Judge, Dindigal, in A. S. No. 34 of 1921, preferred against an order of the Court of the District Munsif, Periakulam, dated the 20th December 1920, in E. A. No. 1170 of 1919, in O. S. No. 1412 of 1917.

Messrs. *B. Sitaram Rao* and *S. Mattusami Iyer*, for the Appellant.

Mr. *T. M. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.

Devadoss, J.—The appellant was the

1st defendant in O. S. No. 1412 of 1917. The suit was by a mortgagee against the mortgagor (1st defendant) and the purchaser was impleaded as 2nd defendant as he had a mortgage subsequent to that of the plaintiff. The appellant was *ex parte* in the District Munsif's Court. A decree was passed in favour of the plaintiff and the hypotheca was sold and was purchased by the 2nd defendant. The *ex parte* decree was reversed on appeal and the 1st defendant applied to have the sale set aside. The 1st defendant having been adjudicated an insolvent, the Official Receiver continued the proceedings before the District Munsif. The District Munsif held that the 2nd defendant was not a decree-holder and, therefore, the sale was not liable to be set aside. On appeal by the Official Receiver the Subordinate Judge held that the order of the District Munsif was right and dismissed the appeal. The Official Receiver has preferred this appeal.

The contention of the appellant is that the purchase by the 2nd defendant is liable to be set aside as the decree in execution of which he purchased the property, was set aside on appeal. It is well-settled that, if a decree-holder purchases the property of the judgment-debtor in execution of his decree which is afterwards set aside, his purchase is liable to be set aside at the instance of the judgment-debtor. The contention for the respondent is that the 2nd defendant is not a decree-holder and, therefore, his purchase is good against the judgment-debtor. In *Zainul Abdin Khan* v. *Muhammad Asghar Ali Khan* (1), it was held that a sale to a *bona fide* purchaser in execution of a decree was not liable to be set aside if the decree was afterwards reversed on appeal. Their Lordships observed at page 172*: "It appears to their Lordships that there is a great distinction between the decree holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order". The question is whether the protection given to *bona fide* purchasers extends to persons who are parties to the suit in which the decree is passed, but who are not given any relief under the decree. In order that a purchaser may have the benefit of the sale under a decree which is afterwards set aside, he must be a *bona fide* purchaser; if he is not a *bona fide* puschaser then the purchase by him is liable to be set aside. A stranger to the decree is not bound to enquire into the merits of the plaintiff's claim or into the validity of the decree; but a party to the suit is in a different position, and it is his duty to enquire into the nature of the plaintiff's claim and the validity of the decree passed in plaintiff's favour. Supposing the plaintiff asked for relief in the alternative against two defendants, if the 2nd defendant satisfies the Trial Court that the 1st defendant alone is liable and on the strength of that, a decree is passed and his property is brought to sale, and if on appeal the decree is set aside and the 2nd defendant is held liable, can it be said that the 2nd defendant is entitled to keep the property of the 1st defendant purchased by him in Court-auction notwithstanding the reversal of the decree. Supposing a defendant contests the plaintiff's suit on the merits and a decree is passed not against him but against another defendant and if the property of the defendant against whom the decree is passed is brought to sale and if the defendant who put forward the contention that the plaintiff's claim is a fraudulent one purchases the property and if the decree is afterwards set aside, can the defendant who purchased the other defendant's property be entitled to say that his purchase is good notwithstanding the fact that he was aware of the fraudulent nature of the plaintiff's claim. It may be said in such a case that he is not a *bona fide* purchaser. The decision in *Zainul Abdin Khan* v *Muhammad Asghar Ali Khan* (1) applies only to *bona fide* purchasers. In that case, the purchasers, whose purchase was upheld by the Privy Council, were strangers to the decree. It does not appear from the report whether they were, or were not, strangers to the suit. It cannot be assumed that the decision has no application to purchasers who are parties to the suit, but in whose favour no decree has been passed, from the mere fact that Sir Barnes Peacock uses the expression, "*bona fide* purchasers who are no parties to the decree". A party to a suit cannot be said not to be a party to the decree if he gets no relief under it. If a party to a suit is on record, the decree in

(1) 10 A. 166; 15 I. A. 12; 5 Sar. P. C. J. 120; 6 Ind. Dec. (N. S.) 112 (P. C.).

*Page of 10 A.—[*Ed.*]

bound to make mention of him; and the principle of *res judicata* or of estoppel may apply to him whether he gets, or not, any relief under the decree. The decision, therefore, in my opinion, covers the case of a party in whose favour no relief is given under the decree.

The contention of Mr. Krishnaswamy Iyer is that the principle of restitution is applicable only to decree-holders who purchase the property of the judgment-debtor in execution of, or who get some benefit under, their decree, and persons, in whose favour a decree is not passed, are not bound to make restitution of what they have got by purchase in a Court auction. The cases relied upon by him do not support the contention that the defendant, in whose favour there is no decree, is entitled to keep the property which he purchased in execution of the decree against another defendant even if the decree be upset either in appeal or in any subsequent proceeding. In *Syed Nathadu Sahib* v. *Nallu Mudaly* (2), it was held that, where property is purchased at a sale in execution of a decree, the purchase is subject to the final result of the litigation between him and the judgment-debtor. In *Mathunsa Rowthar* v. *Apsa Bin* (3), the purchaser was a stranger to the decree. In *Raghavachari* v. *Pakkiri Mahommed Rowther* (4), the purchaser was not a party to the suit. As observed in *Dorasami Ayyar* v. *Annasami Ayyar* (5), "the principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation in the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost". It is contended for the respondent that this must be limited to the decree-holder who gets benefit by reason of his decree. But I am unable to accept this view. In this case, if the hypotheca had fetched a very large price and if a balance remained after satisfying the plaintiff, the balance would go to satisfy the 2nd defendant who is a puisne mortgagee. Even though a defendant may not have a decree in his favour, in many cases, he may get ultimately a benefit under the decree. In such cases it cannot be said that he is a stranger to the decree. The decision in *Zainul Abdin Khan* v. *Muhammad Asghar Ali Khan* (1) does not seem to have been brought to the notice of the learned Judges who decided *Dorasami Iyer* v. *Annasami Iyer* (5). The American decision in *Quan Wo Chung Co.* v. *Laumeister* (6), in laying down, "all that the one has gained and all that the other has lost is due to the agency of the Court and, therefore, no injustice is done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession", has stated the principle too broadly. I think the correct principle is that a *bona fide* purchaser who is not a party to the suit or proceeding in which the auction sale is held, is entitled to hold the property even though the decree or order in execution of which the auction-sale is held is subsequently reversed or set aside.

In *Yellappa* v. *Ramchandra* (7), Farran, C. J., observes: "The Privy Council in a case very analogous to the present has decided that where a person, a stranger to the proceedings, purchases property *bona fide* at an auction-sale held in execution of a decree, his sale cannot be set aside on the ground that the existence of a cross-decree rendered the sale in execution improper", If the contention of the respondent is good, then a defendant, in whose favour there is no decree, would be entitled to keep the property which he purchased in Court auction, even though he knew that there was a cross-decree in favour of the defendant whose property was sold in execution. I think the principle of the decisions in *Rewa Mahton* v. *Ram Kishen Singh* (8) and in *Yellappa* v. *Ramchandra* (7) is against the contention of the respondent.

This point was specifically raised and decided by a Bench of the Calcutta High Court in a case reported as *Krishna Chandra Mandal* v. *Jogendra Narain Roy* (9). In that case Mookerjee, J., after an exhaustive examination of English and American cases observed: "An examination of these cases shows that protection is afforded to the purchaser only when he is a stranger to the suit". This principle is not only consonant with equity, but it also saves the Court the trouble of enquiring whether the defendant, in whose favour there is no

(2) 27 M. 98.

(3) 12 Ind. Cas. 444; 36 M. 191; 21 M. L. J. 969; 10 M. L. T. 373; (1911) 2 M. W. N. 425.

(4) 34 Ind. Cas. 760; 30 M. L. J. 497; 19 M. L. T. 381; (1916) 2 M. W. N. 73.

(5) 23 M. 306; at p. 310; 10 M. L. J. 307; 8 Ind. Dec. (N. S.) 616.

(6) (1890) 17 Am. St. Rep. 261 at p. 263; 83 Cal. 384.

(7) 21 B. 463; 11 Ind. Dec. (N. S.) 310.

(8) 13 I. A. 106; 14 C. 18; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746; 7 Ind. Dec. (N. S.) 13 (P. C.).

(9) 27 Ind. Cas. 139; 20 C. L. J 469; 19 C. W. N. 537

decree at the time of the sale would be entitled to some benefit after the sale. I think the protection which is given to a *bona fide* pruchaser should not be extended to a defendant or a party to the suit even though he gets no benefit directly under the decree; in other words, it is only a *bona fide* purchaser, who is not a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected.

In the result the appeal is allowed and the sale to the 2nd defendant is set aside with costs throughout.

Wallace, J.—I have had the advantage of perusing the judgment of my learned brother and I am not prepared to differ from his opinion in the case. I was at first inclined to hold that in such a case the principle of restitution, that is the restoration to his *status qua ante* or a person wrongfully dispossessed by the agency of the Court, should be enforced only against the party at whose instance the decree has been enforced, but on further consideration I think, as at present, advised, that this salutary principle of restitution should be enforced as the rule, and that exceptions to that rule should be allowed only so far as authority by which we are bound has allowed them. The Privy Council in *Zainul Abdin Khan* v. *Muhammad Asghar Ali Khan* (1) has laid down that a *bona fide* purchaser not a party to the decree forms an exception to the rule, and we are not referred to any case which has definitely extended the exception to auction-purchasers who are parties to the suit or decree, but who had not themselves enforced the decree and brought about the auction-sale.

I, therefore, agree in the order proposed by my learned brother.

V. N. V. *Appeal allowed.*

N. H.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 122 OF 1925.

September 21, 1925.

Present :—Mr. Dalal, J. C.

Musammat SAIRA BIBI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Saiyid KAZIM HUSAIN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Decree for possession—Delivery of possession in execution of another decree—Refusal of Revenue Authorities to grant mutation—Suit for possession, second, whether maintainable.

Plaintiff obtained a decree for the recovery of his share in certain property but failed to execute it. In execution of another decree, however, he obtained symbolical possession of his share of the property and this possession continued undisturbed for some time. Plaintiff then made an application for mutation of names in his favour but his application was refused by the Revenue Court and he thereupon brought another suit for possession of his share of the property:

Held, that the refusal of the Revenue Authorities to grant mutation of names in favour of the plaintiff amounted to an act of dispossession and furnished the plaintiff with a fresh cause of action upon which to maintain a suit for possession and that s. 47 of the C. P. C. was not, therefore, a bar to such a suit. [1, 20, cols. 1 & 2.]

Second appeal against a decree of the Additional District Judge, Hardoi, dated the 26th November 1924, reversing that of the Subordinate Judge, Hardoi, dated the 31st August 1923.

Mr. *Niamat Ullah* for Mr. *Naim Ullah*, for the Appellants.

Mr. *H. Husain*, for the Respondent.

JUDGMENT.—The plaintiff, Kazim Husain, is the step-son of the defendant, *Musammat* Saira Bibi. His father was Mir Mendai. He died about the year 1912. The date, however, does not appear on the record. He was a mortgagee in possession of a 5-*biswas* share in village Kaimpur.

Both the plaintiff and the defendant female were heirs to this property. The defendant took possession. Kazim Husain thereupon brought a suit for recovery of possession of his share of the mortgagee rights. The suit was compromised, and a consent decree passed on 27th October 1914, under which the plaintiff was held to be entitled to 21/40th share of the 5 *biswas* mortgaged property.

No execution of this decree was taken out. On 5th December 1917 in execution of another decree, the plaintiff applied for possession of 21/40th share of the 5 *biswas* property in Kaimpur, and symbolical possession was delivered to him on the 14th December 1917. The possession was symbolical because another co-sharer was collecting the revenue and the mortgagees as successors-in-interest of Mir Mendai were only entitled to recover profits.

In my opinion the proceedings are described with great care and acuteness in paras. 4 and 5 of the plaint.

It is stated in para. 4 that delivery of possession was due to a mistake, but the possession continued without any inter-

ference. Then in para. 5 it is described how on the basis of this symbolical possession, the plaintiff applied for mutation of names to the Revenue Court in 1918, but that Court refused to grant mutation on 5th May 1919.

The plaintiff bases his cause of action for a suit for possession on this order of the Revenue Court refusing to order mutation in his favour. The present suit was filed on 7th October 1922, that is within 12 years of the refusal of the Revenue Court to order mutation.

In the lower Appellate Court it was argued that the suit was barred under the provisions of s. 47 of the C. P. C., because the plaintiff had previously sued on the same cause of action, and his only remedy was to execute the decree of 27th October 1914. The learned Judge of the lower Appellate Court has met this argument, though he has started the judgment by saying that the finding of the Trial Court that the suit was not barred under that provision of law was not brought into issue before him. As a corollary to this argument, it followed that a suit filed more than three years after the consent decree could not be treated as an application for execution within time.

On the ground stated in paras. 4 and 5 of the plaint, I hold that the plaintiff has sued on a fresh cause of action. I agree with his contention in para. 4 that the possession made over to him by mistake on 4th December 1914, was never disturbed. When this mistake was discovered, the Subordinate Judge who had put the plaintiff in possession passed an order on 11th May 1918, annulling the previous warrant for possession. It is difficult to understand how such a warrant can be annulled when it had already been complied with, and plaintiff had been put into possession. The proper remedy was to put *Musammat* Saira Bibi in possession again if the Court thought that such restoration was necessary.

In my opinion, the plaintiff was certainly, on the basis of this possession, which was not interfered with by the Court by a reentry of *Musammat* Saira Bibi, entitled to apply to the Revenue Court for mutation. When the mutation was refused, on objection by *Musammat* Saira Bibi, the plaintiff was justified in considering the refusal to amount to his dispossession and to bring the suit for possession on that cause of action.

The present suit being filed on a fresh cause of action, which, in my opinion, is correctly stated in the plaint there is no bar under s 47 of the C. P. C.

I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 20 OF 1923.

October 14, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, Justice Sir Amberson Marten, KT., and Mr. Justice Fawcett.

JOHN OVER—PETITIONER

versus

MURIEL A. I. OVER--RESPONDENT.

Divorce Act (IV of 1869), s. 10—Evidence Act (I of 1872), ss. 17, 18, 21, 58—Admission of adultery by respondent—Corroboration, absence of—Decree, whether can be granted—Duty of Court—Admission, whether relevant.

In divorce cases great care and caution are necessary in dealing with the admissions of the parties and it is only the exceptional circumstances of a given case that could justify the Court in acting upon the admissions of a party as to adultery without any corroboration. As a matter of prudence it is desirable to insist upon evidence corroborative of the admissions. [p. 22, col. 2.]

Per *Marten, J.*-- In practice the confession of guilt by a party in a divorce case ought to be treated on somewhat similar lines of caution to those of an accomplice's evidence in a criminal case. [p. 28, col. 1.]

Section 58 of the Evidence Act has in general no application to divorce cases although the admissions of the parties to the case may be proved under ss. 17, 18 and 21 of the Act. [p. 24, col. 2; p. 25, col. 1.]

An *ex parte* divorce case is sometimes the most difficult of all cases to decide because there is no Counsel for the respondent to point out the deficiencies in the petitioner's case and consequently it is left to the Court for itself to detect them. [p. 28, col. 1.]

[Case-law referred to.]

Reference made by the District Judge, Poona, under s. 17 of the Indian Divorce Act, 1869.

Mr. *I. J. Sopher*, for the Petitioner.

JUDGMENT.

Shah, Actg. C. J.—When this matter came before us on June 20 last, we directed the District Court to record further evidence as to the alleged adultery, and to examine the petitioner. The District Court has recorded further evidence. The petitioner has been examined on oath now, and his son also has given evidence. The respondent, the wife of the petitioner, has not

appeared at any stage of the proceedings. The letters written by the wife to the petitioner are on the record. On the strength of the letters and the evidence given by the petitioner and his son, the learned District Judge has expressed his opinion that the adultery of the respondent with another person not known is proved. He held the letters written by the respondent to be conclusive.

The matter is now before us, and the learned Pleader for the petitioner supports that view. The respondent has not appeared. In the evidence given by the petitioner, he stated that the respondent had committed adultery with one person named in the evidence in 1922: but there was no further evidence about it. He also stated that she had misconducted herself with four or five men before she left his house. That also is not supported by any evidence. It appears that she ultimately left her husband's house in January 1923, and has not returned.

The principal question in the case is whether the letters written by the wife are sufficient in the circumstances of this case to justify the finding of adultery on the part of the respondent with an unknown person.

The learned Pleader for the petitioner has informed us that he is not in a position now to prove the alleged adultery with the particular person named in the evidence in September 1922, as one of his two witnesses is dead, and the other is out of India. Nor is he in a position to establish his statement as to adultery with four or five persons before she left Kirkee. We have, therefore, to decide the case on the basis of the alleged adultery of the respondent with an unknown person after she left her husband in the beginning of 1923.

Before dealing with this question, I desire to refer to the necessity for great caution which has been recommended in the English cases on this point, to guard against the reasonable possibility of collusion between the husband and the wife.

In the case of *Robinson* v. *Robinson* (1), the observations of Cockburn, C. J., who delivered the judgment of the full Court, at pages 393* and 394* are very important:—

"Now the evidence, as has been before observed, consists entirely of admissions made by the wife herself; and here a question presents itself, as to how far the admissions of a wife charged with adultery, unsupported by any confirmatory proof, can be acted upon as conclusive evidence on which to pronounce a divorce..."

"But as this Court is not a Court of ecclesiastical jurisdiction, nor bound in cases of divorce *a vinculo* by rules of merely ecclesiastical authority, it is at liberty to act, and bound to act, on any evidence legally admissible, by which the fact of adultery is established; and if, therefore, there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them. No doubt the admissions of a wife unsupported by corroborative proof shold be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind..."

"Nevertheless, if after looking at the evidence with all the distrust and vigilance with which, as we have said, it ought to be regarded, the Court should come to the conclusion, first, that the evidence is trustworthy; secondly, that it amounts to a clear, distinct, and unequivocal admission of adultery, we have no hesitation in saying that the Court ought to act upon such evidence, and afford to the injured party the redress sought for. The admission of a party charged with a criminal or wrongful act has at all times, and in all systems of jurisprudence, been considered as most cogent and conclusive proof; and if all doubt of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it in cases like the present."

In *Williams* v. *Williams and Padfield* (2) with reference to the case, it is pointed out (page 31*):—

"The case cited is an authority for the

(1) (1859) 1 Sw. & Tr. 332; 27 L. J. P. 91; 5 Jur. (N. S.) 392; 164 E. R. 767.

*Pages of (1859) 1 Sw. & Tr.—[*Ed.*]

(2) (1866) 1 P. 29; 35 L. J. Mat. 8; 13 L. T. 610.

*Page of (1866) 1 P.—[*Ed.*]

proposition that the Court may act on the admissions of the wife although they are not supported by any other evidence. But I entirely concur with the observations of the Lord Chief Justice as to the great danger of relying entirely upon such admissions. In each case the question will be whether all reasonable ground for suspicion is removed."

These observations of the Lord Chief Justice have been referred to in *Arnold* v. *Arnold* (3).

We have, therefore, to consider whether in this case all reasonable ground for suspicion is removed. It is quite true that our attention has not been drawn to any case in which the adultery of a wife with an unknown person has been accepted as a fact on the strength of the admissions of the wife only. In the present case, however, on a consideration of all the circumstances, I have come to the conclusion that all reasonable ground for suspicion is removed, and that there is no collusion between the husband and the wife.

The parties were originally married in 1902, and a decree for divorce was obtained by the present petitioner on the ground of adultery of his wife with another person in 1918. The decree was made absolute in 1919. The parties re-married in December 1920.

According to the evidence of the petitioner and his son the conduct of the wife in September 1922, was apparently open to objection, and she ultimately left the house of the husband in the beginning of 1923. Thereafter she wrote three letters, which are Exs. 17, 18 and 19 in the case. In the first letter she says:—

"I wrote to you when leaving Pindi and told you that I had no intention of returning to you.

You know how utterly miserable I am with you, so I have placed a definite gulf between us by living with another man.

I have no intention of ever returning to you. A divorce under the circumstances is your only sensible act and also kind."

In the other two letters she deliberately evaded giving any indication of her whereabouts, and practically confirmed what she had stated in the first letter, that she had been living with another man and had no intention of returning to the petitioner. I do not see any reason whatever in this case to suspect collusion. I have dealt with this case at some length in view of the difficulty which we have felt on account of there being no other corroborative evidence of the admissions of the wife. But, having regard to the circumstances, as disclosed in the evidence, I see no reason to doubt the genuineness of the admissions made by the wife, and in the words of Cockburn, C. J, it is our duty to act upon such admissions although there might be a total absence of all other evidence to support them.

The question whether in a given case the Court should consider the admissions of the wife as to adultery sufficient must necessarily depend upon the circumstances of that case. The fact that admissions are accepted as sufficient in one case can afford no reason whatever for accepting them in another case. The general considerations which would and should guide the Court are indicated in the judgment of Cockburn, C. J. Subject to those considerations each case must be dealt with on its own facts and circumstances.

I would, therefore, confirm this decree.

I may add that after writing my judgment I have had the advantage of reading the judgment of my learned brother Marten and I desire to make it clear that in divorce cases great care and caution are necessary in dealing with the admissions of parties and it is only the exceptional circumstances of a given case that could justify the Court in acting upon the admissions of a party as to adultery without any corroboration. Generally speaking as a matter of prudence it is desirable to insist upon evidence corroborative of the admissions.

Marten, J.—This matrimonial case presents exceptional features. It is a husband's petition founded on the alleged adultery of his wife with some person unknown. He has already been divorced from her once, *viz.*, by a decree *nisi* passed by me on August 12, 1918, on the Original Side of this High Court, which decree was made absolute on March 3, 1919. He, however, married her again on December 22, 1920 at Poona. She left him from September 8, 1922, to October 7, 1922. It would appear that her husband then thought he had cause to complain of her conduct with a Captain Chamberlain who had been living with them, but who, the petition states, has since gone to Australia. What exactly the petitioner alleges took place between Captain

(3) 13 Ind. Cas. 491; 38 C. 907.

Chamberlain and the respondent is by no means clear on the evidence taken before the learned District Judge. But the petitioner deposes that he condoned "the offence" with Captain Chamberlain and it is clear from the evidence of his son that there were disputes between the husband and wife over the latter's conduct with Captain Chamberlain.

Shortly afterwards, *viz.*, about January 1923, the respondent left the petitioner again and this time for good. She wrote to him in March 1923, from Rawalpindi stating that she was not returning to the petitioner. Then in May 1923 she wrote to say that she was living with another man and did not intend to return, and the letter ended: "I have no intention of returning to you, a divorce under the circumstances is your only sensible act and also kind." She then gave her address as c/o Miss Reynolds, Presidency General Hospital, Calcutta. Accordingly the petitioner instructed his legal adviser to write to the respondent there asking for her address, and also the name and address of the man she was living with. Her reply to that letter was: "I have no intention of giving the name or any information concerning the man I have been living with. That is no concern of Mr. Over's." At the same time she wrote to her husband: "Your letter received. No wily tricks of yours to get the name of the man I've lived with or the address by which you would find out will go down with me. I am not giving you any chance of getting damages, so you might as well give up the idea. I shall not write again and I tell you now finally that I am never coming back to you. I don't care to ask you for favours but should certainly like you to divorce me to know that I was quite free from you... ... ..."

Under those circumstances this present petition was filed under s. 10 of the Indian Divorce Act, 1869, for a dissolution of the marriage of 1920, by reason of the wife's adultery with an unknown man. The petition did not, as it ought to have done, ask the Court to excuse the petitioner under s. 11 of the Act from making the alleged adulterer a co-respondent to the petition. This can be done under sub-s. (2) if the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it. In the present case the petitioner has made no efforts to discover the name of the adulterer beyond asking his wife for the name. Nor did he even know where his wife was then living. Her address in the petition is given as "c/o Miss La Franc, Presidency General Hospital, Calcutta," but it does not appear why the name of Miss La Franc has been substituted for the name of Miss Reynolds. Service of his petition appears to have been effected by registered post on the respondent "c/o Miss La Franc," but the postal packet has been returned "Refused."

However, as the previous letters found the respondent, I am not prepared to say that this service by registered post should be rejected notwithstanding the difference in the names of the addressee. Nor, on the other hand, am I prepared to overrule the discretion of the learned Trial Judge in excusing, as I must assume he did, the absence of the name of the co-respondent under s. 11 of the Act. But I may express the hope that this case will be looked upon as an exception and not as the rule, and that the learned District Judge will not lightly excuse a party from making any enquiry which he can reasonably be asked to make, nor if necessary from effecting personal service of the petition, should circumstances render that course desirable in preference to the practice often prevailing in our Courts of service by registered post.

Unfortunately this petition has been heard by two successive Trial Judges, and this is not as satisfactory a mode of trial as if the case had been heard throughout by one Judge. The petition was originally decided by Mr. Waterfield on affidavit evidence. This mode of trial we refused to accept in the present case and directed a remand The oral evidence on the remand was taken by Mr. Wild. The letter from the District Judge giving his views on the evidence purports to come from Mr. Wild, but is signed by Mr. Weston, the present Acting District Judge. I should, however, infer that the opinion expressed is that of Mr. Wild and not of Mr. Weston.

The learned Trial Judges do not seem to have felt any difficulty in this case and to have considered that the wife's letters were conclusive. It was indeed argued before us that, in a suit on a contract, the Court would normally grant a decree if the defendant had written a letter admitting the breach and the sum due, and, therefore, a different standard ought not to be adopted in this undefended divorce case having re-

gard to the above letters. This argument seems to me to show a complete misapprehension of the duties of the Court in dealing with divorce cases. The Court is there dissolving a marriage solemnised between persons professing the Christian religion, and its duties are of a totally different character from those in suits connected with the sale and barter of goods.

The sole jurisdiction of the District Court to dissolve Christian marriages is to be found in the Indian Divorce Act, 1869, and it is incumbent on the Court strictly to follow the statutory directions therein given. The District Court has no inherent jurisdiction in this respect, and its predecessors did not even have the old ecclesiastical jurisdiction of divorce a *mensa et thoro* which was conferred on the Supreme Court of Bombay by the Supreme Court Charter of 1823. I need not, however, go into the history of the divorce jurisdiction in India and England. That is explained in *Wilkinson* v. *Wilkinson* (4). Turning then to the 1869 Act, s. 7 enacts: "Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." Section 12 provides that "Upon any such petition for the dissolution of a marriage, the Court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery, or has condoned the same." Section 13 provides that "In case the Court, on the evidence in relation to any such petition, is satisfied that the petitioner's case has not been proved, or is not satisfied that the alleged adultery has been committed,...then and in any of the said cases the Court shall dismiss the petition." Section 14 provides in effect that it is only in case the Court is satisfied on the evidence that the case of the petitioner has been proved, and does not find any connivance or collusion that the Court is to pass a decree. No doubt s. 45 provides that "Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the C. P. C." But that provision, in my opinion, does not override the express directions in ss 7, 12, 13 and 14 to which I have already alluded.

Some reference was made, during the course of the case, to s. 58 of the Indian Evidence Act, and it was suggested that this section would render the letters of the respondent sufficient evidence, or as the trial judgment describes them, conclusive. That section runs: "No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agreed to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

That section normally relates to agreed statements of facts made between both parties to save time and expense at a trial. But on the facts here there is no agreement to admit facts. Further, as no pleading has been put in by the respondent, it cannot be said she has made any such admission in her pleading.

Moreover, in my opinion, this section has in general no application to divorce cases. I have never yet heard it even suggested that an English Divorce Judge would grant a divorce merely on an agreed admission of misconduct by the parties or their Attorneys. If any such attempt was made, it would in all probability result in the suit being dismissed for collusion.

But in fact this section is controlled by s. 2 of the Indian Evidence Act, which provides that "nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed." Now the Indian Evidence Act was passed in 1872, and consequently the Indian Divorce Act, which was passed in 1869, was already in force at the date of the Indian Evidence Act. Consequently the express provisions laid down in ss. 7, 12, 13 and 14 of the Indian Divorce Act as to the requisites for a decree for divorce cannot, I think, be overridden by any such section as 58. On the other hand, I think these letters are clearly admissible in evidence as admissions within the meaning of

(4) 77 Ind. Cas. 654; 25 Bom. L. R. 945; 47 B. 843; (1923) A. I. R. (B.) 321.

ss. 17, 18 and 21 of the Indian Evidence Act. (See also *Rutherford* v. *Richardson* (5). But although a document may be admissible in evidence, the weight to be attached to it is quite another matter, and that is the real point of difficulty here.

The evidence before us in support of the petition practically rests on three main points, *viz.*, (1) the alleged worthless character of the respondent and her past immorality; (2) her desertion of her husband and family; and (3) the letters written by her after her last desertion. There is no corroborative evidence of the wife's statement that she is living in adultery with another man. Captain Chamberlain is alleged in the petition to have gone to Australia. No other man's name is even suggested by the petitioner. Beyond her own letters there is nothing to show even where she is living nor whether alone or with any man. The case, therefore, is a very exceptional one in which to grant a decree and demands the greatest care and caution in approaching it.

The general rule of practice adopted in the English Divorce Courts is thus stated in Halsbury's Laws of England, Vol. XVI, p. 478, Art. 931: "The evidence of the husband or the wife alone must be corroborated, either by a witness, or at least by strong surrounding circumstances; especially (the presence of witnesses notwithstanding) where a respondent has made admissions, or a confession; and even where a co-respondent has also confessed, a decree will be granted only if the Court is satisfied that there is no ground for suspicion."

No doubt in *Robinson* v. *Robinson* (1), it was laid down that a decree can be granted on the mere confession of a wife. But it is to be observed that in that case, although the wife's diary was alleged to admit misconduct, the Court was not satisfied that it did, and so the petition was in fact dismissed. So in one sense the judgment was *obiter*. Further, that case was decided as long ago as 1859, when the divorce jurisdiction of the Court had only been in force for some two years, *viz.*, since the Matrimonial Causes Act, 1857. The Court had, therefore, little or no experience of such cases to go on. As already stated, I think that such a confession is admissible in evidence, and I agree that there is no rule of law which absolutely precludes the Court from acting upon it. But as a rule of prudence the practice of the Divorce Courts has been in general not to act upon such confessions, unless corroborated.

The Pleader for the petitioner was unable to assist us by reference to any authority, and I think that all the cases cited came from the Bench. The nearest case I have been able to find is *Getty* v. *Getty* (6). The head-note there rather states the effect of the decision than what the learned Judge actually said, but it runs as follows:—

"Although it is the general practice in matrimonial cases not to act and grant relief upon uncorroborated confessions of adultery, there is no absolute rule of practice and no rule of law precluding the Court from acting upon such uncorroborated evidence. The true test seems to be whether the Court is satisfied from the surrounding circumstances in any particular and exceptional case that the confession is true. If so satisfied, it is open to the Court to grant relief, notwithstanding the absence of independent corroborative testimony."

That was a very peculiar case, in which the husband and wife had been separated for serveral years. Subsequently the wife became a Christian Scientist, and in consequence she admitted that she had been unfaithful to her husband some nineteen years previously but she refused to give the name of the man nor any particulars about the alleged adultery. She, however, made certain statements to her Solicitor Mr. Lupton, who was called by the petitioner at the trial and who was compelled by the Judge to answer certain questions as to whether she had admitted the adultery to him and what her reason was for refusing to give the name of the man. The learned Judge said that the Solicitor's statement seemed to him very strong corroboration of the confession, and he proceeded (page 338*):—

"If Mr. Charles Lupton had not been called, I should have found myself with only the confession of the respondent, written more than two years ago and not since repeated, unless as implied by her saying in effect that the money due to her by the terms of the marriage settlement was not any longer her money. If it had not been for the evidence of Mr. Charles Lupton, I should have felt very great difficulty in

(5) (1923) A. C. 1 at p. 6; 92 L. J. P. 1; 128 L. T. 399; 67 S. J. 78; 39 T. L. R. 42.

(6) (1907) P 334; 76 L. J. P. 158.

*Page of (1907) P.—[*Ed.*]

acting upon the respondent's confession; but, having heard his evidence, I am of opinion that all doubt of its genuineness and sincerity has been removed, and that the respondent so dealt with her Solicitor as to show that this was not an untrue confession, but that out of mercy towards, or through fear of the result to the man, she was not going, to use a colloquial expression, to give him away. Having now, as I say, sufficient evidence before me to remove from my mind all reasonable ground for suspicion, I am satisfied that the wife's confession was true, having been confirmed long afterwards to her own Solicitor, when she told him in effect that the adultery was committed shortly after she arrived in England, that it was not continued, but that out of fear for the consequences to the man she did not wish to disclose his name."

In the present case we have no such corroborative evidence as the learned Judge had in that case. We have, however, a reason for the respondent wishing to shield the man, *viz.*, that he should not be exposed to a claim for damages. In the previous petition in 1918, there had been a claim for Rs. 10,000 damages against the then co-respondent Lieut. Hunt, though in fact I awarded no damages at the trial.

The only case referred to by the Pleader for the petitioner was an unreported case decided by me in which, according to him I had granted a divorce on merely a letter written by a wife who had left her husband. It is curious that the Pleader should know of this unreported case although he was unable to refer the Court to the ordinary authorities on the subject. But if it is thought by the Bar at Poona or elsewhere that this High Court will normally grant divorces on suitable letters written by a wife they may take it that this is an entire misapprehension on their part, and that neither in the case alluded to nor in the present case is it to be taken that this Court intends to lay down any such practice. This illustrates the difficulty of giving the benefit of the doubt to a petitioner in a case near the line, for somebody else may use it as a starting point for some even more doubtful case, or else try to induce some other Judge to think that a definite rule of practice has been laid down.

The petitioner's Pleader did not have the file produced from the Original Side as he might have done, and so my learned brothers have not seen the particulars of that case. But I have since seen the file, and my notes of evidence and judgment, and the real circumstances are as follows: The suit was that of *Mitchell* v. *Mitchell*, No. 3444 of 1919. There the husband was an English soldier who had gone to fight first in Mesopotamia and then on the Indian frontier, but on returning home found his wife's manner completely changed. On his return from the frontier she denied him marital access; and subsequently she admitted to her husband that she had committed adultery with a private in another regiment. The husband was shortly afterwards transferred to Bombay. He asked his wife to go there, and said he was prepared to condone her past offence. She, however, declined saying that if she came back he would always throw the past in her face. Subsequently she left him altogether and wrote a letter, somewhat similar to the one we have in the present case, intimating that she was living with another man although she did not actually mention his name. In that case the private was made a co-respondent but neither he nor the wife entered an appearance. The petitioner appeared in person and I cross-questioned him at considerable length. My notes of evidence have recalled this witness to my recollection. I remember that he gave his answers as an English soldier should, direct and to the point, and I was completely satisfied that what he told me was true. That being so, I held that there was no rule of law which absolutely prevented me from accepting his evidence corroborated as it was by the letters of the wife, and that though I thought the case was near the line, I ought to grant him a decree.

The decision I gave in that case can, if necessary, be supported by *Williams* v. *Williams and Padfield* (2). There the wife when challenged with adultery confessed it on the spot to the mother of the co-respondent. So there was this additional circumstance, besides the letters which were afterwards written by her. Moreover, this additional circumstance, if believed, tends to negative the risk of collusion which is a serious one in many undefended divorce cases.

If in the present case there was any corroborative evidence by the husband, *e. g.*, if the respondent while living with her husband had been challenged by him

with her conduct and had confessed to adultery with a particular man with whom it afterwards appeared she had gone away, the case would be quite different. The difficulty, in the present case is, as I have said, that we have merely her letters to go on as to her adultery with some unknown man.

There are certain passages in the evidence taken on remand which would tend to suggest that the lady had committed adultery with Captain Chamberlain and with several other persons. The petitioner there stated:—

"In 1922 Captain Chamberlain came to stay with us. I had reason to complain of his behaviour with respondent. While I was away from Kirkee I received a letter in September 1922 from respondent saying that she was leaving me and not returning. I returned to Kirkee and she came back. I thus condoned the offence with Captain Chamberlain. I tried to reform respondent; but in January 1923 she again left me and took my daughter. Before she left I had suspicions that she was corresponding with Captain Chamberlain, and I heard that he had given her Rs. 6,000 to enable her to re-join him."

Then later on he stated:—

"She has misconducted herself with four or five men. I have heard that she is now married."

In my opinion the learned Trial Judge ought never to have allowed loose statements like these to appear on the depositions. When we asked the Counsel what "offence" Captain Chamberlain was alleged to be guilty of, he replied misbehaviour, and when we asked what the misbehaviour consisted of, he practically was unable to answer. Similarly, when the Pleader was asked how did the witness know that the respondent had misconducted herself with four or five men he could only answer that it was merely hearsay, and what the witness meant by saying "I have heard that she is now married" is left in complete obscurity. I think the Judge should have at once asked the witness what he meant by these statements, and what were his means of knowledge. The Judge would then have been able to decide how far the witness was speaking from his personal knowledge and how far he was merely repeating hearsay which, of course, is not evidence. We did give the Pleader an opportunity of considering whether he was in a position to prove adultery against Captain Chamberlain or anybody else, because if so the subsequent desertion by the wife might revive the adultery notwithstanding its condonation. [See *Copsey* v. *Copsey* (7).] But, having regard to ss. 22 and 10 of the 1869 Act and to the necessity in general for the desertion to be for a period of two years or upwards in order to constitute a matrimonial offence on which certain decrees could be obtained, it may be that this suit would be premature if it was founded on that ground, inasmuch as a period of two years has not expired in the present case.

We are accordingly left to decide this case on the record in its present state which to me is far from satisfactory. But my learned brothers are satisfied on the evidence that the confession of the wife is true, and under the circumstances I do not think I ought to differ from them. My mind has fluctuated a good deal during the course of the case, but one statement in the respondent's last letter to her husband is I think just sufficient to turn the scale in favour of the petitioner. I refer to the letter in which she alludes to the wily tricks of her husband, and states she is not going to give him any chance of getting damages. I have already stated that in the previous divorce case in which Lieut. Hunt was a co-respondent, the present petitioner had claimed Rs. 10,000 damages. So although I did not award any damages to the petitioner, that claim may have caused annoyance to the guilty parties at the time. The wife would doubtless recollect this, and I think it unlikely that she would write to her husband in this way on the subject of damages, if in fact there was no man against whom a claim could be made. On looking at the former petition I see that the wife was there described as "until recently a Nursing Sister in Military service now dischaged." The co-respondent Lieut. Hunt was described as "in the service of East African Railways, now on leave." On looking at my notes of evidence, which I have thought it permissible to do under the peculiar circumstances of this case, I find that the parties were first married as long ago as 1902, and that their matrimonial troubles first began during the war when without the knowledge of her husband the wife joined up as a

(7) (1905) P. 94; 91 L. T. 363; 20 T. L. R. 728; 74 L. J. P. 40.

military nurse and subsequently went to East Africa. That affords some explanation of the origin of the trouble which she has caused to her husband who appears to have been most considerate to her throughout. It may also explain why she gave an address by reference to a hospital at Calcutta. It is not, however, suggested that she has since had anything more to do with Lieut. Hunt.

Under all the circumstances then of this exceptional case, I agree with my Lord the Chief Justice in thinking that the decree *nisi* may be confirmed.

But I wish to add this. I am much struck with the difference in the way in which divorce work is done in the District Courts, as compared with the normal criminal and civil work. In the latter, and particularly in the criminal work, we usually get every assistance. If, for instance, a criminal case depended on an accomplice's evidence, then the Trial Judge would be sure to deal carefully with the question whether there was any corroborative evidence. In practice the confession of a guilty party in a divorce case ought to be treated on somewhat similar lines of caution to those of an accomplice's evidence in a criminal case. And yet in the present case it was accepted almost as a matter of course. If this was the only instance of the kind, I would have regarded it as an exception. But in *Wilkinson* v. *Wilkinson* (4) [reported on other points in 25 Bom. L. R. 945] and again *Hewson* v. *Hewson* (8), this Court has had to comment adversely on the loose way in which divorce cases are at present conducted in the Trial Courts. If it is once realised that an *ex parte* case is sometimes the most difficult of all cases to decide because there is no Counsel for the respondent to point out the deficiencies in the petitioner's case, and consequently it is left to the Court for itself to detect them, I feel sure that no cause will be given to us in the future for making adverse comments such as those which I have thought it my duty to make in the present case. The ideal which all we Judges, who have to exercise this difficult jurisdiction of divorce, should I think aim at, is well expressed by Lord Sumner in *Russell* v. *Russell* (9), where he says (page 736):—

> "The question cannot have been entirely absent in litigation until the last three or four years, and we know that in that period at any rate many decrees have been granted after and in consequence of the admission of a husband's evidence, which, if applicable, this rule would have excluded. It is no answer to say that a husband's evidence of non-access has only been admitted to save expense and time. That is not the way in which matrimonial jurisdiction is or ought to be exercised. Decrees of dissolution of marriage are to be made only upon strict proof. Consent to a decree, direct or indirect, is inadmissible, nor is there any one present to make admissions, if the suit is undefended. In such cases the Judge must, and I doubt not does, watch vigilantly to see that the evidence on which he acts is such only as he is entitled to receive, and the rule in *Goodright* v. *Moss* (10), if it applies at all, is a striking one which could hardly be overlooked. The fact that both parties are equally anxious to get a divorce is precisely a reason why the Judge should be absolutely strict as to proof. No consideration of saving time and trouble can be a legitimate ground for admitting illegitimate evidence."

Fawcett, J.—I concur with the judgment of the learned Chief Justice.

In my opinion the circumstances in the present case justify the Court in acting on this respondent's admission of adultery with an unknown man though there is no corroborative evidence on the point. I think that the Court can safely act on the respondent's admission as the real truth and that all reasonable ground for suspicion of collusion is removed by the tone of the respondent's letters, her evident desire to shield the adulterer, and the history of her past conduct and relations with the petitioner as disclosed in the evidence (omitting what my learned brother Marten has pointed out to have been improperly allowed on the record).

At the same time, I agree that this is an exceptional case, and that the Courts should not (as a matter of prudence) ordinarily act on such confessions, without some corroborative evidence.

Z. K. *Decree accordingly.*

(8) 85 Ind. Cas. 774; 26 Bom. L. R. 467; (1924) A I. R. (B.) 397.

(9) (1924) A. C. 687; 93 L. J. P. 97; 131 L. T. 482, 68 S. J. 682; 40 T. L. R. 713.

(10) (1777) 2 Cowp. 591; 98 E. R. 1257.

*Page of (1924) A. C.—[*Ed.*]

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 141 OF 1925.

September 16, 1925.

Present :—Mr. Dalal, J. C.

JAGMOHAN SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

Babu SITAPATRAM AND OTHERS—DECREE-HOLDERS AND B. KAMAKHYA DATT RAM AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 152—Amendment of decree, when can be allowed—Intention of Judge—Mortgage suit—Preliminary decree directing payment of interest after due date—Final decree omitting provision for payment of interest—Amendment.

The test whether a Court can make an amendment under s. 152 of the C. P. C. is whether the order as it stands represents the intention of the Judge at the time he made it. [p. 30, col. 1.]

A preliminary decree passed in a mortgage suit allowed interest on the mortgage money at a certain rate after the due date fixed by the Court for payment. A final decree was subsequently passed but the provision with regard to the payment of interest was not entered in the final decree and the decree-holder on discovering this omission applied for amendment of the decree:

Held, that as it was by an omission that the clause regarding the payment of interest was not entered in the final decree and as the intention of the Judge was to allow interest, the omission could be rectified by the Court at any time under s. 152 of the C. P. C. [p. 29, col. 2.]

Application for revision against the judgment and formal order of the Sub-Judge, Fyzabad, dated the 22nd May 1925.

Mr. *Har Gobind Dayal*, for Mr. *Aditya Prasad*, for the Appellant.

Mr. *Niamat-Ullah*, for Opposite Party Nos. 2 and 3.

Mr. *H. N. Das*, for Respondents Nos. 1, 4, 5, 6, 7 and 8.

JUDGMENT.—Certain decree-holders applied for amendment of a decree under s. 152 of the C. P. C. That application was granted and one of the judgment-debtors has come here in revision.

A preliminary decree for sale was passed on 6th March 1916 which allowed simple interest at 6 per cent. per annum after due date fixed by the Court for payment. On 15th February 1919, the decree-holder applied for a final decree and an order for the preparation thereof was passed on 28th June 1919. When the final decree was prepared the office omitted to note that in the preliminary decree interest at 6 per cent. was to run and did not enter it in the final decree. As usually happens the Pleaders for the decree-holder also did not notice the omission. On 17th January 1920, the decree-holder applied for execution which was transferred to the Deputy Commissioner as the property sought to be sold was ancestral. The judgment-debtor paid up the money due without interest and on the 23rd of August 1924, applied for an order for the full satisfaction of the decree.

Prior to that on 6th August 1924, the decree-holder applied for execution to the amount of interest from the date of the final decree to realisation. On this application being filed it was discovered that in the final decree the order of the preliminary decree as regards interest was not copied. The application of the decree-holder was, therefore, dismissed on 16th of December 1924, and on the same date he applied for an amendment.

In spite of this application for amendment the Court happened to pass an order six weeks later on the 31st January 1925, consigning the execution file to the record room on full satisfaction. Execution work is not properly watched by judicial officers and is practically left to the office hands to play about with orders as they please. It is certain that when this order of 31st January was passed the decree-holder could not have been informed because he had actually tried once to keep the decree alive and on failing that he had asked for amendment of the decree. The order of 31st January 1925, therefore, cannot in any sense be taken to be an acquiescence on the part of the decree-holder to the relinquishment of this claim for interest or to the dismissal of his application for amendment.

The application for amendment was granted on the 22nd of May 1925, and that order is the subject of revision here.

This is eminently a case where the provisions of s. 152 apply. When the Court ordered a final decree for sale to be prepared on 28th June 1919, it must have had it in its mind to prepare the decree in accordance with the terms of the preliminary decree. If it had desired to alter the terms of the preliminary decree, which on the fact of it, it had no jurisdiction to do, it would have given definite reasons for its action out of routine procedure. It was by an omission that the clause regarding interest was not entered in the final decree for sale. This omission may be rectified at any time by the Court under s. 152.

A number of rulings was quoted by the learned Counsel for the appellant, but the

only one pertinent was that of *Ashik Hussain* v. *Mahdi Hasan* (1). It was laid down there, and the principle can be applied to this case, that the test whether a Court can make an alteration under s. 152 of Act V of 1908, is whether the order as it stands represents the intention of the Judge at the time he made it. It is clear to me that the order entered in the final decree for sale is not in accordance with the intention of the Judge at the time he made the order. The Judge's intention was to make interest payable at the rate entered in the preliminary decree.

I dismiss this application with costs.

Z. K. *Application dismissed.*

(1) 6 Ind. Cas. 979; 13 O. C. 111.

LAHORE HIGH COURT.

CIVIL REVISION NO. 90 OF 1925.

May 12, 1925.

Present:—Mr. Justice Addison.

BUDHU RAM—PLAINTIFF—PETITIONER

versus

KALU RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. III, r. 4—Vakalatnama, *acceptance of, whether must be in writing*—Vakalatnama *authorizing Pleader to prosecute all litigation in suit*—*Appeal*—*Fresh* vakalatnama, *whether necessary.*

Order III, r. 4 (2) of the C. P. C., does not require that the acceptance of *vakalatnama* by a Pleader should be in writing upon the *vakalatnama*. The fact that the Pleader mentioned in the *vakalatnama*, appears and conducts the case in Court shows that he has accepted the *vakalatnama*.

Mathra Das-Bishambar Nath v. *Rama Lal-Kanshi Nath*, 84 Ind. Cas. 518; (1923) A. I. R. (L.) 402 and *Mohesh Chandra Addy* v. *Panchu Mudali*, 32 Ind. Cas. 395; 43 C. 884 at p. 888; 20 C. W. N. 287; 23 C. L. J. 297, relied on.

Mohammad Ali Khan v. *Jasram*, 23 Ind. Cas. 461; 36 A. 46; 11 A. L. J. 1015, distinguished.

A power-of-attorney authorizing a Pleader to prosecute all the litigation of a suit impliedly confers upon him power to lodge and conduct an appeal up to the High Court.

Dyal v. *Hirde Ram*, 29 Ind. Cas. 895; 80 P. W. R. 1915; 153 P. L. R. 1915, followed.

Application for revision of a decree of the District Judge, Dera Ghazi Khan, dated the 29th July 1924, affirming that of the Subordinate Judge, Fourth Class, Dera Ghazi Khan, dated the 7th June 1924.

Lala *Amar Nath Chona*, for the Petitioner.

Lala *Sagar Chand*, for the Respondent.

JUDGMENT.—The plaintiff sued the defendant for recovery of Rs. 119-10-0 on a promissory-note. His suit was dismissed and he appealed in the Court of the District Judge. His appeal has been dismissed on the ground that the *vakalatnama* or appointment of the Pleader, who filed the appeal, was not accepted in writing by him. Against this decision this revision petition has been filed.

It obviously must be accepted. It is not stated in O. III, r. 4 (2), C. P. C., that the *vakalatnama* should be accepted by a Pleader in writing. It was conceded by the learned Counsel who appeared in the case of *Mathra Das-Bishambar Nath* v. *Rama Lal-Kanshi Nath* (1) that the acceptance of a power-of-attorney need not be in writing. It was held in *Mohesh Chandra Addy* v. *Panchu Mudali* (2), that O. III, r 4, C. P. C., does not expressly state that the acceptance of a *vakalatnama* should be in writing, and it was pointed out that in a previous case of that Court this had also been held. In the Calcutta High Court there is now a rule of that Court that the acceptance must be in writing, but there is no rule of this High Court that this should be so. The ruling relied upon by the District Judge, namely, *Mohammad Ali Khan* v. *Jas Ram* (3) is not in point. There the name of the Pleader was omitted from the body of the *vakalatnama*. I, therefore, hold that the acceptance of a *vakalatnama* need not be in writing by the Pleader upon the *vakalatnama* and the fact that he appeared and conducted the case in the lower Court and also filed the appeal shows that he accepted it.

It was argued, however, by the respondent's Counsel that the revision should be dismissed as a fresh power-of-attorney was not filed with the appeal. There is no force in this as by the original power-of-attornery the Pleader was given authority to file an appeal and to conduct it. It has been held by this Court in *Dayal* v. *Hirde Ram* (4) that a power-of-attorney authorizing a Pleader to prosecute all the litigation of a suit impliedly confers upon him the power to lodge and conduct the appeal up to the Chief Court.

In the result this revision petition is accepted with costs and the order of the District Judge is set aside, and the appeal is returned to him for decision on the merits.

Z. K. *Revision accepted.*

(1) 84 Ind. Cas. 518; (1923) A. I. R. (L.) 402.
(2) 32 Ind. Cas. 395; 43 C. 884 at p. 888; 20 C. W. N. 287; 23 C. L. J. 297.
(3) 23 Ind. Cas. 464; 36 A. 46; 11 A. L. J. 1015.
(4) 29 Ind. Cas. 895; 80 P. W. R. 1915; 153 P. L. R. 1915.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 1 OF 1924.

February 11, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Phillips and Mr. Justice Kumaraswamy Sastri.

MULLAPALLI GOPALAN NAIR—

APPELLANT

versus

KOPPOTHIL GOPALAN NAIR—

RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 16 (2) (b), 44—Adjudication, effect of—Leave to arrest insolvent, grant of—Discretion—Appeal—Interference by Appellate Court—Discharge, refusal of—Fresh application, whether maintainable.

The scheme of the Provincial Insolvency Act of 1907 is that when a petition for adjudication is filed and the debtor is adjudicated, the debtor automatically gets the equivalent of what is known as a protection order by virtue of the provisions of s. 16 (2) (*b*) of the Act.

There is nothing in s. 44 of the Provincial Insolvency Act of 1907 to warrant the suggestion that an application for discharge when refused is refused for ever and that no later application or renewal of the former application can be made.

Where a Judge in granting leave to arrest an insolvent under s. 16 (2) (*b*) of the Provincial Insolvency Act of 1907 does not give any reasons on which the Court of Appeal can say whether he has exercised his discretion properly, the Appellate Court should reverse the order and send the case back for fresh enquiry.

Letters Patent Appeal against the judgment of Mr. Justice Krishnan, dated the 4th December 1923, in A. A. O. No. 6 of 1923, preferred to the High Court against an order, dated the 14th November 1922, of the District Court, South Malabar, in M. P. No. 500 of 1922, in I. P. No. 12 of 1918.

Mr. *C. V. Anantakrishna Iyer*, for the Appellant.

Mr .*P. Govinda Menon*, for the Respondent.

JUDGMENT.—In this case a debtor who was governed by the Provincial Insolvency Act appealed to this Court against the order of the learned District Judge and as the learned Judges who heard the appeal differed, the matter comes before us.

The scheme of the Act is that, when the petition is filed and the debtor is adjudicated, the debtor automatically gets what is the equivalent of what I am more familiar with, a protection order, on the Original Side ; because by s. 16 (2) (*b*) of the Provincial Insolvency Act, III of 1907 "the insolvent, if in prison for debt, shall be released ; and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose".

In this case the leave of the Court has been granted for the man's arrest, the Court having previously—we do not question the order on that ground—refused his discharge. We may note in passing that we do not as at present advised see any thing in s. 44 of the Act to warrant the suggestion of Mr. Justice Waller that the application for discharge when refused is refused for ever and that no later application can be made or no renewal of the former application ; nor do we think that the real point in this case is as to any alternative remedy as between refusing discharge and allowing an arrest. What, we think happened here is that the learned Judge below has really not given us any material on which it is possible to say whether he exercised his discretion properly. It is needless to say that we should not interfere with his discretion in a matter of this kind unless it appears that it was not a judicial discretion. The short answer is that the learned Judge has expressed himself so briefly that we really cannot say whether he exercised a judicial discretion or not. All that he says is "The respondent was adjudged insolvent in November 1918 ; he declared no assets, he applied for discharge in 1921, that was refused on the ground that he had borrowed recklessly". There the matter stands and I can see no reason why in these circumstances he should have special protection. He did not ask for it but asked to have only the ordinary protection which the Act gives him as his right and which must not be taken away from him without good ground. We think that the matters must go back to the learned District Judge to inquire into afresh and, if he again desires to allow this man to be arrested, to state the grounds which have influenced him in exercising his discretion in that way. We reverse the order and remand the case for disposal. The costs will abide the result.

V. N. V.

Z. K.

Order reversed: Case remanded.

LAHORE HIGH COURT.

CIVIL APPEAL No. 1927 OF 1924.

March 30, 1925.

Present:—Mr. Justice Martineau.

THAKUR DAS—APPELLANT

versus

DAULAT RAM—PLAINTIFF AND FIRM HAKUMAT RAI-CHIMAN LAL, INSOLVENT AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Appeal—Death of respondent not concerned with point in dispute—Legal representatives, substitution of, absence of—Abatement—Court Fees Act (VII of 1870), s. 7 (iv) (f)—Accounts, suit for—Appeal—Court-fee payable.

The failure of an appellant to bring on the record the legal representatives of a deceased respondent who was not in any way concerned with the point in dispute in appeal does not operate to cause an abatement of the appeal.

A defendant appealing against a preliminary decree passed against him in a suit for accounts is entitled to put his own valuation on the memorandum of appeal and to pay Court-fees on that valuation and is not bound to accept the valuation given by the plaintiff in his plaint.

Second appeal from an order of the District Judge, Multan, dated the 3rd April 1924, from an order of the Senior Subordinate Judge, Multan, dated the 2nd August 1923.

Lala *Hargopal*, for the Appellant.

Lala *Fakir Chand*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for dissolution of partnership and rendition of accounts. On the objection of Kanshi Ram defendant No. 7 Thakar Das was added in the Trial Court as a defendant, and the question for determination was whether Thakar Das was a partner in the business or only a sub-partner with Kanshi Ram. The Subordinate Judge held on the strength of a judgment given in a suit which Thakar Das had brought for rendition of accounts, that he was a partner in the concern, and passed a preliminary decree in which he declared that Thakar Das had a half-anna share. Thakar Das appealed to the District Judge, paying a Court-fee of Rs. 10 on the appeal. The District Judge held that the Court-fee should have been paid *ad valorem* on Rs. 130, the value of the suit as given in the plaint, and that there was no sufficient reason for giving time to the appellant to make up the deficiency, and he accordingly dismissed the appeal. Thakar Das has filed a second appeal in this Court.

A preliminary objection is taken on behalf of the respondents that the appeal cannot proceed because Udho Ram, one of the defendants, died on the 27th February 1924, (while the appeal to the District Judge was pending) and his representative has not been brought on the record. I think there is no force in this objection as Udho Ram was in no way affected by the only point which was in dispute in the case, namely, whether Thakar Das was a partner or only a sub-partner with Kanshi Ram. It was only Thakar Das and Kanshi Ram who were concerned with that matter. *Raj Chunder Sen* v *Ganga Das Seal* (1) and *Jamna* v. *Sarjit* (2) which have been cited by Counsel for the respondents, are not in point, and I overrule the preliminary objection.

The plaintiff valued his suit at Rs. 130 and paid a Court-fee of Rs 10 which was sufficient under the Court Fees Act, which was in force when the suit was instituted. Before the appeal in the District Court was filed the old Act had been amended by Act VII of 1922, under which the Court-fee payable on a valuation of Rs. 130 is Rs. 14-10-0. But under s. 7 (*iv*) (*f*) of the Act the amount of fee payable in a suit for accounts is to be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal and in *Kanhaiya Lal* v. *Ram Sarup* (3) it was held that a defendant appealing against a preliminary decree passed against him in a suit for accounts is entitled to put his own valuation on the memorandum of appeal and pay the Court-fee on that valuation, and is not bound to accept the valuation given by the plaintiff in his plaint Now in the memorandum of appeal filed in the District Court (*i. e.*, the vernacular memorandum) the actual value was not entered, but the value was stated to be fixed. This being so, as the appellant was entitled to put his own valuation on the appeal and was not bound to accept the valuation given in the plaintiff it cannot be said that the Court-fee paid on the appeal in the District Court was insufficient.

I accordingly accept the present appeal, set aside the lower Appellate Court's decree and remand the case to that Court under O. XLI, r. 23, C. P. C., for decision on the merits. The Court fee paid on the appeal in this Court will be refunded, and other costs will be costs in the case.

Z. K. *Appeal accepted. Case remanded*

(1) 31 C. 487; 8 C. W. N. 442; 14 M. L. J. 147; 31 I. A. 71; 1 A. L J. 145; 8 Sar. P. C. J. 623 (P. C.).

(2) 52 Ind. Cas. 510; 67 P. R. 1919.

(3) 66 Ind. Cas. 841; 44 A. 542; 20 A. L. J. 416; 4 U. P. L. R. (A.) 99; (1922) A. I. R. (A.) 228.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 19 OF 1925.

May 16, 1925.

Present :—Mr. Justice Broadway.

JOWANDA MAL—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Railways Act (IX of 1890), s. 121—Obstructing or impeding Railway servant, what amounts to—Railway servant abused and assaulted when off duty—Offence.

Before a person can be convicted of wilfully obstructing or impeding a Railway servant in the discharge of his duties within the meaning of s. 121 of the Railways Act, it must be shown that the obstruction or resistance was offered to such Railway servant in the discharge of his duties as authorized by law.

Complainant, a goods clerk at a Railway Station, demanded from the accused, a trader who wanted to book certain goods by the Railway for carriage, a rate of freight higher than that which the accused was willing to pay. Accused went away and on returning to the Railway Station shortly afterwards found the complainant sitting on the platform having closed his office. Complainant alleged that the accused then abused and assaulted him:

Held, that assuming that the abuse and the assault were proved it could not be said that the complainant was at the time when he was abused and assaulted exercising any of the duties imposed upon him as a Railway servant and, that, consequently, accused was not guilty of an offence under s. 121 of the Railways Act.

Case reported by the Sessions Judge, Lahore.

Mr. *Duni Chand*, for the Petitioner.

JUDGMENT.—On the 21st of December 1923 Ram Lal was a goods clerk at Chhanga Manga Railway Station. Jowanda Mal, a trader, went to him in order to book three wagon-loads of wood. Some of this wood, it appears, was firewood and the rest appeared to be timber. The rate for timber was different from that for wood and Ram Lal wanted to charge a higher rate for the timber than for the firewood. Jowanda Mal is supposed to have said that he had been in the habit of sending such wood at firewood rates. Ram Lal refused to allow him to do so saying that the Railway rules prohibited him from so doing. Thereupon Jowanda Mal went to the Station Master. As it was after office hours the Station Master was unwilling to have anything to do with the matter that day. He was, however, persuaded to accompany Jowanda Mal to the station where Ram Lal was found sitting on the platform. Ram Lal explained the situation to the Station Master and it was at this stage that the story of Ram Lal differs from that of Jowanda Mal. According to Ram Lal, Jowanda Mal is said to have abused him and to have grappled with him. This Jowanda Mal denies. The Station Master, who has now retired from service, while supporting Ram Lal upon certain points, says nothing about Jowanda Mal having grappled with him, and as to the abuse he says that Jowanda Mal abused himself but no one else. The Station Master's evidence may be regarded as wholly unworthy of credence. Ram Lal, however, gave a complaint to the Station Master in writing which is to the following effect :—"I am insulted and disgraced by Jowanda Mal—Ram Lal on duty—please take necessary action." Necessary action was taken and Jowanda Mal was tried for an offence under s. 121 of the Indian Railways Act, IX of 1890, and sentenced to pay a fine of Rs 50.

The learned Sessions Judge has referred the case to this Court under s. 438, Cr. P. C., with a recommendation that the conviction should be quashed inasmuch as the facts disclose no offence under the Railways Act. This reference has been supported before me by Mr. Duni Chand who has drawn my attention to *In the matter of Baroda Kanto Pramanick* (1) and *Radha Kishen* v. *Emperor* (2). The latter case need not be considered as it has no bearing on the point before me. The former case, however, is to the point. It is clear that before a person can be convicted of wilfully obstructing or impeding a Railway servant in the discharge of his duties, it must be shown that the obstruction or resistance was offered to such Railway servant in the discharge of his duties as authorised by law. In the present case apparently when Ram Lal was abused, and as it is alleged, seized, he was not exercising any of the duties imposed upon him as a Railway servant. It appears that he was taking his case after having closed his office for the day. In these circumstances, in my judgment, the learned Sessions Judge was right and assuming that Jowanda Mal did abuse and assault (technically) Ram Lal, he committed no offence within the purview of s. 121 of the Indian Railways Act. If Ram Lal feels himself aggrieved it is for him to take action under any other law that he may be advised.

The recommendation of the learned Sessions Judge is accepted, the conviction

(1) 1 C. W. N. 74.

(2) 68 Ind. Cas. 846; 23 Cr. L. J. 622; (1922) A. I. R (L.) 71.

is quashed and the sentence set aside. The fine, if paid, will be refunded.

Z. K. *Revision accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 320 OF 1925.

July 23, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Daniels.

AKBAR ALI—ACCUSED—APPLICANT

versus

RAJA BAHADUR AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), ss. 209, 213—Case triable by Sessions Court—Evidence disbelieved by Magistrate—Discharge, order of, whether proper—Procedure—Duty of Magistrate.

If a Magistrate hearing a charge triable by the Court of Session comes to the conclusion that the evidence before him is totally untrustworthy and that there is no reasonable possibility of the case resulting in a conviction, he is entitled, and it is, indeed, his duty, to discharge the accused under s. 209, Cr. P. C. The same result follows if he comes to a similar conclusion after framing a charge and hearing witnesses for the defence under s. 213 (2) of the Code. This discretion must, however, be carefully exercised, and wherever there is a possibility that different Courts might take different views of the evidence, the Magistrate, even though he may himself not think the evidence sufficient for a conviction, should leave it to the Sessions Court to pronounce finally upon the matter. [p. 34, col. 2; p. 35, col. 1.]

Per *Sulaiman, J.*—The policy of the Legislature is that serious offences should be tried by Sessions Judges who are ordinarily more experienced than Magistrates. They are the proper Courts for pronouncing an opinion as to the guilt or innocence of accused persons in cases triable exclusively by the Sessions Court. Where, however, the evidence is wholly untrustworthy and the Magistrate is satisfied that it cannot lead to a conviction, he would be perfectly justified in discharging the accused, even though he has already framed his charge. The Magistrate has to see whether there are sufficient grounds for commitment or not. If he is satisfied that the evidence is altogether untrustworthy and not fit to be acted upon he may discharge the accused. He should not, however, try to weigh the probabilities of the case and then after balancing the evidence on both sides decide whether the guilt of the accused has or has not been conclusively proved. [p. 36, col. 1.]

Criminal revision from an order of the Sessions Judge, Shahjahanpur, dated the 18th April 1925.

Mr. *S. Raza Ali*, for the Applicant.

Mr. *Saila Nath Mukerji*, for the Opposite parties.

JUDGMENT.

Daniels, J.—This is an application in revision against an order discharging three persons Raja Bahadur, Raj Narain and Murari Lal, who were prosecuted on a charge under s. 302 of the Indian Penal Code of murdering Asghar Ali. There is no doubt that Asghar Ali was murdered on the 23rd of September 1924 at Shahjahanpur. A severe religious riot took place on that date, and it is said that a number of other persons were killed. So far as the evidence in this case goes it appears that one Munna Lal, a Hindu, was seriously injured shortly after 10 o'clock and died between 10 and 11. The First Report in regard to the attack on him was made at the *kotwali* at 10-45 A. M., and he died before he could be conveyed to hospital. The report of Asghar Ali's murder is said to have been made at the *kotwali* at 12 o'clock, the time of the occurrence being given as about 11. A special Sub-Inspector, S. Masum Ali, was sent from Budaun a few days later to investigate this case. He had two other similar cases to investigate, and he did not commence the investigation till October 8th. He concluded his enquiry on October 19th and sent in Form B finding that the charge against the accused was not established. A complaint was filed in Court by the deceased man's brother, Akbar Ali, and a Special Magistrate, Mr. C. H. Cooke, was deputed to hear the case. After hearing a number of witnesses for the prosecution he framed a charge on February 10th 1925. He then proceeded to record the evidence of certain witnesses for the defence, and under s. 540, Cr. P. C., of M. Ali Hussain, Deputy Magistrate, who had been on duty patrolling the city just after Asghar Ali was killed. After considering this evidence, and, as he says in his order, on a more careful consideration of the prosecution evidence at leisure, he decided that the prosecution evidence was wholly untrustworthy and that no reliance whatever could be placed upon it. Under these circumstances he cancelled the charge against the accused.

Some argument has been addressed to us as to the duty of a Committing Magistrate in cases of this kind, and we have been referred to a number of cases bearing on the subject. It is, in our opinion, well established that if a Magistrate hearing a charge triable by the Court of Session comes to the conclusion that the evidence

before him is totally untrustworthy and that there is no reasonable possibility of the case resulting in a conviction, he is entitled, and it is, indeed, his duty, to discharge the accused under s. 209, Cr. P. C. The same result follows if he comes to a similar conclusion after framing a charge and hearing witnesses for the defence under s. 213 (2). Of course, this discretion is to be carefully exercised, and, wherever there is a possibility that different Courts might take different views of the evidence, the Magistrate, even though he may himself not think the evidence sufficient for a conviction, should leave it to the Sessions Court to decide. Knox, J. in *Hait Ram* v. *Ganga Sahai* (1) has too narrowly restricted the functions of a Committing Magistrate. We agree with the view of the law stated by Lindsay, J., in *Muhammad Abdul Hadi* v. *Baldeo Sahai* (2) which is so far as we are aware, the only reported case of this Court dealing with an order of discharge passed under s. 213.

We have, therefore, to see whether in this case the Magistrate's order of discharge was justified according to the above tests; in other words, was the Magistrate justified in coming to the conclusion that no Court could possibly convict the accused on the evidence before him? The Magistrate has allowed the witnesses to be cross-examined with reference to contradictory statements which they made in the Police enquiry. The result of that cross-examination was extremely damaging to the witnesses. In fact if their statements in the Police enquiry have been correctly recorded they deprived their evidence in Court of any value. The deceased's brother Akbar Ali, for instance, having named four witnesses as eye-witnesses in the First Report, stated in the Police enquiry that these were not the eye-witnesses and that he wanted to call different witnesses as having seen the occurrence. Before the Committing Magistrate the complainant's Counsel took the line that he did not ask the Magistrate to rely on the witnesses named in the First Report, but wished to rest his case mainly on the evidence of Farzand Ali and Sultan Husain. In this Court we have been asked to ignore the Police enquiry altogether and to rely on the statements of Khuda Baksh, Nurul Hasan, Ahmadullah and Akbar Ali. This we are not prepared to do. Ahmadullah, we may note, was not examined by the Police at all. The complainant gave as a reason for not calling him the fact that he was away from home, but the witness himself in his evidence stated that he was at his house during the whole time the Police enquiry lasted. Another point which has impressed the Committing Magistrate is that there is considerable doubt as to whether the scene of the occurrence has been correctly placed by the prosecution witnesses. They all with one exception state that Asghar Ali was killed just outside the northern gate of the Jama Masjid. The one remaining witness states that he was killed under a *pakar* tree only about ten paces to the east of the gate. The Deputy Magistrate, M. Ali Husain, who was patrolling the neighbourhood just afterwards states in his evidence that he found no blood outside the mosque, but he found blood at some distance along the road to the east, and he estimates the distance at 25 yards, though, as he made no note at the time and his evidence was not given till five months later, his estimate of the distance can only be a very rough one. Having regard to the very destructive criticism of the prosecution witnesses contained in the Magistrate's order we are satisfied that if we directed this case to be committed to Sessions, there is not the least likelihood that it would result in conviction. We accordingly uphold the order of the Court below and dismiss this application.

Sulaiman, J.—I concur. Having regard to all the circumstances of this case it is not a fit one in which we should interfere. I, however, wish to guard myself against being understood to dissent entirely from the view expressed by Knox, J., in *Fatu* v. *Fatu* (3) and *Hait Ram* v. *Ganga Sahai* (1). Perhaps the learned Judge expressed himself too strongly, but the principle underlying his pronouncements seems to be sound. Section 213 uses the expression "not sufficient grounds for committing the accused." This expression is quite different from such expressions as "the case not proved" or "the accused are innocent." I agree with the view of Lindsay, J., that when after hearing the evidence for the

(1) 46 Ind. Cas. 290; 40 A. 615; 16 A. L. J. 486; 19 Cr. L. J. 703.

(2) 63 Ind. Cas. 831; 44 A. 57; 3 U. P. L. R. (A.) 184; 22 Cr. L. J. 703; 19 A. L. J. 831; (1922) A. I. R. (A.) 168.

(3) 26 A. 564; A. W. N. (1904) 125; 1 A. L. J. 292; 1 Cr. L. J. 510.

defence the Magistrate comes to the conclusion that their evidence rebuts that produced for the prosecution, or renders it so incredible or unreliable that a conviction will not follow, he may pass an order of discharge, as expressed by him in *Muhammad Abdul Hadi* v. *Baldeo Sahai* (2). I also fully accept the statement of the law laid down by my learned colleague in the case of *Ganpat Lal* v. *Emperor* (4) that if the Magistrate is satisfied that the charge is without foundation and that there are no sufficient grounds for committing the accused person for trial, he is entitled. and, indeed, it is the duty, to discharge him. This, however, does not mean that the Magistrate is to arrogate to himself the functions of the Sessions Court and try the case as if he were that Court himself. The policy of the Legislature seems to be that serious offences should be tried by Sessions Judges, who are ordinarily more experienced. They are the proper Courts for pronouncing an opinion as to the guilt or innocence of the accused in cases triable exclusively by the Sessions Court. Where, however, the evidence is wholly untrustworthy and the Magistrate is satisfied that it cannot lead to a conviction, he would be perfectly justified in discharging the accused, even though he has already framed his charge. The Magistrate has to see whether there are sufficient grounds of commitment or not. If he is satisfied that the evidence is altogether untrustworthy and not fit to be acted upon, he may discharge the accused. He should not, however, try to weigh the probabilities of the case and then after balancing the evidence on both sides decide whether the guilt of the accused has or has not been conclusively proved.

Z. K. *Application dismissed.*

(4) 81 Ind. Cas. 315; 46 A. 537; 22 A. L. J. 411; 10 O. & A. L. R. 551; 25 Cr. L. J. 795; (1924) A. I. R. (A.) 664 L. R. 5 A. 174 Cr.

RANGOON HIGH COURT.
FULL BENCH.

CRIMINAL REVISION No. 84-B OF 1925.
March 23, 1925.

Present :—Sir Sydney Robinson, KT., Chief Justice, Mr. Justice Rutledge and Mr. Justice Maung Gyi.

EMPEROR—PETITIONER
versus
SYED KHAN AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195 (1) (b), 476—Penal Code (Act XLV of 1860), ss. 109, 211—False charge—Abetment—Complaint against abettor—Jurisdiction of Court—High Court, power of, to make complaint.

A Court has jurisdiction to make a complaint under s. 476 of the Cr. P. C., in respect of an offence under s. 211 read with s. 109 of the Penal Code against a person who was not himself a party to the proceeding which forms the subject of the complaint. [p. 37, col. 2.]

Section 476 of the Cr. P. C. gives the High Court as a superior Court full powers to lay a complaint in any or every case in which it appears expedient in the ends of justice to do so, and there is nothing in the Code to justify the contention that that power and jurisdiction is taken away because in case of a complaint or refusal to lay a complaint by some subordinate Court under that section, an appeal is allowed. [*ibid.*]

Reference made by the District Magistrate of Rangoon on an application to revise the order of the Western Sub-Divisional Magistrate, Rangoon, in Criminal Regular Trial No. 1576 of 1923.

Messrs. *Keith* and *Young*, for Respondents Nos. 1 to 3.

Mr. *Vakharia*, for Respondents Nos. 4 and 5.

JUDGMENT OF THE FULL BENCH was delivered by

Robinson, C. J.—A complaint was made before a Magistrate as long ago as 1913 of a charge of criminal breach of trust. Ten years later, the person complained against, K. C. Nagoor Meera, laid a complaint before a Magistrate alleging a conspiracy between the original complainant and the five petitioners who, it was alleged, had instigated the original complainant to lay this false charge. The Magistrate dismissed the complaint for want of sanction as required by s. 195 (1) (*b*). The District Magistrate, however, while holding that that order was correct as regards the original complainant, ordered the Magistrate to proceed with the complaint in respect of the remaining five. They, therefore, moved this Court in revision to set aside the order of the District Magistrate. That application came before our brother Heald and, in the course of his order, he came to the conclusion that a *prima facie* case

existed and that, while it was correct that this prosecution could not proceed in the absence of a complaint, he was of opinion that it was necessary, for the ends of justice, that the accused should be proceeded against, and he thereupon passed an order ordering as follows:—"And as I am satisfied that it is expedient in the ends of justice that an enquiry should be made into an offence under s. 211, read with s. 109 or 120-B of the Indian Penal Code, which appears to have been committed in relation to Criminal Regular Trial No. 118 of 1913 in the Court of the Western Sub-Divisional Magistrate of Rangoon, a copy of this order signed by me will be sent to the Western Sub-Divisional Magistate, Rangoon, as this Court's complaint."

On this complaint being received by the Western Sub-Divisional Magistrate, he held purporting to follow a ruling of a Bench of this Court in the case of *Guruswamy* v. *Ebrahim* (1), that the learned Judge had no jurisdiction to lay a complaint, because the five petitioners were not parties to the proceedings in 1913. The District Magistrate, on being moved, apparently, was of opinion that this authority was applicable, and he referred the case to this Court, with the recommendation that the sanction of the Local Government may be applied for to put the complaint completely in order.

We are clearly of opinion that the ruling cited has no application whatever to the facts of this case. That ruling dealt specially and particularly with the express wording of sub-clause (*c*) of s. 195 (1), and it is based on such particular wording. The present case falls under s. 195 (1) (*b*), and such words not only do not occur but much wider words, fully wide enough to cover the facts of the present case, are employed. That being so, we do not consider it necessary to again consider the correctness of the ruling cited. The High Courts are not at one on the matter, but that authority dealt only with a case falling under s. 195 (1) (*c*).

It is further urged before us by learned Counsel for the petitioners that that precedent is in no way wrong. This being so, two points only arise. It is urged that the sanction granted by our brother Heald was wrong, or without jurisdiction, because he included, in the alternative, s. 120-B. We do not consider it necessary to deal with the point at any length. Even if the reference to s. 120-B is struck out, our learned brother had jurisdiction to lay a complaint, and to lay a complaint of an offence under s. 211, read with s. 109.

It is next urged that his complaint is defective because he made a complaint when taking up proceedings from a subordinate Court in revision.

It is said that s. 476-B specially allows an appeal and that, if the High Court takes up a case of this kind, on second revision, the party concerned will be deprived of the right of appeal to it. We do not think that this argument is sound. There is no question that s. 476 gives the High Court, as a superior Court, full powers to lay a complaint in any and every case in which it appears expedient in the ends of justice to do so, and there is nothing in the Code to justify us in saying that that power and jurisdiction is taken away, because, in cases of a complaint or for its refusal to lay a complaint by some subordinate Court, an appeal from that order is allowed.

We, therefore, hold that the complaint laid in this case is a perfectly good and valid complaint of an offence under s. 211, read with s. 109, and we order that the case be referred back to the Magistrate with directions to hold further enquiry into such offence.

Case referred back.

Z. K.

(1) 84 Ind. Cas. 439; 2 R. 374; (1925) A. I. R. (R.) 28 26 Cr. L. J. 295.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 356 OF 1925.

July 24, 1925.

Present:—Mr. Justice Banerji.

AMIR HASAN KHAN—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 403—Criminal mis-appropriation—Stray bullock found by accused and sold after effort to discover owner—Offence.

Accused took possession of a *lawaris* bullock, kept it for 20 days, advertised for the owner and nobody having turned up eventually sold it:

Held, that under the circumstances it could not be said that the accused was guilty of an offence under s. 403 of the Penal Code.

Criminal revision from an order of the Sessions Judge, Budaun, dated the 4th June 1925.

Mr. *Iqbal Ahmad*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision by one Amir Hasan Khan, Sub-Inspector of Police. The charge framed reads as follows:—"That you on or about the 26th day of September 1924 at Police Station Ushet dishonestly mis-appropriated certain property, to wit, a *lawaris* bullock." Now under s. 403 if a *lawaris* bullock is appropriated and immediately afterwards the owner of the bullock is found, certainly a man can be convicted, but in this case for 20 days the bullock was kept by the Sub-Inspector and then sold. No owner has up to now turned up. The Inspector advertised for the owner but no one turned up, so it is impossible to say that he knew or had means of discovering the owner, and he had certainly kept the property a reasonable time before disposing of it. Even if I had found him guilty, I would have considered that he had been sufficiently punished by being prosecuted. As it is, upon the finding I hold that no offence has been made out. I set aside the conviction and sentence. The fine, if paid, will be refunded. The bail bond is discharged.

Z. K. *Conviction set aside.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 179 OF 1925.

July 10, 1925.

Present:—Mr. Justice Sulaiman.

HARIHAR DAT—COMPLAINANT

versus

MAKSUD ALI AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 250—Offences triable by Magistrate and Sessions Court—Discharge of accused—Compensation, whether can be awarded.

An order passed under s. 250 of the Cr. P. C. awarding compensation to an accused person must be confined to Summons Cases. [p. 39, col. 1.]

Where a complaint is filed against an accused person in respect of offences some of which are triable exclusively by a Magistrate and some by the Sessions Court and the accused after trial by a Magistrate, is discharged in respect of all the offences, an order for compensation against the complainant under s. 250 of the Cr. P. C. cannot be passed. [p. 38, col. 2.]

Criminal reference made by the Additional Sessions Judge, Gorakhpur, dated the 25th February 1925.

JUDGMENT.—The point which arises in this reference is as to whether when a complaint has been filed against an accused person for offences some of which are triable exclusively by the Magistrate and some by the Sessions Court and the accused after trial is discharged in respect of all the offences, an order for compensation against the complainant under s. 250 can or cannot be passed.

The complaint was filed under ss. 395, 323 and 330, Indian Penal Code. The learned Magistrate found that no case had been made out against the accused in respect of any of the offences mentioned. He accordingly discharged him. He further ordered the complainant to pay Rs. 50 as compensation to the accused. The complainant applied in revision to the Additional Sessions Judge who has referred the case to the High Court. The learned Judge has declined to interfere on the merits, but has recommended that the order directing compensation to be paid should be set aside. He has cited the case of *Crown* v. *Hamir Chand* (1) and the case reported as *Kottalanada* v. *Muthaya* (2). The learned Magistrate in his explanation has, however, relied on the case of *Mahajanam Venkatrayar* v. *Kodi Venkatrayar* (3).

The Punjab case is not in point because the offence with which the accused was charged was one exclusively triable by the Sessions Judge and there was no other offence complained of which could have been tried by the Magistrate himself. The other case referred to by the learned Judge is not available here. Similarly the case relied upon by the learned Magistrate is not directly in point. In that case the Magistrate had regarded the offence complained of as being one under s. 463, Indian Penal Code (which he had jurisdiction to try) and had tried the accused for that offence and discharged him and ordered compensation. In the High Court it was contended that the offence really fell under s. 477, Indian Penal Code, and the order for compensation was, therefore, illegal. The learned Judges held that inasmuch as the Magistrate had not proceeded il-

(1) 14 P. R. 1902 Cr.

(2) 2 Weir 315; 9 M. 374; 3 Ind. Dec. (N. S.) 656.

(3) 66 Ind. Cas. 72; 45 M. 29, 14 L. W. 247; (1921) M. W. N. 613; 41 M. L. J. 398; 30 M. L. T. 75; 23 Cr. L. J. 232; (1922) A. I. R. (M.) 223.

legally in trying the accused for the lesser offence he was not acting illegally in awarding compensation.

It may at first sight appear that inasmuch as the offence under s. 323 was at any rate triable by the Magistrate the order for compensation is not illegal merely because there were other offences also with which he was charged. It has, however, to be borne in mind that the methods prescribed for an enquiry into cases triable by a Court of Session, the trial of Summons Cases and Warrant Cases are distinct. Section 250 which empowers a Magistrate to grant compensation, when he discharges an accused person on a finding that the complaint was false, frivolous or vaxatious, occurs in Ch. XX of the Code which relates to the trial of Summons Cases. There is no similar provision in Ch. XVIII which deals with an enquiry into cases triable by the Court of Session. Although in the complaint there was a mention of the offence of s. 323 which was triable in accordance with the procedure laid down in Ch. XX nevertheless inasmuch as it was joined with offences under ss. 395 and 330 the Magistrate could not follow the procedure for the trial of Summons Cases. As a matter of fact he proceeded to enquire into the complaint under Ch. XVIII of the Code. The order of discharge which he passed must have been under s. 209 of the Code. When an accused is discharged under that section an order for compensation cannot be made against the complainant.

The learned Magistrate in his explanation suggests that the discharge was under s. 253, Cr. P. C., though the order does not expressly say so. I cannot understand how he could have proceeded to try these cases as warrant cases under Ch. XXI when two of the offences, namely, those under ss. 395 and 330 were triable exclusively by the Sessions Court. Assuming, however, that the discharge was under s. 253. Cr. P. C. I would still be of opinion that the order when issued was illegal. That order contained as it is in s. 250 which occurs in Ch. XX must be confined to a trial of Summons Cases. There is no such similar provision in Ch. XXI which deals with the trial of Warrant Cases. This view finds some support from the case of *Het Ram* v. *Ganga Sahai* (4). There too one offence was triable exclusively by the Sessions Court and the other two offences by the Magistrate. In the present case the trial undoubtedly was not under Ch. XX dealing with Summons Cases. The order of compensation was, therefore, illegal. I accept the reference and set aside the order of the Magistrate so far as it directs the complainant to pay compensation of Rs. 50 to the accused. The order of discharge, however, will stand.

Z. K. *Order set aside.*

(4) 46 Ind. Cas. 200; 40 A. 615; 16 A. L. J. 483; 19 Cr. L. J. 706.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 50 OF 1925.

March 31, 1925.

Present:—Mr. Justice LeRossignol.

DATA RAM AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 99, 104, 149, 325—Unlawful assembly—Determination to enforce right by violence—Rioting—Grievous hurt—Right of private defence of property, whether available.

M and *R* were throwing earth upon a narrow path of the *shamilat* and in so doing threw earth upon certain fences with which the accused had formed an enclosure upon the *shamilat*. The accused, eight in number, thereupon made a combined attack upon *M* and *R* causing several injuries to them, one of which was inflicted on the head of *M* and proved fatal, the remaining being trifling:

Held, (1) that as the matter was not urgent, no serious loss of property was threatened, and there was ample time to have recourse to the authorities, the accused could not be said to have been acting in the exercise of the right of private defence of property;

(2) that the accused were members of an unlawful assembly being determined to resist by violence any attempt by *M* and *R* to repair the pathway and that it must have been within the knowledge of all the accused that grievous hurt was likely to be inflicted on the other side in the course of the fight;

(3) that, therefore, all the accused were guilty of an offence under s. 325 read with s. 149 of the Penal Code with regard to the fatal injury inflicted upon *M* and of an offence under s. 323 read with s. 149 of the Code with regard to the injuries inflicted upon *R*.

Criminal appeal from an order of the Sessions Judge, Hissar.

Sir Mian *Muhammad Shafi*, and Mr. *Shamair Chand*, for the Appellants.

Lala *Jagan Nath Bhandari*, for the Respondent.

JUDGMENT.—In the course of a fight in village Mirchpur one Malu received an injury which resulted in his death and one Ram Chandar also received an injury. The appellants have been convicted of rioting and have been sentenced to six years' rigorous imprisonment in respect of death of Malu under s. 325/149 of the Indian Penal Code and to one year's rigorous imprisonment under ss. 149/323 of the Indian Penal Code in respect of the hurt inflicted on Ram Chandar.

They have appealed and on their behalf it has been contended that as Moulu appellant has been found to have inflicted the final blow on Malu he alone is responsible for that blow inasmuch as there was no common object linking together the eight appellants. A further argument is that the death of Malu was more or less an accident such as often occur in what would otherwise be a petty village squabble.

Having heard Counsel and perused the record I see no reason to doubt that the eight appellants made a combined attack upon Malu and Ram Chandar as they were thowing earth upon a narrow path of the *shamilat* and in so doing threw earth upon the fences with which the appellants had formed enclosures upon the *shamilat*. The appellants' reason for objecting to the repair and widening of the path no doubt was that their enclosure fence would come under the new deposit of earth and it is, therefore, contended that whatever they did they did in their right of private defence of property. I am unable to accept this contention. The matter was not urgent, no serious loss of the property was threatened and there was ample time to have recourse to the authorities.

The sentences inflicted, however, appear to me to be very excessive. The death of Malu was due to one single blow on the head for the other marks of injuries upon his person were trifling. I agree with the Court below that the appellants did form an unlawful assembly determined to resist by violence any attempt by the complainants to repair the pathway and it must have been within the knowledge of all of them that grievous hurt was likely to be inflicted upon the other side in course of the fight.

For these reasons I accept appeal and reduce the sentences in the case of each appellant as follows:---

Two years' rigorous imprisonment under s. 325/149, Indian Penal Code.

One year's rigorous imprisonment under ss. 323/149, Indian Penal Code.

The sentences shall run concurrently.

Z. K.

Appeal accepted.
Sentences reduced.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 392 OF 1925.

July 23, 1925.

Present:—Mr. Justice Ashworth.

PANNA LAL AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), ss. 13, 13-A—Game of skill played in public place—Offence.

The playing of a game of mere skill for a stake or a prize in a public place amounts to gaming, but is not such gaming as falls within the purview of s. 13 of the Public Gambling Act. [p. 41, col. 1.]

Reference made by the Sessions Judge, Aligarh, dated the 1st June 1925.

REFERRING ORDER.—This is an application for revision of the order, dated 11th February 1925, of Thakur Sheorakhan Singh, Magistrate First Class, convicting the six applicants under s. 13 Act III of 1867 (The Public Gambling Act) and sentencing each of them to a fine of Rs. 5 or in default of payment of fine to rigorous imprisonment for a week. The case was tried summarily and the facts found by the Magistrate are that the applicants were playing a game of marbles on a public road at Mursan. Each player had contributed six pice to a pool and if a player succeeded in throwing his marble into a hole with the help of his finger he took the whole pool. The Magistrate was of opinion that the game of marbles was not a game of mere skill and that s. 13A of the Public Gambling Act applied to a game of mere skill only. The Magistrate was further of opinion that as the game played by the applicants was accompanied by betting and pice were actually found on the spot their act amounted to gaming in a public place. I am afraid that I am unable to agree with the view taken by the learned Deputy Magistrate. In my opinion the game of marbles is a game of mere skill and there

is no more element of chance in it than there is in billiards or any other game of that kind. Bridge is commonly known as a game of skill but there is more element of chance in bridge than there is in the game of marbles. The fact that the game was played for stakes does not alter the nature of the game. The Magistrate admits in his judgment that s. 13A of the Gambling Act excludes a game of mere skill from the purview of s. 13. I would, therefore, report the case under s. 438 of the Cr. P. C. to the Hon'ble High Court with the recommendation that the convictions and sentences of the applicants be reversed. Before the record is submitted to the High Court the Magistrate will be asked to send an explanation if he wishes one to be sent up with the record.

I cannot bring myself to believe that the law prohibits the playing of a game of skill for a stake or prize. The interpretation of the word "mere" in s. 13A is ingenious. In reality the word is used to exclude the element of chance.

Mr. *S. N. Gupta*, for the Applicants.

JUDGMENT.—This is a Reference by the District Judge of Aligarh recommending that the conviction of six persons under s. 13 of the Public Gambling Act III of 1867 should be set aside in revision.

The finding was that the accused persons were playing a game with marbles on a public road, the game being one of mere skill into which chance did not enter. It is not disputed that before the amendment of the said Act by U. P. Gambling (Amendment) Act I of 1917 the conviction would have been in order. That Act, however, has added a section that nothing in the Gambling Act shall apply to any game of mere skill *wherever played*. The result of this amendment appears to be as follows. The playing of a game of mere skill in a public place is gaming but it is not such gaming as falls within the ambit of the Public Gambling Act. The Magistrate's suggestion that the expression "any game of mere skill" means a game in respect of which there is no wagering or betting, is untenable. Accordingly the convictions of the six persons in this case are set aside and the fines, if paid, will be returned to them.

Z. K. *Conviction set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION NOS 58 AND 59 OF 1925.

May 7, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.

THAKUR SAO AND OTHERS—PETITIONERS

versus

ABDUL AZIZ—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 139-A—Obstruction to public right—Denial of public right—Procedure—Jurisdiction of Magistrate.

The first duty of a Magistrate in a case under s. 133 of the Cr. P. C. is to determine whether any public right exists and if the party against whom proceedings have been taken denies that there is any public right, the Magistrate has to determine whether that denial is *bona fide* or a mere pretence. Only when he is satisfied that the denial is a mere pretence can he proceed to make his order absolute. If he finds that the denial is *bona fide*, his jurisdiction is ousted and he has no authority to enquire further. He has no jurisdiction to weigh the evidence and to determine on which side the balance lies. [p. 42, col. 1.]

Per *Ross, J.*—The intent of s. 139-A (2) of the Cr. P. C. is that the Magistrate should neither encroach upon the jurisdiction of the Civil Court, which alone can determine the existence of such a public right as is referred to, nor fail to exercise his own jurisdiction. The criterion is that he should find evidence to support the denial which he can pronounce reliable. That is necessary and that is sufficient to oust his jurisdiction. [p. 42, col. 2.]

Criminal revision from an order of the District Magistrate, Patna.

Messrs. *K. B. Dutt, S. P. Varma, Manohar Lal* and *S. N. Sahay*, for the Petitioner.

Messrs. *Sultan Ahmad, Muhammad Hasan Jan* and *Fakr-ud-din*, for the Opposite Party.

JUDGMENT.

Mullick, J.—A dispute having arisen between the Hindus and Muhammadans residing within the Cantonment of Dinapur regarding the use of a *ghat* on the river Sone, the Sub-Divisional Magistrate of Dinapore on the 14th January last issued two orders which form the subject of the present applications before us.

One of these orders declares the "*ghat*" to be public and purports to have been made under s. 139-A, Cr. P. C. The Magistrate had issued a notice under s. 135 of the Code calling upon Deonarain Pande, the priest of the temples, to show cause why he should not remove certain enclosures and a signboard indicating that it was private property. The other order was made under s. 144 of the Code and prohibited six of the leading Hindus from restraining the Muhammadans from using the *ghat*.

It appears that the bank down to the

water of the river is the property of Government and that 40 or 50 years ago a Hindu resident of the locality obtained permission to erect two or three temples on the bank and to construct a flight of steps for the use of bathers.

The case of the Hindu is that they have acquired an exclusive right to use the steps and that the Muhammadans are not entitled to use the same as of right.

The learned Magistrate proceeded to hold an inquiry under s. 139A of the Cr. P. C. as to Deonarain's claim that the *ghat* was private property and as to his denial that there existed any public right in respect thereof, he took the evidence of five Hindus and of a number of Muhammadans, and the conclusion to which he came was that the Hindu witnesses though reliable were mistaken in imagining that there was no public right.

Now it is contended that the law does not give the Magistrate the power to find whether in fact the denial is true or false and as soon as a *bona fide* dispute has been made out, the Magistrate must hold his hand and refer the parties to the Civil Court.

The law, previous to the Code of 1923 as expanded in judicial decisions, was that as soon as the party cited appeared before him the Magistrate's first duty in a case under s. 133 of the Code was to determine whether any public right existed, if the party denied that there was any public right, the Magistrate had to determine whether that denial was *bona fide* or mere pretence. Only when he was satisfied that it was pretence could he proceed to make the order absolute. If, however, he found that the denial was *bona fide*, his jurisdiction was ousted and he had no authority to enquire further.

Now s. 139 of the present Code appears merely to have confirmed this view of the law and given statutory expression to it. The section provides that if in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court; and, if he finds that there is no such evidence, he shall proceed, as laid down in s. 137 or s. 138, as the case may require.

The law, therefore, requires first of all that the party shall appear before the Magistrate and deny the existence of the public right in question. Secondly that he shall produce some reliable evidence, and, thirdly that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then the Magistrate's jurisdiction ceases to exist.

Now it is contended that the Magistrate is entitled to demand that the evidence shall be sufficient to satisfy him that no public right exists. The section, however, requires evidence and not proof and the only condition is that upon the materials before him the Magistrate has no reason to think the evidence false. The Magistrate has no jurisdiction to weigh the evidence and to determine on which side the balance leans.

Moreover there was evidence which, if believed, supported the claim made by the petitioners. It is not disputed that the witnesses are thoroughly honest in what they say; but the Magistrate says that they are mistaken in thinking that the *ghat* is not public. That is a matter for the Civil Court and, in my opinion, the Magistrate has no jurisdiction to inquire any further into the actual existence of the public right claimed by the Muhammadans.

In this view of the case the order of the learned Magistrate of the 14th January, 1925, will be set aside and he will be directed to stay all further proceedings in the case. The order under s. 144, Cr. P. C., has spent its force and no orders are required in respect of it.

Ross, J.—I agree. It seems to me that the intent of s. 139-A (2) is that the Magistrate should neither encroach on the jurisdiction of the Civil Court which alone can determine the existence of such a public right as is referred to, nor fail to exercise his own jurisdiction. The criterion is that he should find evidence to support the denial which he can pronounce reliable. That is necessary and it is sufficient to oust his jurisdiction.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 438 OF 1925.

July 7, 1925.

Present:—Mr. Justice Boys and
Mr. Justice Ashworth.

EMPEROR—APPELLANT

versus

PARAM SUKH—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 99, 101, 302—Police Officer conducting search—Assault on member of household—Private defence, right of, whether arises—Death caused by blows from stick—Intention—Offence—Criminal Procedure Code (Act V of 1898), s. 165—Search for property not believed to be stolen, legality of—Criminal procedure—Public Prosecutor, duty of.

Deceased who was a Sub-Inspector of Police while proceeding to make a search assaulted and insulted a female member of the household who occupied the house to be searched. Accused, who was a male member of the household, remonstrated with the deceased, the deceased resenting the conduct of the accused struck him with a cane whereupon the accused grappled with the deceased. A constable who was present thereupon struck the accused with a stick which he was carrying and two other constables also ran up to the spot. The accused snatched the stick from the hands of the constable who had struck him and delivered two blows with it on the Sub-Inspector's head which caused a fracture of his skull and resulted in his death :

Held, (1) that the Sub-Inspector was acting in excess of his authority in assaulting the woman and was not acting in good faith and that consequently the provisions of s. 99 of the Penal Code had no application to the case ; [p. 45, col. 1.]

(2) that the accused had a right to defend a female member of his household from assault and when he was subsequently assaulted himself both by the Sub-Inspector and by the constable he had a right to defend himself ; [p. 45, col. 2]

(3) that in hitting the Sub-Inspector it could not be held that the accused intended either to cause the death of the Sub-Inspector or even grievous hurt and that the intention of the accused was merely to put a stop to the Sub-Inspector's illegal aggressions ; [p. 46, col. 1.]

(4) that the accused having acted in the exercise of the right of private defence and not having exceeded it was not guilty of any offence. [*ibid*]

Per *Boys, J.*—The sections of the Penal Code dealing with the right of self-defence are very valuable in that they lay down general principles for the guidance of Courts, but they are principles which are only intended to afford a guide to the Courts as to what is to be held reasonable and what is to be held unreasonable and punishable by law. The test in each case is whether the action of the accused was unreasonable and unjustified. That is to say whether his acts were acts which in ordinary parlance he had no right to commit. [p. 45, col. 2.]

Section 165 of the Cr. P. C. does not authorize a Police Officer to make a search only for what is stolen or believed to be stolen property, but permits him to search for anything necessary for the purposes of an investigation into any offence. [p. 46, col. 2.]

A Public Prosecutor must not during the examination of a witness make any remark which is likely to suggest to the witness that he has made a mistake and that he should amend his statement. [*ibid.*]

Criminal appeal by the Local Government from an order of acquittal passed by the Additional Sessions Judge, Banda, dated the 16th of March 1925.

The Government Advocate, for the Crown.

Dr. *K. N. Katju*, for the Accused.

JUDGMENT.

Boys, J.—In this case Government has appealed against the acquittal of one Param Sukh, son of Dwarka, caste *Brahman*, a resident of Balhaura in the District of Banda. The charge was one under s. 302 of the Indian Penal Code and was in regard to the death of Sub-Inspector Jhamman Singh, on whose head the accused was alleged to have struck two blows when he was engaged in making or attempting to make a search in the house of a cousin of the accused.

On the 7th of November 1924 a report was made at the Police Station by one Bal Govind against Mahadeo, relative of the *chaukidar* of the village, Jeorakhan. Bal Govind charged Mahadeo with having stolen three ornaments from the person of his (Bal Govind's) son. Jeorakhan apparently arrived at the *thana* either with Bal Govind or at any rate, at just about the same time and he informed the Sub-Inspector that, as a matter of fact, the report made by Bal Govind was false as regards two out of the three ornaments, which, as a matter of fact, he (Jeorakhan) had seen on the person of the boy after the alleged theft had taken place. Two constables were deputed to investigate the matter at the village. We are not particularly concerned any further with their movements.

On the next day, the Sub-Inspector, Jhamman Singh the deceased, went himself to the village accompanied by Ajodhya Prasad, a constable, and arrived there at 11 o'clock in the morning. He is said to have first enquired from *Musammat* Gilli, a daughter of Bal Govind about 15-16 years of age, and to have been informed by her that, as a matter of fact, only one ornament had been stolen from the person of her brother and the other two ornaments had been placed by Bal Govind in the house of one Parmeshur who was a cousin of the present accused. I may say that there is reason to doubt whether *Musammat* Gilli ever gave the Sub-Inspector any

information at all. He had already got this information from Jeorakhan and it is very difficult to believe that *Musammat* Gilli would make a statement so prejudicial to her own father of her own accord to the Sub-Inspector. It seems much more probable that the Sub-Inspector proceeded to search Parmeshur's house on the information of Jeorakhan or even more probably the *Mukhia* Sital Prasad. If this be the fact the reason no doubt for putting the words into the mouth of *Musammat* Gilli would be to give a greater colour of *bona fides* to the search of Parmeshur's house and it has this but only this indirect bearing on the matter which we have now to decide. It is common ground then that upon information received, be it from whatever source, the Sub-Inspector went accompanied by Ajodhya Prasad constable to the house of Parmeshur in order to recover, if possible, the ornaments. One of the ornaments said to have been stolen was an ear-ring that has never been traced. It was apparently indubitably stolen because the boy's ear bore signs of an ear-ring having been wrenched out. The other two ornaments which were supposed to be in the house of Parmeshur were a *tawiz* (amulet) and a pair of silver bangles. The Sub-Inspector and the constable were also accompanied by *Musammat* Gilli and the *Mukhia* Sital Prasad. There is again a great discrepancy in the prosecution evidence in regard to the question whether *Musammat* Gilli prior to the visit of the Sub-Inspector was sent to demand the ornaments from Parmeshur's wife. But this is immaterial again to the case we have to decide. It is only of importance as showing that in many aspects of the case the evidence for the prosecution is in itself conflicting. It is in evidence and established beyond doubt that when the Sub-Inspector arrived he demanded the ornaments from Parmeshur's wife. She repudiated all knowledge of them and said that her husband would be back very shortly as he had only gone to fetch water from the *nadi* close by. The Sub-Inspector, and this is established by the evidence for the prosecution itself, refused to be content with this reply or with merely surrounding the house to see that nothing was removed until Parmeshur returned. But at the very least it has to be admitted that he threatened *Musammat* Dhirajia, the wife of Parmeshur, with a cane and laid hands on her *dhoti*. On her cries two men (cousins of Parmeshur) arrived. They were Param Sukh the present accused, and Ram Nath. I may here observe that Ram Nath was put upon his trial at the same time with Param Sukh, but was acquitted by the learned Sessions Judge and Government has not appealed against that acquittal. Param Sukh on his arrival naturally protested against the treatment, he saw being meted out to *Musammat* Dhirajia. After this it is not very clear exactly what happened; but I think the facts as I shall now state them are sufficiently near to the truth. It is admitted that when Param Sukh and Ram Nath arrived they were empty handed and this is a fact of very great importance. Then it is not difficult to understand that Param Sukh would protest in forcible terms against the treatment he found being meted out to the woman and would urge again that the Sub-Inspector should do nothing until Parmeshur would come. The Sub-Inspector clearly resented this interference and after this it is not possible to be precise but from the evidence of the prosecution witnesses read to some extent with that of *Musammat* Dhirajia it is clear that very hot words would pass between Param Sukh who thought the woman of his household was being treated in a most undignified and insulting manner and the Sub-Inspector who would, as a man in authority, resent Param Sukh's attitude Param Sukh then apparently grappled with the Sub Inspector, who had either threatened him with a cane or had struck him with it and on this it is not difficult to realise that Ajodhya Prasad, the constable, would strike Param Sukh with his *danda*. Here again the fact is not clear whether Param Sukh snatched up a *lathi* which was standing near by as some witnesses said or whether he snatched away the *danda* from Ajodhya Prasad. I think that the latter is much more probably the truth for it is supported by the fact that Ajodhya Prasad is entirely unable to account for what happened to his *danda*. Having possessed himself of this weapon Param Sukh struck the Sub-Inspector two blows on the head, with the result that the Sub-Inspector died the next morning at sun-rise and it is proved by the medical evidence that he had two blows on the head, neither of the superficial wounds being very serious but the internal fracture of about 7 inches

showing that at least one of the blows was delivered with considerable force. These are the facts so far as it is possible to be precise about them at all from the evidence on the record. Of such doubt as there is about the facts the accused must have the benefit.

The burden does not fall on him to show what happened until the prosecution has discharged the primary burden of showing that he did bring about the death and how he brought it about. One of the most essential facts in this case upon which the decision of the right of self-defence must turn is the question whether the woman was or was not being assaulted, using the terms in the legal sense, that is, whether hands were being laid upon her and whether she was being struck or even threatened with a cane. I have no doubt whatever that she was being so threatened. If she was not so threatened there is not the slightest reason to suppose that any disturbance would ever have taken place at all. This shows clearly that she was being insulted and that is why Param Sukh's anger rose.

The next point is whether the Sub-Inspector was himself acting in excess of his powers or not. I think it is clear that he was exceeding his powers and exceeding them not only technically and legally but exceeding them in a very material manner. There can be no doubt that he was acting in excess of his powers in that he was making this search without having recorded any order in writing and giving his reasons therefor under s. 165, but that would in itself have little or no bearing on the point that we have to decide whether the accused had any right to strike him or not.

The next thing we find is that he took with him no witnesses to the search and further that he declined to wait for Parmeshur to return, though he himself had complete command of the situation and there could not really be the slightest reason to suppose that if he had kept his eye on the woman and a watch on the house the property could have been spirited away. Both these last two points are material as indicating the attitude of the Sub-Inspector. Neither of them would have justified the accused in attacking him. But they are of importance as showing in conjunction with the other facts the attitude adopted by the Sub-Inspector.

The last and most important and material point is that clearly he had no right whatever of any sort or description to interfere with the woman. Granted that he had a right of search which he had, and granted that the failure to reduce his reasons into an order in writing was a purely technical defect as it was, he had no right to do anything more whatever than to go into that house and search it. He had no right whatever to use any means of any sort or descripiton to compel the woman to produce the articles beyond being entitled to have facilities given to him for the search and not to be resisted. It is clear, therefore, that he was exceeding his authority and there can be no question of any mistake on his part as to what his authority was he was deliberately exceeding it.

Now to consider the case from the other aspect whether the accused Param Sukh had a right of self-defence. We have heard argument about the sections of the Indian Penal Code which control that right. I feel myself that those sections are very valuable indeed in that they lay down general principles for the guidance of the Court, but they are principles which are only to my mind intended to afford a guide to the Court as to what is to be held reasonable and what is to be held unreasonable and punishable by law. I do not think anything whatever is to be gained by entering into a meticulous examination of the wording of those sections. Bearing in mind then, the principles laid down in those sections, I have really to consider whether Param Sukh's action in striking the two blows he struck was unreasonable and unjustified; whether his acts were acts which in ordinary parlance he had no right to commit. Now what was the situation. He had a right to defend the wife of his brother from being insulted and threatened. There can be no question that for the Sub-Inspector to have laid his hands on that woman in any way whatever, however mildly, would be regarded by the members of the household as a very grave insult; much more so, would it be the case, when they found her being actually struck even lightly or even threatened with a cane. These events naturally led to hot words between Param Sukh and Ram Nath on the one hand and the Sub-Inspector on the other. Resenting this the Sub-Inspector uses his cane on Param Sukh who defies his authority. The result is equally inevitable. Param Sukh grapples with him. There follows the

inevitable assistance given by the constable to his superior and from that follows the snatching of the *danda* from the constable and the blows on the Sub-Inspector's head. Regarding the whole of the facts and bearing in mind the principles laid down in the Indian Penal Code, I find it quite impossible to hold that the action of Param Sukh was unreasonable or unjustifiable. As to whether he voluntarily caused death I do not think for one moment that he could ever have voluntarily intended to cause even grievous hurt or that his real intention was to do anything more than to stop the Sub-Inspector's illegal aggressions and the consequent illegal aggression by Ajodhya Prasad. In this connection one may note that there is no real question of a *lathi* having been used. It is quite possible that there would be no distinction on the particular facts of the case even if it was a *lathi* that had been used. But as I find that in fact it was only a *danda* and the prosecution have not been able to establish what the nature of the *danda* was, I find it still more impossible to hold that Param Sukh intended to cause death. If he did not so intend under the circumstances he was certainly entitled to an acquittal.

There is one further aspect affecting the necessity for the degree of injury that was in fact caused. At the moment two further constables ran up and there can be very little doubt indeed that but for the two blows that the Sub-Inspector received Param Sukh himself would have received injury. These considerations entirely to my mind justify us in refusing to allow this Government appeal.

Two further matters may be dealt with very briefly. The learned Judge has held that the whole search which the Sub Inspector proposed to hold was entirely illegal and he has apparently held this at least in part for two reasons, (1) that there was no order in writing and (2) that there were no search witnesses. But his chief reason, as I gather, is that the Sub Inspector was not searching for anything that was alleged and believed by him to be stolen property. The idea underlying is that the Sub-Inspector was searching for something which had never been stolen at all though it had been falsely alleged by Bal Govind to have been stolen. It is clear that the learned Sessions Judge overlooked the words of s. 165 which do not authorise a Police Officer "to make a search only for what is stolen and believed to be stolen property but permit a search for anything necessary for the purposes of an investigation into any offence." If the story which was told to him was true the two articles for which he was searching were clearly necessary for the purposes of the investigation, and he was fully justified under s. 165 in searching for them though he should undoubtedly have taken the precaution of putting his reasons in writing as required by s. 105 and of taking two witnesses with him as required by s. 103.

The last point to which I will refer was the action of the Government Pleader which is referred to by the learned Sessions Judge. The witness *Musammat* Gilli had been asked in Court to identify Ajodhya Prasad constable. She identified him and said "that he was the constable who had gone with us to Parmeshur's house." Later in her evidence in cross-examination she stated "the *sipahi* also whom I have identified here to-day, beat Param Sukh with a *danda*. Param Sukh caught hold of the *sipahi's* stick". A note made by the Court is as follows: "at this stage the Government Pleader suggested in English notes (*sic* words) the witness perhaps means *darogaji* by *sipahi* and then the witness was asked what she meant by *sipahi* and she replied that she meant *darogaji*. On being asked by the Court she stated that by the *sipahi* she did not mean the *sipahi* who had come in the Court". It is as clear as it can possibly be that the witness corrected her statement in consequence of the remark made by the Government Pleader in view of the fact that he used the words "*darogaji*" and "*sipahi*". There cannot be the shadow of a doubt that she would be able to understand that she was supposed to have made some mistake; it is equally clear that in consequence of her so understanding she altered her statement. There can be no doubt whatever that the action of the Government Pleader was very wrong. It may have been due to mere carelessness or thoughtlessness. If it was due to carelessness or thoughtlessness it was reprehensible carelessness. If it was due to a deliberate intention to suggest something to the witness the proceedings would require to be characterised in very much stronger terms. A Government Pleader is expected at the least to be more careful than this.

For the reasons that I have given I would hold that the appeal by Government in this case must fail and I would dismiss it.

Ashworth, J.—I concur in dismissing the appeal. The evidence in the case is conflicting and beyond a certain point unreliable. It would not be safe to accept as proved any facts more incriminating than the following:—

The Sub-Inspector was searching the house of one Parmeshur for some property necessary for the proper investigation of a certain cognizable offence. He was entitled to do this under s. 165 of the Cr. P. C. He acted, however, illegally in not recording first in writing his belief that the search was necessary to discover the particular articles. He also acted illegally in not taking with him two search witnesses. These illegalities, whatever effect they might have in any other connection would not, in my opinion, prevent it being held that the Sub-Inspector was acting in good faith under colour of his office within the meaning of s. 99 of the Indian Penal Code. No objection was raised to the search being made on the ground of these illegalities. This search, therefore, initially gave no right of resistance to the accused.

The Sub-Inspector had no sooner entered the house than he began to act illegally and otherwise than in good faith. Parmeshur's wife was in a courtyard. The Sub-Inspector was entitled to tell her to stand aside and to allow him to search the house. He went beyond this and caught hold of her clothes and detained her and threatened her with a cane. She cried out. The accused Param Sukh ran to her assistance without having any weapon in his hand. An altercation ensued. Ultimately the Sub-Inspector and the constable, Ajodhya Prasad, who was with him together beat Param Sukh, the former with a cane and the latter with a stick (*danda*). The accused snatched the stick from the constable and struck the Sub-Inspector on the forehead fracturing his skull.

On these facts I hold that the accused had a right of self-defence against this dual assault on his person. That right under s. 101 extended to voluntarily causing grievous hurt not to voluntarily causing death. Section 99 did not interfere with this right of self-defence inasmuch as the conduct of the Sub-Inspector at the time was not in good faith. The question then is whether the accused can be said to have voluntarily caused death. Under s. 39, which defines "voluntarily" in order to hold that he did so, we must hold that he intended to cause death or had reason to believe that he was likely to cause death. He can never have intended to cause death. There is no clear evidence as to the size or character of the stick. We cannot, therefore, assume that it was very heavy one. It might be suggested that the accused had been so provoked that he could not exercise his reasoning powers for the purpose of forming a belief whether the stick was likely to cause death or not. I hold that we are not entitled under the present state of the law to take into consideration the possible fact of the reasoning power of the accused being in abeyance owing to severe provocation. That may be the law one day but it is not the law at present. Even thus I am not convinced that the accused had reason to believe that his two blows on the forehead of the Sub Inspector were likely to cause death. He cannot, therefore, be said to have voluntarily caused death. The death was caused involuntarily during the lawful exercise of a right of self-defence.

For these reasons I agree in the view that the accused was rightly acquitted and dismiss the Government appeal.

By the Court.—The order of the Court is that the appeal filed on behalf of the Government be dismissed, the accused Param Sukh, son of Dwarka, *Brahman*, released forthwith and if he is on bail his bail-bonds be discharged.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 373 OF 1925.

July 16, 1925.

Present:—Mr. Justice Daniels.

AMIR AHMAD AND ANOTHER—ACCUSED —APPELLANTS

versus

EMPEROR—RESPONDENT.

Arms Act (XI of 1878), ss 19, 29—Illegal possession of arms, prosecution for—Bijnor District—Sanction of District Magistrate, whether necessary.

In the Bijnor District the sanction of the District Magistrate is not necessary for a prosecution under s. 19 of the Arms Act.

Criminal appeal from an order of the Additional Sessions Judge, Moradabad at Bijnor, dated the 28th March 1925.

M. *S. M. Zahur Ali*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—Amir Ahmad appeals from his conviction under s. 19 (*f*) of the Arms Act for possession of cartridges, and Nathu from his conviction under s. 20 of the Arms Act on account of possession of a revolver after taking precautions to conceal the offence from a public servant. The Sub-Inspector at Nagina searched Amir Ahmad's house in the hope of finding stolen property. He found instead the accused Nathu hiding in a grain-bin covered by a coat. On his being dragged out, a revolver was found in the pocket of his coat. In another portion of the house a number of cartridges were found and it is in respect of these latter that Amir Ahmad has been convicted.

The facts of the case are quite clear, and on the facts there is no room for doubt as to the propriety of the convictions. Amir Ahmad's appeal has been strongly pressed on the ground that the whole trial is illegal on account of the District Magistrate's sanction to the prosecution not having been first obtained. The Magistrate first charged the accused under s. 19 (*f*), but subsequently altered the charge to one under s. 20 and committed the accused to Sessions. At the Sessions trial it was found that the offence was really one under s. 19 (*f*), and he was convicted accordingly. The same objection was pressed in the Sessions Court, and it was assumed by the learned Sessions Judge that in the Bijnor District the sanction of the District Magistrate is essential to a prosecution under s. 19 of the Arms Act. No discussion of the point is to be found in his judgment. By the terms of s. 29 of the Act the necessity for sanction depends on whether s. 32, cl. (2) of Act XXXI of 1860 was in force in that district in the year 1878 when the Arms Act came into operation. Where the section just referred to was in force, sanction was only required in the case of offences committed within three months of the coming into force of the Indian Arms Act of 1878. Clause (2) of s. 32 of Act XXXI of 1860 was in force (1) in every Province, district or place which had been ordered to be disarmed, and (2) in every district, Province or place where an order for a general search for arms under Act XXVIII of 1857 had been issued and was still in operation.

The Government Gazette of the North-Western Provinces for the year 1858 contains a Notification issued by the Governor-General, No. 5336, dated the 21st of December 1858, extending the provisions of ss. 1, 2 and 5 of Act XXVIII of 1857 to the whole of the North-Western Provinces, and at the same time authorising a general search and seizure of arms in those parts of the Provinces which lie to the north of the rivers Jumna and Ganges. The text of the Notification runs thus:—

"21st December 1858:—No. 5336. The Right Hon'ble the Governor-General has been pleased to extend the provisions of ss. 1, 2 and 5 Act XXVIII, 1857, to the North-Western Provinces of the Bengal Presidency.

"His Lordship having resolved on disarming such parts of those Provinces as lie to the north of the rivers Jumna and Ganges, has further been pleased, under s. 24 Act XXVIII 1857, to authorize a general search and seizure of arms by the Magistrates and Collectors within the tract above specified. The Magistrate and Collector may delegate the same authority to any officer of his establishment, of rank not lower than a *jamadar*."

I have been unable to find any trace of this order having been rescinded between that date and the Arms Act having come into force. Indeed in para. 92 of the Arms Rules and Orders issued under the authority of the United Provinces Government in 1924 it is stated that all parts of the United Provinces except the portion of the Mirzapur District lying south of the Sen have been disarmed. It appears, therefore, that the learned Sessions Judge was wrong in taking it for granted that the sanction of the District Magistrate to the prosecution was necessary. The objection on the score of want of sanction, therefore, falls to the ground. It is impossible to assail the convictions on the merits. I, therefore, dismiss the appeals of both the appellants.

Z. K. *Appeals dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 381 OF 1925.

August 7, 1925.

Present:—Mr. Justice Kanhaiya Lal.

DAUD KHAN AND ANOTHER—ACCUSED —APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 404—Misappropriating property of deceased person—Decree obtained against assets of deceased—Removal of property to cause loss to decree-holder—Offence.

A suit was instituted against *D* as the legal representative of a deceased debtor in order to recover from him the debt due by the deceased out of the assets left by the deceased which were in the hands of *D*. *D* pleaded that *A* was the heir of the deceased and that he himself had nothing to do with the assets of the deceased. A decree was, however, passed against the assets of the deceased in the hands of *D*. While the decree was outstanding *D* and his son *S* removed certain rafters from the roof of the house left by the deceased :

Held, that *D* and *S* having removed the rafters from the house of the deceased in order to obtain a wrongful gain to the prejudice of the decree-holder whose decree was still outstanding, they were guilty of an offence under s. 404 of the Penal Code. [p. 49, col. 2.]

Criminal revision from an order of the Sessions Jadge, Bulandshahr, dated the 4th June 1925.

Mr. *Nehal Chand*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The accused Daud Khan and Sharf Uddin have been convicted of an offence under s. 404 of the Indian Penal Code and sentenced to rigorous imprisonment for four months and a fine of Rs. 100 each. It appears that one *Musammat* Aziman was indebted to Nanhu Khan and that when she died Nanhu Khan brought a suit against Daud Khan, alleging that he was the successor of the deceased and claiming the money due by her from the assets left by her at the time of her death which were stated to be in his possession. The assets consisted of a house situated in the village Jagatpur. In that suit Daud Khan pleaded that Alauddin was the heir of *Musammat* Aziman and that he had been unnecessarily pleaded. It was ascertained on enquiry that Alauddin was missing from about eight years and the suit was decreed against the assets of *Musammat* Aziman in the hands of Daud Khan.

Nanhu Khan subsequently sold his decree to Mahboob Khan who found that Daud Khan and his son Sharf Uddin had removed some materials from the house left by *Musammat* Aziman. On his complaint Daud Khan and Sharf Uddin have been convicted and the only question for consideration is whether section 404 of the Indian Penal Code is applicable to the case.

Section 404 lays down that a person who dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease and has not since been in the possession of any person legally entitled to such possession, shall be liable to punishment under that section. The property removed by the accused in this case consisted of the rafters used in the house left by *Musammat* Aziman. They were immoveable property so long as they were attached to the house but became moveable property when they were severed from the house; and as the two accused had on their own showing no title to the house and the house was not in the possession of any person legally entitled to its possession, s. 404 of the Indian Penal Code applies if after severing the rafters from the house, they dishonestly removed them and mis-appropriated or converted them to their own use. The word property is not defined anywhere in the Indian Penal Code; but the word moveable property is defined by s. 22 as intended to include corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth. In their severed state the rafters were moveable property. The person entitled to the house was Alauddin Khan and failing him any other nearest heir of the deceased or the *zemindar*, as the case may be. The accused do not claim any title to the house. They removed the rafters in order to obtain a wrongful gain to the prejudice of the decree-holder whose decree was still outstanding. In other words they dishonestly misappropriated property which was in the possession of a deceased person at the time of her death and has not since been in the possession of any person legally entitled to it.

Like s. 378 s. 403 refers to moveable property. Section 404 and some of the other sections following it refer to property without any such qualifying description; and in each case the context must determine whether the property there referred

to is intended to be moveable property or property moveable or immoveable. In *Ram Manick Shah* v. *Brindaban Chunder Potdar* (1) Norman, J., observed that where a person was entrusted with the dominion over property and wilfully omitted to pay revenue, and caused the same to be sold at a revenue sale for the purpose of defrauding the mortgagee and purchased it himself in the name of some other person, he could be treated as having dishonestly misappropriated the same and converted it to his own use in violation of the legal contract which had been made affecting it. In *Queen-Empress* v. *Abdul Ahad* (2) where a certain person who, personating a Court peon, proclaimed by beat of drum that a tenant had been ordered by the Court, of which he personated himself to be the peon, to be ousted from a holding, it was held that s. 420 of the Indian Penal Code could have no application to the delivery of immoveable property or to the surrender of the cultivatory holding. In *Jugdown Sinha* v. *QueenEmpress* (3) the word property referred to in s. 405 of the Indian Penal Penal Code was treated as meaning moveable property as in s. 403 and it was laid down that an offence of criminal breach of trust could not be committed in respect of immoveable property. In *Reg.* v. *Girdhar Dharamdas* (4) it was held that s. 404 of the Indian Penal Code did not apply to immoveable property left by a deceased person. Section 404 contains no such express limitation ; and criminal misappropriation or conversion is easily possible of immoveable property where as in this case the materials have been severed from the building and removed. The appellants have been rightly convicted and there is no sufficient reason for interference in revision. As the materials were not of very great value and there was no lawful claimant existing the sentence need not be stringent. The application is dismissed except in so far that the substantive sentence of rigorous imprisonment passed on each of the applicants will be reduced to the period they have already undergone. The sentence of fine will be maintained. The bail bonds will be cancelled.

Z. K. *Application partly dismissed.*

(1) 5 W. R. 230.
(2) A. W. N. (1882) 6.
(3) 23. 372; 12 Ind. Dec. (N. S.) 248.
(4) 6 B. H. C. R Cr. 33.

MADRAS HIGH COURT.

REFERRED TRIAL No. 100 OF 1924.
CRIMINAL APPEAL No. 643 OF 1924.
January 26, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

In re AYYAPERUMAL PILLAI—ACCUSED—APPELLANT.

Criminal Procedure Code (Act V of 1898), s. 288—Sessions trial—Statement made before Committing Magistrate, portions of, whether can be transferred.

Where a Sessions Judge wants to rely upon the statement made by witness before the Committing Magistrate, the whole of it should be filed and it would then be open to the Court to come to a conclusion after weighing the evidence. It is irregular to mark only portions of the statement made before the Magistrate and to use such portions for the purpose of contradicting the statement made before the Judge by the witness. [p. 51, col. 1.]

Trial referred by the Court of Session of the Ramnad District at Madura for confirmation of the sentence of death passed upon the said prisoner in Case No. 29 of the Calendar for 1924 and appeal by the prisoner against the said sentence.

Messrs. *L. A. Govindaraghava Iyer* and *K. S. Ramabhadra Iyer*, for the Appellant.

The Public Prosecutor, for the Crown.

JUDGMENT.—The appellant in this case has been convicted of the murder of his wife and has been sentenced to death by the Acting Sessions Judge of Ramnad. The prosecution case is that the accused called out his wife, who was sleeping in her mother's house, took her to his house about 5 A. M. in the morning and murdered her. The evidence for the prosecution mainly consists of the evidence of the mother of the deceased, who says, she saw the accused standing in front of her house, calling out his wife; and there is also the evidence of P. W. No. 12, who saw the accused going towards his house in the morning and of P. W. No. 13 of his going away from the house sometime after. Another witness seems to have heard the cry "Ayyo, Appa."

The witnesses have not adhered to the statements made by them under ss. 288 and 164, Cr. P. C. The mother now states that she did not know, who it was that called her daughter though she has told that it was the accused who took her away, in her previous statement. It is unnecessary to discuss the evidence of the other witnesses, which is on a par with the evidence of the mother of the deceased. The learned Judge has not filed the whole of the evidence

taken under s. 288. He has marked only portions of the previous statements for the purpose of contradicting the statements made before him by the witnesses. The learned Judge has come to a halting conclusion that the previous statements must be true. If a Judge wanted to rely upon s. 288 the whole of statements should have been filed and it would then have been open to the Court to come to a conclusion after weighing the evidence. Such a course was not adopted in this case. We are not at all satisfied that the evidence of the witnesses proves that the accused committed the crime. The learned Judge relies upon Ex. E as furnishing a motive. It is an anonymous letter produced four or five days after the occurrence under suspicious circumstances. But for that letter, there is no motive at all for the accused to murder his wife. Ex. E is not evidence of its contents and there is evidence that the accused was in no way influenced in his conduct towards his wife, and if we eliminate Ex. E, as the learned Judge rightly observes, there is no motive at all for the accused to murder his wife, with whom he was living on affectionate terms.

We, therefore, think that the evidence does not establish that the accused committed the offence and we, therefore, allow the appeal.

The next question is whether there should be a re-trial in the case. The trial we are constrained to say was not properly conducted before the lower Court. The learned Judge should have seen to the filing of the whole of the previous statements and not portions of them if he wanted to rely upon them. This was not properly done. And the Judge does not say definitely, that he relied upon the earlier statements in preference to the statements made in his Court, and we do not think that the evidence of these witnesses who have resiled from their earlier statements should be relied upon for supporting a case of this sort. We do not, however, in these circumstances think that there should be a re-trial and we accordingly set aside the conviction and direct the accused to be set at liberty.

V. N. V. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 158 OF 1925.

June 2, 1925.

Present :—Mr. Justice Boys and Mr. Justice Banerji.

KAMLAPATI PUNTH AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

U. P. Panchayats Act (VI of 1920), ss. 53, 71—Criminal Procedure Code (Act V of 1898), s. 439—Order passed by Collector under s. 71—Revision, whether competent—Panchayat, *whether Court—Practice—Superior and inferior Court having jurisdiction to entertain application—Procedure.*

Where an inferior Court has jurisdiction to entertain an application, the application must be made to that Court first and its order obtained thereon before a superior Court is asked to exercise such jurisdiction in the matter as it may think fit. [p. 52, col. 1.]

A village *panchayat* constituted and held under the U. P. Panchayats Act of 1920 is a "Court" and when it is dealing with a case in regard to an "offence" it is a Criminal Court. [p. 52, col. 2.]

There is no provision in the U. P. Panchayats Act declaring that the Collector's order made under s. 71 of the Act in criminal proceedings should be final. [*ibid.*]

Semble.—The High Court has jurisdiction to interfere in revision with an order passed by the Collector under s. 71 of the U. P. Panchayats Act in a criminal proceeding.

Criminal revision from an order of the Panchayat held at Patti, Talladesh, Pergana Sor, District Almorah, dated the 10th December 1924.

Mr. *S. C. Das*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case on the 10th of December 1924 a *panchayat* held under the U. P. Act (VI of 1920) convicted Kamlapati Panth, Parkhotam Panth and Sheo Datt Panth under s. 323 of the Indian Penal Code and sentenced them to pay fines of Rs. 7, Rs. 5 and Rs. 5 respectively. The order of the *panchayat* refers to the statements of the complainant and two of his witnesses, and briefly to three witnesses produced on behalf of the accused. The order does not state whether the witnesses of the complainant or the witnesses of the accused are on their merits believed or disbelieved, but it continues "on private enquiry, it appears that the accused used abusive language (against the complainant) and slapped him".

The next step was an application made by the accused to the Deputy Commissioner, Almorah under s. 71 of the Local Act (VI of 1920). The principal objection set out

in that petition to the order of the *panchayat* is to be found in para. 3 of the petition where it is alleged that "it appears that the *panches* made certain enquiries behind the back of the petitioners and without any information to them, upon which the *panches*' order is based". This appears to be a fair statement of the order of the *panchayat*. That petition had been duly stamped apparently on the 2nd of March 1925 and it was filed in this Court on the 17th of March 1925 with the revisional application with which we at present have to deal. We are informed by Counsel for the applicants that the petition was presented to the Deputy Commissioner (Collector), of Almorah but was returned to the applicants with a verbal intimation that they should go to the High Court. This instruction to Counsel who has further communicated it to us is not supported by affidavit but we have no reason to doubt the accuracy of the instruction given to Counsel in view of the presence of the petition itself and its appearance. At the first hearing of this application on which Mr. Dass, Counsel for the applicant, was unable to be present we had to consider for some time the intricate question as to whether a village *panchayat* under s. 6 of 1920 was a "Court" and whether, if so, this Court had any power to interfere with its decisions.

We had not at that time before us the history of the petition to the Collector to which we have referred.

It appears clear to us that our present order must be guided by the general principle that where a lower Court has jurisdiction, an application must be made to that lower Court first and its order obtained thereon before the superior Court is asked to exercise such jurisdiction as it may think fit. In this case we have no information before us as to why the Collector refused to pass any orders on the petition and why he returned it to the applicants if he did so, with instructions to apply to the High Court. We must, therefore, order the applicants to make their application again to the Collector accompanied by a copy of this order and invite the Collector to deal with it under s. 71 of Act VI of 1920. That is sufficient for the disposal of this application.

But as we have had to consider at some length the question of the jurisdiction of this Court we think that we should make some observations in regard thereto though we are not unaware that those observations will be in the nature of *obiter dicta*. We should have little hesitation in coming to the opinion that a village *panchayat* constituted and held under Local Act (VI of 1920) is a "Court" and when it is dealing with a case in regard to an "offence" that it is a Criminal Court. The question whether this Court has any jurisdiction to interfere with its orders is one of very much greater difficulty. It is clear from s. 71 that "jurisdiction" to deal with the orders of a village *panchayat* is primarily given to the Collector. The only other section which throws any light on the matter at all appears to be s. 53. That declares that "there shall be no appeal from any decree or order passed by a *panchayat* in *any suit* under this Act, and except as provided in ss. 49 and 71 no Court or authority shall have power to revise any such decree or order."

Where they occur for the second time of course the words "any decree or order" refer back to those words where they occur for the first time and the words "any decree or order" where they occur for the first time are clearly limited by the words "in any suit". The word "suit" is declared by s. 2 sub-s. 9, to mean "a civil suit". Section 53 is, therefore, clearly confined to civil proceedings. We can find no provision in the Act declaring that the Collector's order under s. 71 in "cases", *i. e.*, criminal proceedings should be final. This is a matter for the consideration of the Legislature. The question is almost certain to recur.

For the reasons we have given above we order the petition of the applicants which is on the file now dated the 2nd of March 1925 to be returned to them for representation to the Collector who in view of what we have said above will no doubt deal with it according to law under the powers vested in him under s. 71.

Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 35 OF 1923.

September 8, 1925.

Present :—Mr. Simpson, A. J. C.

EMPEROR—PROSECUTOR

versus

CHET KHAN AND OTHERS—

OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 148—Costs of proceedings—Person not party, whether can be made liable.

Under s. 148, Cr. P. C., a Magistrate has no power to saddle a person with costs who is not party to the proceedings.

Reference made by the Sessions Judge, Hardoi, dated the 10th July 1925.

Mr. *Iqbal Narain*, for the Applicant.

Messrs. *S. M. Haq* and *Tirjugi Nath*, for the Opposite Parties.

ORDER.—This case has been sent up by the learned Sessions Judge of Hardoi on revision. The case was one under s. 145, and the parties were on one side, Kunjan Lal, tenant-in-chief, and with him Hulas as sub-tenant, and on the other side Chet Khan and others, who claimed the right to bury in the land in suit. The learned Magistrate came to the conclusion that the action of Kunjan Lal and Hulars was not *bona fide*, and was done under the instigation of their *zemindar* Pandit Jugal Kishor. Accordingly he made an order under s. 148 directing that the costs of the Musalmans, which it appears amounted to Rs. 100, were to be paid, as regards three-fourths, by Pandit Jugal Kishor and as regards one-fourth by Kunjan Lal. Pandit Jugal Kishor applied to the learned Sessions Judge in revision, and he accepted the application, and has sent the case up to this Court with a re-commendation, that the order, so far as it relates to Jugal Kishor, should be quashed. I accept the reference and quash the order. The terms of s. 148 are perfectly clear. A Magistrate can direct that the costs of any party may be paid by any other party to the proceedings whether in whole or in part, but there his jurisdiction ends. He has no power to wander about the country, as the Magistrate has done in this case, and saddle persons whom he meets in the village with costs of a proceeding under s. 145.

The question then arises what order this Court ought to pass. On behalf of the Mussalmans I am asked to saddle Kunjan Lal with the whole of their costs or, in the alternative to send the case back to the Magistrate in order that he may make an order according to law. I prefer the latter course. An order under s. 148 is a discretionary order, and it is better that the discretion should be exercised by the Court of Trial, and not by this Court, on incomplete materials, in revision. On behalf of Kunjan Lal, I am asked merely to quash the order against Jugal Kishor, and to leave intact the order that Kunjan Lal is to pay a fourth part of the costs. I do not think that this would be a proper order. It is impossible to say how the Magistrate would have apportioned the costs if he had realized that he had no legal power to saddle Pandit Jugal Kishor with them. Therefore, I quash the whole of the order, both as regards Pandit Jugal Kishor and as regards Kunjan Lal, and I direct that the record be returned to the Magistrate, through the learned District Judge, in order that he may make any order with regard to costs that shall be in accordance with the law.

N. H. *Record returned.*

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS APPEAL NO. 143 OF 1925.

July 23, 1925.

Present:—Mr. Justice Ashworth.

EMPEROR—PROSECUTOR

versus

BHIMA—OPPONENT.

Criminal Procedure Code (Act V of 1898), ss. 180, 181 (3)—Penal Code (Act XLV of 1860), s. 412—Possession of stolen property—Place of trial—Jurisdiction of Courts.

The offence of being in possession of stolen property may be enquired into and tried either in the district in which the property was stolen or in the district in which it was found to be dishonestly possessed.

Reference made by the District Magistrate, Muttra.

JUDGMENT.—This is a Reference by the District Magistrate of Muttra asking for the transfer of a certain case on the ground that no Court within his district has jurisdiction to try the same. The accused person is being tried for retention in Aligarh of a bullock stolen in Muttra and the Magistrate is of opinion that the provisions of s. 181 (3) of the Cr. P. C., as amended by s. 42 of the Cr. P. C., (Amendment) Act, 1923 exclude the jurisdiction of the Muttra Court.

The Magistrate has wrongly construed the provision referred to. Section 181 (3) of the Cr. P. C., as amended means that the offence of being in possession of stolen property may be inquired into either in the district where it was stolen or where it was found to be dishonestly possessed. This indeed is expressly stated in Illustration (*b*) to s. 180. It must be conceded that the language of s. 181 (3) as amended is open to objection. The context requires that the words "such offence" in that section should mean the offence of theft whereas grammatically they should mean any offence of possession.

For the above reasons let the record be returned to the Magistrate with direction that the case be allowed to proceed.

Z. K. *Record returned.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 43 OF 1925.

May 21, 1925.

Present:—Mr. Findlay, J. C.

Musammat YAMUNABAI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 145, proceeding under—Receiver, appointment of—Remuneration of Receiver, rate of.

The rate of remuneration fixed for Receivers under the C. P. C. does not necessarily provide the limit of the rate of remuneration to be fixed for a Receiver appointed in a proceeding under s. 145 of the Cr. P. C. The total amount of the Receiver's remuneration, however, should not in any case exceed the amount of the net income realized by the Receiver.

Application for revision of an order of the Sub-Divisional Magistrate, Ramtek, dated the 11th February 1925.

Mr. *V. N. Herlekar*, for the Applicant.

Mr. *M. R. Bobde*, for the Receiver.

ORDER.—This is an application for revision of an order of the Sub-Divisional Magistrate, Ramtek, dated the 11th of February 1925, under which an amount of Rs. 2,075 was ordered to be paid as costs in connection with the appointment of a Receiver and other matters in a proceeding under s 145 of the Cr. P. C. Of this amount the present applicant was ordered to bear three-quarters and the non-applicant Jamunabai one-fourth.

The facts of the case are sufficiently clear from the order of the Sub-Divisional Magistrate. In the first place it has been urged that the order of 13th February 1924 attaching the fields and appointing a Receiver was *ultra vires* and reference is made to the decision of Wadegaonkar Assistant Judicial Commissioner, in *Dashrath* v. *Tarachand* (1) in this connection. It seems to me however, that it is impossible for one now to go into this matter. The order dated the 13th February 1924 must be assumed for the purposes of the present application, to have been a good order, no application for revision thereof having previously been made.

I am, therefore, now only concerned with whether the amount of costs and remuneration fixed by the Sub-Divisional Magistrate was proper and reasonable in the circumstances of the case. I fully appreciate the reasons which led the Sub-Divisional Magistrate to award Mr. Doke remuneration at the rate allowed and I also concur in the view that the remuneration fixed for Receivers under the C P. C. need not necessarily be the limit of the remuneration to be fixed in a case like the present. It is also true that it was practically essential to have a person of standing like Mr. Doke appointed as a Receiver, who would be capable of dealing with a difficult position which had arisen between the parties, a position which would appear to have been much aggravated by the conduct of the present applicant and her followers. At the same time the fact remains that the total income received from the estate only amounted to Rs. 614 and the order in question fixes a remuneration so far above this amount that it virtually amounts to a fine upon the applicant and the non applicant. From the moral points of view there might be every justification for the order of the Magistrate, but I am unaware of any legal basis for remuneration being allowed so far in excess of the actual income from the property. The regrettable point in this case, of course, is that the remuneration should not have been fixed before hand and the difficulty in the case has largely arisen from the omission to do so. There are no exact criteria available in the circumstances, on which a reasonable rate of remuneration can be fixed but in all the circumstances the total amount of the remuneration should certainly, on every standard of equity and justice, be not more than the net income realized by the Receiver. Under these conditions I think a fair amount will be to allow

(1) 89 Ind. Cas. 514; 8 N. L. J. 69; (1925) A. I. R. (N.) 297.

Rs. 500 in all as the remuneration of the Receiver,

The only point which remains is how this amount should be distributed between the applicant and non-applicant. It has been strenuously urged in this connection that there should have been no discrimination between Yamunabai and Jamunabai as regards their liability to pay their quota of the Receiver's remuneration but I am satisfied from the Magistrate's order, as well as from the explanation dated the 9th of April 1925 submitted by him that the present applicant is far more to blame for the unfortunately long drawn out proceedings than the non-applicant and it is perfectly clear that the conduct of the applicant and her followers has been lawless and high handed in the extreme. I accordingly order the applicant Yamunabai to bear three-quarters of the Receiver's total remuneration and the non-applicant Jamunabai to bear the remaining quarter. The Sub-Divisional Magistrate now will have to pass further orders clearing up the position as between the Receiver and Yamunabai in respect of sums specified in the order of the 11th February 1925.

Order accordingly.

Z. K.

LAHORE HIGH COURT.

CRIMINAL PETITION NO. 22 OF 1924.

May 9, 1925.

Present:—Mr. Justice Addison.

NAZAR MUHAMMAD KHAN—ACCUSED—PETITIONER

versus

Baba HARA SINGH BEDI—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 369, 421, 561A—Appeal, dismissal of, in absence of appellant—Dismissal, whether can be set aside—Review, power of.

An appeal can be rejected under s. 421 of the Cr. P. C. without any formality. No judgment need be recorded in such a case and no reason of any description need be given. [p. 55, col. 2.]

Where an appeal is dismissed in the absence of the appellant and his Pleader after giving them a reasonable opportunity of being heard in support of the appeal, the dismissal must be taken to be under s. 421 of the Cr. P. C., and is not open to review. [*ibid.*]

Obiter dictum.—Section 561A of the Cr. P. C. which is of a very general nature does not empower the High Court to review its judgment. [*ibid.*]

Petition, under s. 561A of the Cr. P. C., for restoration of the Case No. 788 of 1924, dismissed in default on the 12th December 1924, by Mr. Justice LeRossignol.

Dewan *Ram Lal*, for Mr. *Dev Raj Sawhney*, for the Petitioner.

Lala *Moti Sagar*, R. B., and Lala *Anant Ram Khosla*, for the Respondent.

ORDER.—On the 4th August 1924, the Sessions Judge, Montgomery, directed under s. 195, Cr. P. C., that a complaint under s. 211, Cr. P. C., should be filed in the Court of the District Magistrate, Montgomery, against Nazar Muhammad Khan. An appeal from this order was filed in this Court and it was summarily dismissed on the 12th December 1924, by a learned Judge of this Court, neither the appellant nor his Counsel being present. On the 3rd January 1925 the appellant put in an application stating that his appeal had been dismissed because of the non-appearance of the appellant and his Counsel, that his Counsel had been misinformed about the date of the hearing and that the appeal should, therefore, be heard and decided on the merits as no judgment on the merits was given by the Hon'ble learned Judge in Chambers. The application purported to be under s. 561 A, Cr. P. C. The question to be decided is whether the appeal can now be heard.

The appeal was obviously dismissed under the provisions of s. 421, Cr.P.C., in the absence of the appellant and his Pleader who had a reasonable opportunity of being heard in support of the appeal. This must be taken to be the case as no affidavit has been filed. It is true that the order of the learned Judge of this Court does not state that he saw no sufficient ground for interfering but, in my opinion, it must be assumed that this was omitted inadvertently or because it was considered unnecessary to note everything in a summary order. An appeal can be rejected under s. 421, Cr. P. C., without any formality. There need be no recorded judgment or reason of any description. I have not the slightest doubt that this was why a full order was not recorded to the effect that there were no grounds for interference. For this reason alone this application must be rejected.

I am also of opinion that s. 561A, Cr. P. C., which is of a very general nature, has no application to the question now under consideration. The section applicable is s. 369, Cr. P. C., which is to the effect

that no Court shall alter or review its judgment after it has been signed, save as otherwise provided by the Cr. P. C., etc. It has not even been argued that there is any special provision apart from s. 561A Cr. P. C., which deals with this subject. The Division Bench ruling of the Bombay High Court, *Queen Empress* v. *Bhimappa* (1) is in point. A Sessions Judge dismissed an appeal without going into the merits on the ground that it was barred by limitation, he subsequently admitted the appeal and acquitted the appellant. The Bombay High Court held that the first order was under s. 421, Cr. P. C., though it was not upon the merits and was not open to review by the Sessions Judge. I, therefore, hold that the matter cannot be re-opened on this ground also, although it is not necessary for me to go into this question on my first finding.

There is no question of hardship in the present case, as all that has been ordered is that a complaint under s. 211, Indian Penal Code, shall be filed against the petitioner. The result is that this application is rejected.

Z. K. *Application rejected.*

(1) 19 B. 732; 10 Ind. Dec. (N. S.) 490.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 337 OF 1925.

July 24, 1925.

Present:—Mr. Justice Ashworth.

SHAM SUNDER LAL—ACCUSED —APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Police Act (V of 1861), ss. 31, 32—Evidence Act (I of 1872), s. 114, Illus. (c)—Toll imposed by District Magistrate for entry into certain grounds—Accused refusing to pay toll—Order by Police constable to pay toll or to turn back, disobedience of—Offence—Legality of toll—Presumption.

There is a presumption in favour of any order of an official being legal until the contrary is proved. [p. 57, col. 1.]

An order issued under s. 31 of the Police Act may be an oral order by a Police constable issued during the control of the public at any place of public resort. [*ibid.*]

A District Magistrate had issued orders for the levying of a certain amount of toll on animals and carriages sought to be admitted into a certain *mela* ground. Accused who wanted to drive into the *mela* ground in a bullock tonga was asked to pay toll in respect of it but he refused to do so. The Police constable on duty ordered the accused to pay the toll or to go back and the accused having disobeyed the order was prosecuted and convicted under s. 32 of the Police Act:

Held, that irrespective of the fact whether the toll had been imposed by the District Magistrate with or without jurisdiction, the Police constable was entitled to assume that the toll collector was acting rightfully in carrying out the orders of the District Magistrate, and the order to the accused to pay the toll or turn back was a lawful order given by the constable under s. 31 of the Police Act and the conviction of the accused for an offence under s. 32 of the Act was, therefore, perfectly legal. [p. 57, col. 2.]

Criminal revision from an order of the Additional Sessions Judge, Moradabad, dated the 11th February 1925.

Mr. *Kumuda Prasad*, for the Applicant.

The Government Advocate, for the Crown.

JUDGMENT.—The applicant Sham Sunder Lal has been convicted by a Magistrate of the First Class of an offence under s. 32 of the Police Act V of 1861 and sentenced to a fine of Rs. 200. An application in revision was made to the Sessions Judge and has been rejected. The applicant comes up before this Court in further revision.

The facts of the case are briefly as follows. There is a *mela* held every year at a village called Daranager 7 miles from Bijnor. Last year this *mela* was held from the 8th of November. The District Magistrate issued orders to the Police that a certain schedule of tolls for the admission of animals and carriages into the *mela* ground had been fixed. Various toll gates were set up for the collection of these tolls and at the gate in question in this case a District Board school master was put to receive the tolls. The applicant when asked by this official to pay the toll for the bullock tonga in which he was seated refused to pay it and entered into argument with the toll collector. The Police constable on duty ordered the applicant to pay the tax or go back, an order which was disobeyed by the applicant, who remained arguing and, it is said, forced his way into the *mela* grounds. He was accordingly arrested and taken to a Deputy Magistrate on duty at the fair. The contention of the applicant is that the District Magistrate had no power to impose the toll required from him and that consequently the constable on duty had no right to direct the applicant either to pay the toll or go back.

Section 31 of the Police Act prescribes that "it is the duty of the Police to keep order at places of public resort and to prevent obstructions on the occasions of assemblies.....and in any case when any

road, street, thoroughfare, *ghat* or landing place may be thronged or may be liable to be obstructed." Section 32 makes a person liable to conviction for opposing or not obeying an order issued under s. 31. It is clear that an order issued under s. 31 may be an oral order by a Police constable issued during the control of the public at any place of public resort. The only question, therefore, that arises in this case is whether the constable was entitled to direct the applicant to pay the toll or to turn back. It is contended on behalf of the applicant that the constable was not entitled to do this because it has not been proved that the Magistrate was entitled to impose the toll. On the other hand there is a presumption in favour of any order of an official being legal until the contrary is proved. In this case it has not been shown that the road was a public thoroughfare. The probability is that the road on which the toll barrier was set up was a temporary road made on the *zamindar's* land for the passage of visitors to the *mela*. The applicant failed to prove that he had a right, by any dedication of the surface of the road to the public, to use this road. It cannot be denied that if this road is the property of the *zamindars* they could make the granting of a licence to use any portion of it or to enter on to their lands, conditional on the payment of a toll. It is possible that the collector may have been granted actually or impliedly the right to collect such a toll. It is common ground that tolls had been collected for many years, a fact which would justify an inference of a grant to collect the tolls. It is, therefore, possible that the District Magistrate had a right to collect the toll and as a presumption must be made that any action taken by him was lawful and this presumption has not been met, it must be held for the purposes of this case that the imposition of the toll by the Magistrate was lawful. From this point of view it is clear that the Police constable was in order in telling the applicant to pay the toll or turn back. He could not direct the toll collector to give way and let the applicant proceed on his way if the toll collector was acting lawfully.

Even, however, if it could be proved that the District Magistrate had no authority to impose the toll, it does not follow that the order of the Police constable on duty was not a legal order under s. 31 of the Police Act. This constable was given power to prevent obstruction at this place of public resort. The situation was that the applicant was being prevented entry by the tax collector or at least that his entry was being formally objected to. The Police constable was bound either to tell the toll collector to make way or to issue the order that he did to the applicant. The Police constable was entitled to assume that the toll collector being there carrying out the orders of the District Magistrate was acting rightfully. It was not for him to go into the merits of the question. The order to the applicant to pay the toll or turn back was obviously in the circumstances a more correct order than an order to the tax collector to allow the applicant to proceed.

For the above reasons I am of the opinion that the order given by the constable on duty under s. 31 was a lawful order and that the opposing or disobedience of that order by the applicant made the applicant liable to conviction under s. 32 of the Police Act.

It has been urged in this case, and in the other cases covered by the revisional order of the Sessions Judge, that the sentences are excessive. There are nine such cases. In eight of them the sentence has been the maximum fine of Rs. 200. It is clear that the action of the applicants in protesting at the toll barrier against their being stopped was deliberately taken in order to call in question the legality of the District Magistrate in imposing the toll. The applicant in the present case is the son of the Chairman of the District Board and in the course of argument of this case it has been made clear that there was a definite party of the District Board in opposition to the Magistrate in the matter of imposing this toll. The Magistrate has pointed out rightly that it was not a fit place or opportunity for the accused to make a protest against the imposition of the toll. Such a protest and the consequent disturbance in the middle of a public *mela* might have had dangerous results to the public. I see no reason in reducing the sentence. This application is, therefore, rejected. This same order will apply to the other eight cases in revision as all these cases have been argued by one Counsel and no point of difference has been made between them.

Z. K. *Application rejected.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 12 OF 1925.

April 6, 1925.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Fforde.

FEROZE—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 300, Excep. IV, 4-I—Death caused by blows with knife—Injuries caused to accused person—Explanation, absence of—Sudden fight—Presumption—Offence.

Accused inflicted four injuries on the person of the deceased with a clasp knife, one of them in the abdomen which proved fatal. The accused himself received numerous injuries, some of them on the head, in respect of which no explanation was given in the evidence for the prosecution. The accused had no motive for the deliberate murder of the deceased as it was not proved that he had any real grudge against him. It was found that the deceased at the time of the attack upon him was armed with a stick:

Held, (1) that under the circumstances it must be presumed that there was a sudden and unpremeditated fight between the accused and the deceased, but that the accused had exceeded his right of private defence in giving the deceased several injuries, one of them on a very vital part of the body; [p. 59, col. 1.]

(2) that the act of the accused fell within the provisions of the 4th Exception to s. 300 of the Penal Code and that he was, therefore, guilty of an offence under s 304-I of the Code. [p. 59, cols. 1 & 2.]

Criminal appeal from an order of the Sessions Judge, Lahore, dated the 4th December 1924.

Lala *Ram Lal Anand*, for the Appellant.

Mr. *C. H. Carden Noad*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—Feroze appeals from the order of the Sessions Judge of Lahore convicting him of the murder of Kala which took place on the 13th May, 1924, and sentencing him to death. The case is also before us under s. 374, Cr. P. C., for confirmation of the sentence.

The evidence shows that Feroze had been annoying the wife of Bakhshi (P. W. No. 6) who is the brother of Kala deceased but it is not proved that there had been a criminal intimacy between the pair. The evidence is rather to the effect that the appellant used to annoy the woman by making overtures to her in public. Bakhshi objected to his coming into the *mohalla* where he lived and it is proved that on the morning of the 13th May, he and the appellant had a quarrel and struggled together but were separated without any great harm being done. The witnesses admitted that Kala deceased was not present on that occasion. On the evening of the 13th May, Dina and Kala were walking along the Chetterji Road, Lahore, and according to Dina he stopped to ease himself whilst Kala walked on. He heard a noise and on looking up saw the deceased being assaulted by a man whilst two other men were running away. He ran up to the assistance of Kala and found that it was the appellant who was attacking him and Kala cried out, "Fauja has struck me with a knife in the stomach". The appellant stabbed the witness also on the hand with a knife and then ran away. Whilst Dina was attending to the wounded man Bakhshi (P. W. No.6) and Mool Chand (P. W. No. 7) ran up from the other direction and pursued Feroze whom they caught in a compound close by. It is admitted that Bakhshi picked up a small stick and struck the appellant one blow with it on the head. The stick broke so he was unable to strike any further blows.

A report was made at the Police Station and later on in the evening the appellant with the aid of a lantern found a clasp knife under a tree in the compound where he had been arrested. This has been produced as the weapon with which Kala was wounded.

In our opinion there can be no doubt that the appellant was the man who gave Kala injuries which resulted in his death and indeed his Counsel has not before us contested this point. It is also clear that he was arrested immediately after the occurrence by Bakhshi and Mool Chand. The only difficult points in the case are how the occurrence took place and what offence has been committed. The medical evidence shows that the deceased had four injuries. The only really serious one was an incised penetrating wound in the abdomen $1\frac{1}{2}''$ to the left of the navel which was $1\frac{1}{2}''$ long $\times \frac{1}{2}''$ broad and several coils of the intestines were protruding from the wound. The medical witness did not say that the intestines themselves had been injured. There was also an incised wound $1'' \times \frac{1}{4}'' \times \frac{1}{4}''$ on the left side of the chest and two small incised wounds on the front of the left shoulder and on the left upper arm respectively all the injuries were simple with the exception of the one in the abdomen. The medical evidence shows further that the appellant had 12 injuries on his person. One was a contused wound $1'' \times \frac{1}{8}'' \times \frac{1}{8}''$ on

the front of the head. The second was a contused wound $\frac{3}{4}'' \times \frac{1}{8}'' \times \frac{3}{16}''$ above the left eye-brow. The third was a contusion over the left eye with contused wound on the lower eye-lid $\frac{1}{2}'' \times \frac{1}{8}'' \times \frac{1}{3}''$. In addition to this there was a contusion $4'' \times 4''$ on the back of the right hand and a fracture of metacarpel bone of the index finger of the right hand. There was also an abrasion on back of the left hand and contusions on the right chin and on the left upper arm as well as abrasions on the right knee and on the back, and a contusion on the right arm.

It is clear from this that the prosecution evidence in no way explains these injuries as it was only admitted that Bakhshi gave the appellant one blow at the time of his arrest. The appellant had no motive for the deliberate murder of Kala who admittedly was not present at the quarrel which took place on the morning of the 13th May. It also does not appear that he had any real grudge against him. It follows that he had no reason to strike him without any cause and it appears to us to be undoubted that there was a sudden and unpremeditated fight between Kala and the appellant. Dina may have been a little behind Kala at the time. His evidence does not show how the occurrence started. The absence of any explanation on the part of the prosecution as to how the numerous injuries were caused to the appellant leads us to infer that there must have been a fight between the parties. Having regard to the nature of the injuries on the person of the appellant, the stick with which Kala was armed must have been a fairly substantial one. The learned Sessions Judge was of opinion that even if the fight was a sudden and unpremeditated one the appellant was not entitled to the benefit of the 4th Exception to s. 300 because he took undue advantage by using a knife. The knife was an ordinary clasp knife and seeing that the appellant received blows on the head from a fairly substantial stick we think he was justified in defending himself with the only weapon available to him at the time. At the same time we think he clearly exceeded his rights in giving his opponent several injuries, one of them being on a very vital part.

In view of the unsatisfactory nature of the prosecution evidence and what we have said above as to what probably happened we consider that the applicant is entitled to the benefit of the 4th Exception and we, therefore, alter the conviction into one under s. 304 Part I of the Indian Penal Code and reduce the sentence to one of seven years' rigorous imprisonment.

Sentence reduced.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 298 OF 1925.

July 15, 1925.

Present :—Mr. Justice Daniels.

GHURAHU DAS—APPLICANT

versus

SHAKALRAJ DAS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 133—Nuisance—Obstruction, old, to public road—Proceeding under s. 133, whether can be taken.

Section 133 of the Cr. P. C. is not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which has been in existence for a long number of years. [p. 61, col. 1.]

Reference made by the Sessions Judge, Gorakhpur, dated the 12th May 1925.

REFERRING ORDER.—This application arises out of proceedings taken by a First Class Magistrate under s. 133 of the Cr. P. C. The basis of the proceedings was a complaint dated the 29th of March 1923, and the final order, which is the subject of the present revision, was passed on the 22nd of April 1925. The applicant resides in village Kumdri. The house in which he lives and a well which he owns are situated by the side of a public road running between Gorakhpur and Bansi which passes through this village. In the complaint referred to above it was alleged that the applicant was building his house and in doing so had encroached on a portion of the public road. The first step taken on this complaint was that the *qanungo* was ordered to make a report after inspection of the locality. The *qanungo* visited the spot and after making some measurements reported that a portion of the applicant's house as well as his well near by covered a portion of the public road. It was admitted in this report that the well had been built some 15 or 16 years before, and that the foundations of the walls that were being raised by the applicant were old. The applicant filed objections to this report challenging the measurements made by the *qanungo* and alleging that the encroachment had really been made by the tenants who had their fields on the other side

of the road. The *qanungo* was examined as a witness on behalf of the complainant and the case was then postponed for recording the evidence of parties. After five adjournments the matter was again taken up on the 12th of September 1923. On this date the learned Magistrate proceeded under s. 139 (*a*) of the Code to question the applicant as to whether he denied the existence of the public right in respect of the road. On the 15th of September 1923 the applicant answered the question by stating that the land covered by his house was never a part of the public road. The parties were then ordered to produce their evidence and after two adjournments the learned Magistrate decided to inspect the locality himself. It appears that he was unable to carry out his intention until the 16th of April 1924, when a fresh application was made on behalf of the complainant praying for further steps being taken in the matter. The parties were again asked to produce their evidence which was ultimately recorded after some more adjournments. The matter was then argued and in the course of the arguments the learned Magistrate again felt the necessity of an inspection of the locality by some responsible officer. He, therefore, deputed the Naib Tahsildar to make a report after inspecting the locality. The Naib Tahsildar found that no encroachment had been made by the applicant and reported accordingly. The learned Magistrate recorded the evidence of the Naib Tahsildar on the 21st of October, 1924, and again made up his mind to make a personal inspection of the locality. But for some reason or other he could not make the inspection, and on the 19th of April 1925 ordered that the matter should come up before him for final decision on the 22nd of April 1925. On this date he accepted the report made by the *qanungo* and ordered the applicant to remove a portion of his house which constituted an encroachment on the road. Hence the present application for revision.

Having carefully perused the record, I am of the opinion that the order of the learned Magistrate must be set aside on the merits as well as on the ground of illegality. Dealing first with the merits of the case I find that the learned Magistrate had two contradictory reports before him. One made by the *qanungo* and the other by the Naib Tahsildar. He has accepted the *qanungo's* report without sufficient reasons. The *qanungo* admits in his statement that the applicant's well is 15 or 16 years' old and that his house is in a line with the well. He admits further that the foundations of the walls that were being raised by the applicant were old. It is further clear from the settlement map prepared by the Survey Officer that the applicant's house and his well stand in a line with each other and are beyond the limits of the road. The only reason given by the *qanungo* for rejecting the settlement map is that it was probably wrongly prepared on the basis of some entries made by the *patwari* who was in collusion with the applicant. There is absolutely nothing on the record to show that there was any justification for the surmise made by the *qanungo*. It appears further from the *qanungo's* own statement that the measurements made by him were not based on any permanent land-marks. When asked in cross-examination to state what permanent land-marks he had chosen for making his measurements, he failed to mention any. On the other hand, the Naib-Tahsildar relied on the settlement map and based his measurements on the permanent landmark of the well which was admittedly built 15 or 16 years ago. Under the circumstances I fail to see the grounds on which the learned Magistrate accepted the measurements of the *qanungo* and rejected those of the Naib-Tahsildar.

Turning now to the legal aspect of the case I find as stated above, that the learned Magistrate proceeded under s. 139 (*a*) of the Code to question the applicant as to the existence of the public right. The applicant alleged in answer to that question that the land covered by his house and well was never a part of the public road. This denial was supported by the evidence of the Naib-Tahsildar who had made a personal inspection of the locality. It is clear, therefore, that the denial of the applicant was supported by reliable evidence within the meaning of cl. (*i*) of s. 139 (*a*). Under the circumstances the Magistrate was, in my opinion, bound to stay the proceedings until the matter was decided by a competent Civil Court.

Another legal ground on which, in my opinion, the proceedings must be quashed is that the provisions of s. 133, Cr. P. C., do not apply to the facts disclosed in the present case. Granting for the purposes

of argument that the *qaungo's* report is correct, the fact remains that the encroachment, if any, was made long ago. I base this finding on the admissions of the *qanungo* himself to the effect that the well is 15 or 16 years old that the house is in a line with the well and that the lower portion of the walls, that were being raised by the applicant, up to a height of about three cubits, is old. The powers given to Magistrates under Ch. X of the Cr. P. C. for dealing with cases of public nuisance do not, in my opinion, supplant the provisions of the civil law and do not justify an interference in the case of old and long standing encroachments.

On the grounds mentioned above I think the proceedings should be quashed and I, therefore, submit the record of the case to the Hon'ble High Court with the recommendation that the order dated the 22nd of April 1925, directing the applicant to remove a portion of his house, should be set aside. The learned Magistrate who passed the order has left the district on leave and his explanation is not, therefore, being submitted with the record.

Mr. *Kamla Kant Varma*, for the Applicant.

Mr. *Haribans Sahai*, for the Opposite Party.

JUDGMENT.—This is a Reference by the learned Sessions Judge of Gorakhpore asking this Court to set aside an order passed under s. 133 of the Cr. P. C. in regard to an alleged obstruction on a public road. The learned Sessions Judge has given good reasons for setting aside the order. In the first place even on the finding of the Magistrate the alleged obstruction is at least 15 or 16 years old. Section 133 is not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which has been in existence for 15 years. In the second place the Naib-Tahsildar who inspected the spot found that there was no obstruction, and his report is supported by the settlement map. The reasons given by the Magistrate for accepting the *qanungo's* report in preference to that of his superior officer which is supported by the Settlement Record are extremely flimsy. As regards s. 139-A, I am not sure that the learned Sessions Judge has correctly interpreted the law. The defendant did not deny the existence of a public road at that place; he merely denied that he had encroached upon it. The other two reasons given by the learned Sessions Judge are, however, amply sufficient to justify the Magistrate's order being set aside, and I set it aside accordingly.

Z. K. *Order set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 238 OF 1925.

May 27, 1925.

Present:—Mr. Justice Martineau and Mr. Justice Coldstream.

BELI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 304-II—Death caused by beating—Offence.

Accused, four in number, gave a severe beating to the deceased with blunt and sharp edged weapons as the result of which he died. The injuries caused to the deceased were numerous, but they were nearly all bruises and abrasions, mostly on the legs and arms and none of them individually amounted to more than simple hurt:

Held, that the accused were not guilty of murder but that they must be deemed to have known that by giving the deceased such a beating as they did they were likely to cause his death and that, therefore, they were guilty of an offence under s. 304-II of the Penal Code. [p. 62 col. 2.]

Appeal from an order of the Sessions Judge, Sialkot, dated the 14th February 1925.

Mr. *B. A. Cooper*, for the Appellants.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—The appellants Beli, Bhagta and Jaggu, who are brothers, have been sentenced to death for the murder of Sucheta, a resident of their village Man, who received a severe beating early on the morning of the 21st September 1924, and died soon afterwards before the arrival of the Police who had been informed of the occurrence the same morning by Sucheta's, nephew Mula Singh. The deceased's death was due to shock, the result of the injuries inflicted which were 59 in number. Most of the injuries had been caused with blunt weapons, but a few were incised wounds caused with a sharp weapon.

The facts disclosed by the evidence are as follows:—Sucheta was working in his field when the appellants and one Shaman, who is said to be absconding, came, Beli armed with an axe and the other three men

with *dangs*, and began beating him. People, who were in the neighbouring fields, came up hearing the outcry raised by Shohdu who was in his field which adjoined Sucheta's. The appellants and Shaman went towards them as they approached and Sucheta then ran away. But his four assailants pursued him and when he climbed up a small *kikar* tree they pulled him down, dragged him away from the tree and beat him again.

The case for the prosecution is supported by the evidence of a large number of witnesses, of whom some depose to having seen the appellants and Shaman beat Sucheta in his field and others to having seen the second attack at the *kikar* tree. Two of these witnesses, *viz*, Mulla Singh who made the First Report and Sundar themselves received injuries, being struck by Bhagta when they interceded for Sucheta. There is also the evidence of the Sub-Inspector of Police as to there being signs of a struggle in the *chari* field in which the *kikar* tree is and indications of something having been dragged through the field.

Beli has pleaded an *alibi*, but we agree with the learned Sessions Judge that the evidence produced in support of it is of no value. Jaggu and Bhagta say that the former's wife Kishan Kaur was being abducted by Sucheta and eight other men and that on hearing her cry out they went up to rescue her. Jaggu says that a free fight then took place, whilst Bhagta says that Sucheta grappled with him and threw him down and received his injuries from his companions. No evidence but the statement of Kishen Kaur has been produced to support their story. It was clearly impossible for Sucheta to have received his numerous injuries in such circumstances, when he had so many men on his side and only two against him.

It is true that the appellant Jaggu had 15 injuries and Bhagta 5 and that the prosecution witnesses do not account for these but the appellants' injuries were probably sustained at the hands of some of the people who came to Sucheta's assistance when they heard the out-cry. It is at any rate perfectly clear that the deceased was attacked by the appellants and received his injuries at their hands, though the motive for the assault has not been established.

Whether the offence committed is one of murder is more doubtful. Sucheta was certainly given an unmerciful beating but it has to be observed that, although the injuries inflicted upon him were so numerous, no bones were broken and not a single one of the injuries individually amounted to more than simple hurt. In this respect the present case differs from *Allah Ditta* v. *Emperor* (1) and *Samand Singh* v. *Emperor* (2) and other such cases in which the injuries inflicted were individually far more severe and included many fractures of bones. Sucheta's injuries were nearly all bruises and abrasions, mostly on the legs and arms, and it appears to us that if it had been the appellant's intention to kill him or to cause him such injury as they knew to be likely to cause his death or such as was sufficient in the ordinary course of nature to cause his death, they would have inflicted wounds of much more serious nature. We are of opinion, therefore, that the offence committed by the appellants is not murder. They are, however, guilty of culpable homicide not amounting to murder as they must be deemed to have known that by giving Sucheta such a beating as they did they were likely to cause his death.

We accordingly alter the conviction of each of the appellants to one of culpable homicide not amounting to murder under the second part of s. 304, Indian Penal Code, and reduce the sentence on each to one of ten years' rigorous imprisonment.

Z. K. *Conviction altered.*

(1) 81 Ind. Cas. 35; 25 Cr. L J. 547; 4 L. L. J 276; A. I. R. (L.) 260.

(2) 49 Ind. Cas. 349; 3 P. R. 1919 Cr. 5 P. W. R. 1919 Cr.; 20 Cr. L. J. 157.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 223 OF 1924.
(CRIMINAL REVISION PETITION No. 192 OF 1924.)

March 13, 1925.

Present:—Mr. Justice Phillips.

PAVAKKAL—COUNTER-PETITIONER—PETITIONER

versus

ATHAPPA GOUNDAN—PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898, as amended by Act XVIII of 1923), s. 489 (2)—Order for maintenance of wife—Subsequent decree for restitution of conjugal rights against wife—Maintenance, cancellation of—Discretion of Court.

Under s. 489 (2) of the Cr. P. C., 1898, as amended by Act XVIII of 1923, it is competent for a Magistrate

to cancel or vary an order of maintenance, if he thinks that it should be cancelled or varied in consequence of any decision of a competent Civil Court. If a Civil Court has given to the husband a decree for restitution and the husband *bona fide* wishes to execute that decree and the wife refuses, that would be a good ground for cancelling the order of maintenance under s. 488; but where the Court is satisfied that the husband did not wish to have his wife back and his object in getting the decree was merely to get the maintenance order cancelled, in the exercise of the Court's discretion under s. 488 (2), it would be wrong for the Court to cancel the order for maintenance.

It is not competent to a husband who obtains against his wife a decree for restitution of conjugal rights to impose terms upon her, that she should be confined to a portion of the house. If the husband wants the wife to come back to him, he must accept her and live with her on the ordinary terms of husband and wife without alloting her only particular rooms in the house.

In re Bulakidas, 23 B. 484; 12 Ind. Dec. (N. S.) 322, referred to.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the Joint Magistrate, Pollachi, passed in his proceedings in Miscellaneous Case No. 48 of 1923, cancelling the order of maintenance issued by the said Court in Miscellaneous Case No. 36 of 1919.

Mr. *N. A. Krishna Iyar*, for the Petitioner.

Mr. *S. Muthia Mudaliar*, for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.—The petitioner in this case obtained an order of maintenance against the counter-petitioner in 1919. In 1920 the counter-petitioner filed a suit for restitution of conjugal rights and obtained a decree on 30th June 1922. He put in an application for execution on 28th August 1922. On a statement being filed by the petitioner, the execution petition was dismissed. Another execution petition was presented on 24th February 1923, and it was dismissed as no notice was served on the petitioner. Finally he put in a third petition on 5th April 1923, and the order on that was as follows:—"The defendant is not willing to live with the plaintiff in the room proposed to be allotted to her. The petitioner does not press the petition. Hence dismissed". I think it is clear from the course of the proceedings in execution, that the counter-petitioner was not at all anxious to get back his wife to live with him, for, even on the last application in which the execution of the decree came up for consideration, it appears that he proposed that the petitioner should live in a separate room. The counter-petitioner has a second wife and children by her and when he obtained a decree for the restitution of conjugal rights it was not open to him to impose terms upon his wife. If he wanted her to come back to him, he must accept her and live with her on the ordinary terms as husband and wife and not keep her confined to one portion of the house. The counter-petitioner's object in getting the decree for the restitution of conjugal rights is obviously not *bona fide*, and he did not mean to allow his wife to live with him without restriction. It was found in 1919 that he ill-treated her and her children without allowing them food, and the obvious conclusion would be, that this suit was filed by him in order to evade the order of maintenance and not *bona fide* in order to recover possession of his wife. Under s. 489 (2) of the Cr. P. C. as recently amended, it is competent for a Magistrate to cancel or vary an order of maintenance, if he thinks that it should be cancelled or varied in consequence of any decision of a competent Civil Court. Undoubtedly if Civil Court had given to the husband a decree for restitution and the husband *bona fide* wished to execute that decree and the wife refused, that would be a good ground for cancelling the order of maintenace under s. 488; but in the circumstances in this case, where I am satisfied that the counter-petitioner did not wish to have his wife back and his object in getting the decree was merely to get the maintenance order cancelled, I think that in the exercise of the discretion under s. 489 (2) it would be wrong to cancel the order for maintenance. The joint Magistrate in cancelling the order gives no reason, except that he follows the ruling. *In re Bulakidas* (1) which was decided before the Code was amended. Another case has been cited before me that I need not refer to it in any detail for this particular point, namely, the discretion of the Court under s. 489 (2) was not dealt with there.

The petition is allowed and the maintenance order is restored.

V. N. V. *Petition allowed.*

(1) 23 B. 484; 12 Ind. Dec. (N. S.) 322.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 78 OF 1924.

August 17, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

HYDER—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 411—Criminal Procedure Code (Act V of 1898), s. 234—Receiving stolen property—Ingredients of offence—Charge relating to several items forming subject-matter of separate thefts, legality of.

The offence of receiving stolen property under s. 411 of the Penal Code is an offence of receiving a particular article of stolen property or property stolen in a particular theft and it is necessary that the particular article stolen should be alleged to be stolen and, if possible, traced to its origin. [p. 64, cols. 1 & 2.]

A charge under s. 411 of the Penal Code of having received six specific animals belonging to five specific persons and stolen by five different acts of theft is illegal and wholly vitiates the trial. [p. 64, col. 2.]

Appeal against the judgment of the Assistant Sessions Judge, dated the 6th April 1925.

Mr. *Motiram Idanmal*, for the Appellant.

Mr *C. M. Lobo*, Acting Public Prosecutor, for the Crown.

JUDGMENT.—In this case we feel that there has been a fault in the framing of the charge which vitiates the whole trial. The amended charge will be found at page 6 of the paper book. The first charge (*a*) refers to possession by the accused of four stolen animals—one belonging to one person, another belonging to a second person and two remaining belonging to a third person The second head of the charge being that accused was in possession of a stolen horse of Tahil and the third head of the charge being that he was in possession of a stolen horse of Udhay Bania. And he is charged with having committed three separate offences under s. 411, Indian Penal Code.

This seems to us to be an improper charge. The offence of receiving stolen property under s. 411 is the offence of receiving a particular article of stolen property or property stolen in a particular theft and the law says that not more than three offences committed in the same year should be tried at the same trial. Here the fact is that six specific animals belonging to five specific persons and stolen by five different acts of theft, from those five specific persons form the basis of this charge. Therefore, it seems clear that the accused is charged with at least five separate offences of receiving stolen property. This is wholly illegal.

All the standard forms require (it is to be noted) that in a charge under s. 411 the person from whom the property was originally stolen must be stated if known. This is not a case under s. 413 or s. 414 where there is no necessity to state specifically the origin of the property because the retention of stolen property in general is an offence. Under s. 411 it is necessary that the particular article stolen should be alleged to be stolen and if possible traced to its origin.

It is clear, therefore, that this charge is not a charge in accordance with law. We would point out that the provisions of Cr. P. C. limiting the number of charges to three are particularly wise and salutary in cases such as this. The object of those provisions is to prevent any risk of the Court being satisfied by anything less than complete proof of the offences charged and if the attention of the Court is limited to three offences it is not very likely that it will be satisfied with anything less than full proof. But where a great number of charges are brought against an accused person, it might very often happen (particularly in cases tried by Judges) that the accused may be convicted not on actual proof of a particular offence but more on suspicion and reputation owing to the fact that in a great number of cases, offences are half proved against him. It is, therefore, very important that the Magistrates framing charges particularly in offences relating to criminal mis-appropriation and receiving stolen property, should pay attention to this provision of the law. They should be very careful to see that only three specific offences are charged against the accused if it is to be decided to bring the charge against him in such a manner and under such a section that it is necessary to specify the specific offences. The condition is totally different when an accused person is charged with commission of those offences which do not need specification of particular items of offences. Had the accused person in the present case been charged under s. 413 or 414 it would have been quite possible for the Court to convict the accused in respect of all these animals without the slightest objection. In that case the retention of each individual

animal would not have been the offence but evidence of the offence. Similarly in cases of a charge under s. 222, Cr. P. C. But that is not the line adopted by the prosecution in the present case.

We think, therefore, that the trial was bad. We are asked to consider this error to be a mere technicality which can be set right under s. 537, Cr. P. C. But we have the authority of *Subrahmania Ayyar* v. *King Emperor* (1) for saying that the trial is wholly illegal. And we think, therefore, that we must set aside the conviction and sentence.

It is urged that there should be a re-trial. Against that it should be re-collected that some years have elapsed since the thefts of the animals were alleged to be committed and three or four animals are claimed by the accused as his. Thus it would be necessary (in order that justice should be done) to collect the animals which are the subject of the various offences in order that they might be identified, and to give the accused the opportunity to adduce evidence as to ownership. This it would probably be impossible now to do.

On the whole, therefore, we think that the accused should be acquitted and discharged.

P. B. A. *Accused acquitted.*

(1) 25 M. 61 ; 11 M. L. J. 233 ; 3 Bom. L. R. 540 ; 28 I. A. 257; 5 C. W. N. 863 ; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.)

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 530 OF 1924.

February 26, 1925.

Present :—Mr. Justice Davadoss.

In re MANNARGAN AND ANOTHER—ACCUSED—APPELLANTS.

Criminal trial—Defence Counsel, examination of, as prosecution witness without sufficient notice to accused—Procedure, legality of.

Where a Magistrate put the defence Counsel into the witness-box on behalf of the prosecution without proper notice to the accused and without allowing the accused an opportunity to engage some other Counsel to conduct the defence :

Held, that the trial was vitiated by the procedure adopted by the Magistrate. [p. 67, col. 2.]

It is opposed to all principles of criminal jurisprudence for the prosecution to deprive the accused suddenly of the service of their Counsel. If the prosecution wants to call the Counsel for the defence as a witness on its side, sufficient notice ought to be given to the accused to engage a competent Counsel. [p. 66, col. 2.]

Criminal appeal against an order of the Court of the Third Presidency Magistrate, George Town, Madras, in Case No. 13074 (*a*) of the Calendar for 1923 (of Egmore.)

Messrs. *V. L. Ethiraj* and *V. Rajagopalachari*, for the Appellants.

The Crown Prosecutor on behalf of the Crown.

JUDGMENT.—The appellants have been convicted under ss. 457 and 380, Indian Penal Code, and sentenced to imprisonment by the Third Presidency Magistrate, Madras. The case for the prosecution is that a theft of considerable property occurred on the 22nd May, 1923, and that some of the stolen property was traced to be in the possession of the appellants within six days of the commission of the offence. The Trial did not commence till the middle of last year owing to the absence of the appellants from Madras. There is a considerable body of evidence on the side of the prosecution. In the view I take of the irregularities in the trial, it is unnecessary to consider this appeal on the merits. There were three cases before the Third Presidency Magistrate in which the 1st appellant was concerned. Dr. Swaminadhan, Bar-at-Law, appeared for the accused in all the three cases. The cross-examination of the witnesses in the two other cases was completed on 26th June 1924 and all the cases were adjourned to 28th June, 1924, as there was no time to cross-examine the prosecution witnesses in the third case and on 28th June 1924 Dr. Swaminadhan filed statements of the accused in the two cases and showed cause against charges being framed in them. After he completed his argument, the Prosecuting Inspector was heard on the side of the prosecution. All the three cases were adjourned to the 3rd of July 1924. Late at night on the 2nd July 1924, Dr. Swaminadhan was served with an urgent summons to attend the Court of the Third Presidency Magistrate on the following day to give evidence in the third case out of which this appeal has arisen. On 3rd July 1924 the Magistrate discharged the two cases in which the prosecution had been closed and examined Dr. Swaminadhan as a witness for the prosecution in the present case. Dr. Swaminadhan very rightly thought it was not

proper for him to appear for the defence inasmuch as he had been examined as a witness for the prosecution and ceased to appear from the 3rd July. The Magistrate framed a charge against the appellants on 4th July 1924 There was no cross-examination of Dr. Swaminadhan on 3rd July 1924, as the appellants had no Counsel to represent them that day.

It is contended before me by Mr. Ethiraj that the trial has been vitiated by the procedure adopted by the Magistrate in putting the defence Counsel in the box without proper notice to the accused and without allowing the accused an opportunity to engage some other Counsel to condnct the defence on the day on which Dr. Swaminadhan was examined as a witness.

The Crown Prosecutor urges that the Police had applied for summons on the 13th of June 1924, and that Dr. Swaminadhan must have had information that he was going to be examined as a witness and that the accused have not been prejudiced by the procedure adopted by the Magistrate. In order to make clear what really happened on the day when Dr. Swaminadhan was examined as a witness, a letter of Dr. Swaminadhan written to Mr. Ethiraj, Counsel for the appellants, has been produced and that letter contains details as to what happened. As the Magistrate is said to be on leave and as he is not likely to return to duty in a week or two, I do not think it necessary to call for a report from him as to what happened. I accept as correct the statement made by Dr. Swaminadhan in his letter to Mr. Ethiraj as they are borne out by the records in the case.

The question is whether the trial has been vitiated by the procedure adopted by the Magistrate in this case. Dr. Swaminadhan was not mentioned as a witness in the charge sheet filed in the case. If the prosecution thought that Dr. Swaminadhan's evidence would materially help the case against the accused, one would naturally expect his name to be found in the charge sheet. If the Police came to know after the charge sheet was filed that Dr. Swaminadhan could give material evidence against the accused, he should have been cited at the earliest opportunity so as to allow the accused reasonable time to engage the services of a competent Counsel. Prosecution witnesses Nos. 1 to 7 were examined-in-chief on 3rd May, 1924, P.Ws. Nos. 8 to 10 on 16th May 1924, P. Ws. Nos. 11 and 12 on 23rd May 1924, P. Ws. Nos. 13 and 14 on 31st May 1924 and P. W. No. 15 on 6th June 1924. There were thus five hearings before 3rd July 1924. There is nothing to show that on any one of these dates the accused were informed that their Counsel was going to be called as a witness on the side of the prosecution. The fact that summons was served upon Dr. Swaminadhan late at night on the 2nd of July throws suspicion on the *bona fide* of the Police in calling Dr. Swaminadhan as a witness for the prosecution, and this is strengthened by the fact that his evidence does not materially help the prosecution. The conduct of the Police is highly reprehensible in applying to the Magistrate at a late stage of the case to summon the Counsel for the accused as a witness for the prosecution. In the circumstances of the case, I cannot but consider that the Police have been guilty of a very mean and dirty trick in serving the summons upon Dr. Swaminadhan the night before the day to which the case against the accused stood adjourned. It is a matter for surprise that a Magistrate of considerable experience like the Third Presidency Magistrate should have so far yielded to the influence of the Police as to summon the Counsel for the defence as a prosecution witness without giving due notice to the accused so that they might engage a competent Counsel. The Crown Prosecutor urges that as the accused cross-examined the prosecution witnesses on 15th August, 1924, they would not have been prejudiced by the action of the Magistrate. This argument overlooks the fact that the services of a Counsel are very necessary when witnesses are examined-in-chief to check not only leading questions but to prevent irrelevant evidence being recorded. If the prosecution wants to call the Counsel for the defence as a witness on its side sufficient notice ought to be given to the accused to engage a competent Counsel. I consider it to be very reprehensible to call a Counsel who is actually defending an accused person as a prosecution witness. Such a course not only affects the proper conduct of the defence but it gives a handle to the prosecution to prevent a Counsel who is well acquainted with the facts of the case from conducting the defence. The Crown Prosecutor relies

upon *Weston* v. *Peary Mohun Das* (1) and contends that it is not incompetent for a Counsel to give evidence in the case in which he is briefed. The question here is not the competency of a Counsel engaged in a case to give evidence for one party or the other. The real question is, whether a Counsel, who is conducting the defence of the accused and who is well instructed and is well-acquainted with the facts of the case could be suddenly called upon to give evidence for the prosecution without safeguarding the interests of the accused by giving ample time to the accused to engage the services of a competent Counsel. Even if time be granted to the accused to engage some other Counsel, I consider it very reprehensible tactics for the prosecution to call the Counsel who is actually conducting the defence as a witness for the prosecution in the middle of the case. The prosecution if it thinks that the evidence of a particular individual will prove the case against the accused, his name should be mentioned in the charge sheet and if the Police get information at a later stage that important evidence is likely to be got from the defence Counsel, the Police should make an application at the earliest opportunity so that the defence may not be prejudiced. In this case, I have not the slightest hesitation in holding that the method pursued by the Police and the action of the Magistrate in putting Dr. Swaminadhan in the witness-box on the day he appeared to conduct the defence of the accused has vitiated the trial, and it is unnecessary to consider whether the accused have been prejudiced or not. It is opposed to all principles of criminal jurisprudence for the prosecution to deprive the accused suddenly of the service of their Counsel. The argument that Dr. Swaminadhan could have appeared for the accused after that date is untenable, for, it is against the etiquette of the bar that a Counsel should give evidence in the case in which he is engaged as Counsel, and no self-respecting Counsel would like to conduct a case for the defence after having been called as a witness for the prosecution. I consider the conduct of Dr. Swaminadhan in retiring from the case as the only proper course open to him. I cannot too strongly condemn the action of the Police in calling Dr. Swaminadhan as a prosecution witness after knowing probably that the other cases against the accused were collapsing; and the action of the Magistrate in allowing himself to be a tool in the hands of the Police and in framing a charge on the 4th before the cross-examination of Dr. Swaminadhan was completed, is open to grave censure.

There are other irregularities in the trial, such as the admission of inadmissible evidence like Exs. I and II. Taking all the circumstances into consideration, I consider the trial has been vitiated by the procedure adopted by the Magistrate; and there is no other course open but to set aside the conviction of the appellants and to direct that they be tried by the Chief Presidency Magistrate.

V. N. V. *Conviction set aside*;
Z. K. *Re-trial ordered.*

(1) 23 Ind. Cas. 25; 10 C. 898; 18 C. W. N. 185.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 328 OF 1925.
July 7, 1925.
Present:—Mr. Justice Banerji.
JAIRAJ SINGH—ACCUSED—APPLICANT
versus
BANSI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 250—Report made to Police—Acquittal of accused—Case held to be false and frivolous—Compensation, award of, legality of—Order awarding compensation signed separately, effect of.

Where a proceeding taken by a Magistrate to award compensation to the accused under s. 250 of the Cr. P. C. is a continuation of the original proceeding against the accused, no objection can be taken to the proceeding merely on the ground that the Magistrate has signed two separate orders, one in respect of the acquittal of the accused and the other directing payment of compensation to him. [p. 68, col. 1.]

Where a report is made to the Police which is false, frivolous or vexatious with the intention that action should be taken against the persons mentioned in the report, there is nothing to prevent the Magistrate who tries the case to award compensation to the accused under s. 250 of the Cr. P. C. against the person who made the report. [p. 68, col. 2.]

Reference made by the Sessions Judge, Moradabad, dated the 11th May 1925.

Mr. *Kashi Narain Malaviya*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—On the 15th of March 1925 one Jiraj Singh made a report at the Police station Bachraun, District Moradabad,

that Bansi and three others had stolen 8 bundles of sugar cane seeds belonging to him. The report ends up by saying "*Mera dawa in charon par hai; tahqiqat chahta hun.*" After an enquiry by the Police the accused came up before a Magistrate of the First Class at Moradabad, who on the 23rd of April, 1925, held that the case was a false and frivolous one and being of opinion that the complainant should pay compensation to the accused, immediately asked Jiraj Singh, who was present in Court, why he should not pay compensation to the accused for having brought a false and frivolous case. Jiraj not being able to show cause, he directed Jiraj to pay Rs. 50 as compensation to Bansi. Jiraj went up in revision before the learned Sessions Judge of Moradabad. He has referred the case to this Court with a recommendation that the order directing compensation should be set aside, as it is illegal and as no compensation can be given in cases instituted on a Police report.

The learned Vakil for Jiraj has put forward two contentions in support of the recommendation. I will deal with the second first, namely, that, as the Magistrate did not in the same order, by which he acquitted the accused, order compensation to be paid, that order was illegal. In support of his contention he has cited two cases, namely, *In the matter of the Complaint of Safdar Husain* (1) and *Ram Singh* v. *Mathura* (2), I am of opinion that neither of these cases have any application to the facts of this case. On the 23rd of April the learned Magistrate in continuation of his order directing the acquittal of the accused asked the complainant if he had any cause to show, and immediately thereafter passed the order. This was a continuation of the same order; to my mind if instead of signing his order at two places he has signed his order at the very end, there could have been nothing to say; but in the cases cited the proceeding which was taken by the Magistrates was quite a separate proceeding from that which terminated the criminal case. No objection can to my mind be taken when really the proceeding taken by the Magistrate to award compensation is a continuation of the original proceeding against the accused, who was tried for the offence. I am, therefore, of opinion that there is no force in this contention.

The other point taken is that, when a man goes and makes a report to the Police, however, false, frivolous, mischievous and malicious that report may be, no compensation can be awarded to the accused. Now, as the law stands, compensation can be awarded for false, frivolous or vexatious accusations in any case which is instituted upon complaint or "upon information given to a Police Officer." I am unable to follow the argument that making a report to the Police is not giving an information to a Police Officer. In the present case I have the actual words of the complainant, in which he asks the Police to take action. The action was taken and I cannot say why, when the Legislature used the words "upon information given to a Police Officer" and when a report, which was false, frivolous or vexatious, was made to the Police with the intent that action should be taken against the accused persons, the Court is incompetent to award compensation. Mr. Malaviya has referred to *Ishri* v. *Bakhshi* (3), *Queen-Empress* v. *Polavarapu* (4), *King-Emperor* v. *Habib* (5) and *Sarjug Prasad Singh* v. *Emperor* (6), I have examined all these cases. The first two cases were decided when the words "upon information given to a Police Officer" formed no part of the corresponding section of the Cr. P. C. The facts of the other two cases are clearly different, and I am of opinion that neither of those cases have any application upon the facts. In the case of *Sarjug Prasad Singh* v. *Emperor* (6), the following sentence in the judgment of the Court supports my view, namely that, if a person makes a report to the Police which is found by the Magistrate to be false, frivolous or vexatious a Magistrate can direct compensation to be paid. The sentence I refer to is "There is nothing before us to justify the conclusion that the institution of the proceedings against the accused persons was due to any action taken by the petitioner."

The result is that I am not prepared for the reasons given above to accept the recommendation of the Court below.

Z. K. *Order accordingly.*

(1) 25 A. 315; A. W. N. (1903) 57.
(2) 14 Ind. Cas. 599; 34 A. 354; 9 A. L. J. 308; 13 Cr. L. J. 247.
(3) 6 A. 96; A. W. N. (1883) 224; 3 Ind. Dec. (N.S.) 663.
(4) 7 M. 563; 2 Ind. Dec. (N. S.) 974.
(5) A. W. N. (1901) 142.
(6) 35 Ind. Cas. 512; 1 P. L. J. 106; 17 Cr. L. J. 336; 3 P. L. W. 69.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 113 OF 1925.

July 21, 1925.

Present :—Mr. Kennedy, J. C., and Mr. Raymond, A. J. C.

JAMNA WIDOW OF TIKAMDAS—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 491—Extradition Act (XV of 1903), s. 18—Habeas corpus *proceedings, nature of—Jurisdiction of High Court—Extradition for offence not mentioned in treaty, legality of.*

Proceedings by way of *habeas corpus* are proceedings calling upon a person having custody of a prisoner to produce him and demonstrate under what authority he holds him in custody. If the authority be a legitimate authority binding on the officer complying with it, he is bound to obey the order of that authority and the Court cannot interfere. All that the Court can do is to see that there is no patent defect visible in the authority by which the person having custody detains any person. [p. 70, col. 1.]

There is no derogation of the rights of the parties to a treaty by allowing one Government with the consent of the other to obtain extradition of a criminal who has committed an offence not mentioned in the treaty. [p. 70, col. 2.]

A Government or a State is entitled, if it so wishes, to hand over persons subject to the law of another State at the request of that State. There is, in such a case, no derogation to the Sovereign rights of either party. All that s. 18 of the Extradition Act provides is that the Act shall not work against the will of either party so as unduly to impose any liability on such party. It does not prevent their co-operation in a friendly action according to the comity of nations. [*ibid.*]

Application under s. 491, Cr. P. C.

Mr. *Rewachand Vassanmal*, for the Applicant.

Mr. *C. M. Lobo*, Acting Public Prosecutor, for the Crown.

JUDGMENT.—In this case a warrant was issued by the Resident, Western Rajputana States, dated the 16th of May 1925 at Mount Abu. The Additional District Magistrate of Karachi arrested thereunder one Jamna widow of Tikamdas. At the moment Jamna was a witness in a criminal case pending in the Court of the City Magistrate, Karachi, against one Raju under ss. 498 and 494. In that case the evidence of Jamna was considered important. The Additional District Magistrate, therefore, after taking her statement as required under the Indian Extradition Act released Jamna on bail.

Jamna now comes here under s. 491 of the Cr. P. C., asking that Jamna be brought up before this Court to be dealt with according to law. The proceeding now pending before us is of the nature of a *habeas corpus* and we have jurisdiction to pass such orders as may be necessary under s. 491 provided the conditions exist which render it necessary for us to pass such orders. It is not quite clear to us why Jamna is on bail and on what authority the Magistrate had released her on bail. But we are not concerned with that at present. Because if the Magistrate is wrong in his order releasing Jamna on bail, the only order that could be passed would be one directing him to execute the warrant issued by the Resident, Western Rajputana States and that is not the relief asked for by Jamna. It is doubtful whether the exercise of the jurisdiction of this Court is necessary where the person detained is on bail. But that question need not be discussed because we think the application must fail on other grounds.

It is alleged that there are grave informalities connected with the proceedings of this case. It is stated that the applicant is a *Marwari Brahmin* woman whose family home is Jasalmere but that she has long been residing in Hyderabad and in Karachi and it is said that she recently became a Muhammadan and had married a local Muhammadan. It is said that this apostacy has excited considerable indignation amongst the *Marwari Brahmin* community both here and at Jasalmere and that in order that the woman may be brought back to Jasalmere and to obtain her removal from British India a collusive and fraudulent accusation of theft has been brought against her in Jasalmere in respect of a certain incident which took place some years ago and that the Jasalmere Judicial Authorities have been deceived and that they in their turn unintentionally misled the Resident, Western Rajputana States and that he has issued the warrant without due enquiry. These are mere allegations. We hesitate to believe that any such series of frauds has been committed but in any case, we are of the opinion, it is not for us to look into this matter. No doubt, if the Magistrate has any reason to suppose that any further enquiry should be made before executing the warrant, he will report the case under s. 8 (*a*). We have no doubt the right of asylum in British India would not be violated with impunity. But that

is a matter purely for the discretion of the Magistrate and for the Local Government. We cannot ourselves issue any orders in that purely executive matter.

Assuming that the accused person is in custody all we have to do is to see that she is under custody under a lawful warrant. Now, this warrant is signed by a person having authority to sign the warrant. (*vide* s. 7 of the Indian Extradition Act). The warrant is also addressed to the right person because under the Cr. P. C., "District Magistrate" includes an Additional District Magistrate. The warrant also refers to an extraditable offence as defined in the First Schedule of the Act.

We are invited to investigate into the proceedings of the Resident, Western Rajputana States. But, in our opinion, we have no power to make such an investigation. The proceedings by way of *habeas corpus* are proceedings calling upon a person having custody of a prisoner to produce him and demonstrate under what authority he holds him in custody. If the authority be a legitimate authority binding on the officer complying with it, he is bound to obey the order of that authority, and the Court cannot interfere. All this Court can do is to see that there is no patent defect visible in the authority by which the person having custody detains any person. Had it for instance been the case that the warrant was not issued over the name of the Resident but over that of some inferior agent or had the warrant not been duly sealed or had it been directed to a wrong officer, then, no doubt, the warrant being informal would not justify the detention of the petitioner.

Again if the warrant had directed the arrest of a European British subject, and such a person were so detained that again will be an error which we will be entitled to correct. Or again if a warrant mentions an offence which is not an extraditable offence within the meaning of the Act, there again the warrant would have been invalid, and this Court would have directed that the person detained should be set at liberty. But further than this we do not think that the aid of this Court can be invoked.

It was urged that there was an informality patent on the face of the warrant because although theft is an extraditable offence under the First Schedule of the Act, yet it is not an extraditable offence under the treaty with Jasalmere and there is a provision in the Extradition Act that the Act shall not work in derogation of any treaty between British India and any Indian State. But there is no derogation of the rights of the parties to the treaty of Jasalmere by allowing one Government with the consent of the other to obtain extradition of a criminal who has committed an offence not mentioned in the treaty. It often happens that extradition is granted in special cases between States who have no general treaty of extradition whatsoever. *Volenti non fit injuria*—A Government or a State is entitled if it so wish to hand over persons subject to the law of another State at the request of that State. There is here no derogation to the Sovereign rights of either power. All that the section provides is that the Act shall not work against the will of either party so as unduly to impose any liability on such party. It does not prevent their co-operation in a friendly action according to the comity of nations. There is thus no ground for saying that under s. 18 of the Indian Extradition Act the warrant is invalid. It would, no doubt, be otherwise if the offence under which the warrant is issued had not been an extraditable offence.

On the whole, therefore, we find ourselves unable to interfere and must reject this petition.

P. B. A.
Z. K. *Petition rejected.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 496 OF 1925.
May 15, 1925.
Present:—Mr. Justice Harrison.
ISMAIL—PETITIONER
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 103, 304, 442—Enclosure forming part of house, whether building—Burglar discovered in house at night—Death caused by blows on head—Right of private defence, whether exceeded—Offence.

An enclosure surrounded on all four sides by a wall, entrance and exit from which is effected through a gate which is kept locked at night, and which forms an indivisible part of a residential house is a "building" within the meaning of s. 442 of the Penal Code.

Shera v. *Empress*, 35 P. R. 1879 Cr., followed.

Kohmi v. *Emperor*, 26 Ind. Cas. 305; 208 P. L. R. 1915; 24 P. R. 1914 Cr.; 16 Cr. L. J. 1 and *Sunder* v. *Emperor*, 49 Ind. Cas. 864; 56 P. L. R. 1919; 20 Cr. L. J. 240; 11 P. W. R. 1919 Cr., distinguished.

Accused was awakened in the middle of the night by the sound of movements in an enclosure adjoining the room where he was sleeping. On getting up he found a man inside the enclosure and in the scuffle which ensued he killed him by striking him on his head three times with his stick:

Held, (1) that although the deceased had been guilty of the offence of house trespass the offence had been completed once the deceased had effected his entry into the enclosure and the accused was not, therefore, entitled to the exercise of the right of private defence under the provisions of s. 103 (2) of the Penal Code;

(2) that accused having found a burglar in his house in the middle of the night in a dark room had every reason to suppose that the burglar had committed theft or was going to do so and that if he met him the burglar would presumably strike him and that inasmuch as the accused could not know in the dark whether the burglar was armed or not, it could not be said that he had exceeded his right of private defence by striking the burglar three times and rendering him incapable of doing any further injury to his person or property and that the act of the accused was covered by the provisions of cl. (4) of s. 103 of the Penal Code and he had consequently committed no offence.

Application for revision of an order of the Sessions Judge, Ferozepore, dated the 23rd January 1925, affirming that of the Magistrate, First Class, Ferozepore, dated the 27th November 1924.

Sardar *Tara Singh*, for the Petitioner.

Lala *Anant Ram*, for the Government Advocate, for the Respondent.

JUDGMENT.—The facts of this case are that one Ismail and Dula, his brother, were waked up in the middle of night by the sound of movement in the *wara* adjoining the room where they were sleeping. They got up and found a man Sardara inside the *wara*, and, in the scuffle which ensued, Ismail killed him by striking him on the head with his stick. He has been convicted under s. 304 and sentenced to four years' rigorous imprisonment and his conviction and sentence have been upheld by the learned Sessions Judge, who found that he had exceeded the right of private defence of his person and property as three blows were found to have been inflicted on the head.

It was urged before the Trial Court and the Sessions Judge that s. 103, Indian Penal Code, applied as the man who was killed was committing or had committed the offence of house-breaking. Both the lower Courts have held that the offence of house-breaking was not committed. The Sessions Judge has followed *Kohmi* v. *Emperor* (1) and *Sunder* v. *Emperor* (2), but his attention does not appear to have been drawn to *Shera* v. *Empress* (3) which ruling, it appears to me, exactly covers the facts of this case, while those relied on do not. The map and the evidence show that this so-called *wara* forms an indivisible part of the building which constitutes the house of the accused. It fills up a corner, it is surrounded on all four sides by a wall, entrance and exit are effected through a small gate or *phalla* which is kept locked at night, and the thief Sardara must have effected his entrance by scaling the wall. Neither in *Kohmi* v. *Emperor* (1) nor in *Sunder* v. *Emperor* (2), did the enclosure in question form part of a building. In *Sunder* v. *Emperor* (2), the wall did not go the whole way round, and in the earlier ruling the *wara* was of the common type of an enclosure for cattle out in the fields. Here, the enclosure is for practical purposes one of the rooms of the house; from it other rooms open and, although it has no roof, it is an integral part of the building. The facts are identical with those of *Shera* v. *Empress* (3). Following the decision of the majority of the Judges, who decided that case, I hold that here also the enclosure in question is a part of a building.

While, however, it is clear that the man Sardara committed the offence of house-breaking, the question still remains whether s. 103 or rather s. 103 (2) applies in its entirety: I think not. The right of private defence of property extends to the voluntary causing of death, if the offence, the committing of which occasions the exercise of the right, be one of certain offences including house-breaking by night. In this case that offence had been completed, once the burglar got over the wall, and it was past history. It could not be said to occasion the exercise of the right of private defence. It is, therefore, necessary to see whether the apprehension of what was going to happen justified the accused in acting as he did. All that he knew was that a burglar was in his house in the middle of the night in a dark room. He had every reason to suppose that the burglar had committed theft or was going to do so and that if he (the owner of

(1) 26 Ind. Cas. 305; 208 P. L. R. 1915; 24 P. R. 1914 Cr.; 16 Cr. L. J. 1.

(2) 49 Ind. Cas. 864 P. L. R. 1919; 20 Cr. L. J. 240; 11 P. W. R. 1919 Cr.

(3) 35 P. R. 1879 Cr.

the house) met him he would presumably strike him. He could not know in the dark whether the burglar was armed or not and taking everything into account I do not think that he exceeded his right of private defence by striking the burglar three times and rendering him incapable of doing any further injury to his person or property. I find, therefore, that the right of private defence was not exceeded and that the case fulfils the requirements of s. 103 (4), though it does not fulfil the requirements of s. 103 (2).

I accept the revision and acquit the petitioner.

Z. K. *Revision accepted.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 96 OF 1925.

July 27, 1925.

Present:—Mr. Kennedy, J. C., and Dr. DeSouza, A. J. C.

NATHOOMAL AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Application direct to High Court, whether competent—Intention to apply for transfer notified—Court, whether bound to postpone case—Practice.

An application under s. 526 (8) of the Cr. P. C. for a transfer of a criminal case pending before a Subordinate Magistrate lies direct to the High Court and it is not necessary that such an application should be made in the first instance to the District or Sub-Divisional Magistrate under s. 528 of the Cr. P. C. [p. 73, col. 1.]

In re Fouseca, 6 Bom. L. R. 480; 1 Cr. L. J. 589, not applied.

Dhone Kristo v. *King-Emperor*, 6 C. W. N. 717, referred to.

Whenever an intention to make an application under s. 526 of the Cr. P. C. is notified to the Court, the Magistrate is not bound to adjourn or postpone the case unless he is satisfied that the accused person has a *bona fide* intention to make an application to the High Court. [p. 74, col. 2.]

Joharuddin Sarkar v. *Emperor*, 31 C. 715; 8 C. W. N. 910; 1 Cr. L. J. 804, relied upon.

Queen-Empress v. *Gayitri Prosunno Ghosal*, 15 C. 455; 7 Ind. Dec. (N. S.) 888 and *Gunamony Sapui* v. *Queen-Empress*, 3 C. W. N. 758, referred to.

Per *Kennedy, J. C.*—A Magistrate must not, however, refuse an application for adjournment under s. 526 (8) of the Cr. P. C. on conjectural grounds. It is only in a case where the circumstances existing at the time of the filing of applications are such that it is quite clear to the Magistrate that there is no *bona fide* intention of applying for transfer that he can refuse to adjourn. And if he does so refuse to adjourn, he must take care that he passes no final or penal order against the applicant until the applicant has had a reasonable opportunity of demonstrating by making an application for actual transfer that his intention did really exist. A Magistrate should also remember that should he refuse such an application and should the applicant eventually make an application to the High Court, it is probable that whole of the proceedings subsequent to that application might be held to be void even if the High Court came to the conclusion that there was no ground for transfer. [p. 75, col. 1.]

Reference made by Mr. DeSouza, A. J. C., Sind.

Mr. *Nihcheldas C. Vazeerani*, for the Applicants.

Mr. *C. M. Lobo*, Acting Public Prosecutor, for the Crown.

JUDGMENT.

De Souza, A. J. C.—The first question referred to the Bench is whether an application under s. 526 of the Cr. P. C. for a transfer of a criminal case pending before a Subordinate Magistrate lies direct to the High Court or whether an application should be made in the first instance to the District or Sub-Divisional Magistrate under s. 528 of the Cr. P. C.

In *In re Fouseca* (1), the Bombay High Court held that ordinarily the High Court would not transfer a case pending before a Subordinate Magistrate unless the party applying for the transfer has moved the District Magistrate before going to the High Court. That, however, was a decision given before s. 526 (8) was amended by Act XVIII of 1923. Under the amended clause it is open to the Public Prosecutor or the complainant or the accused person *at any stage* in the course of an enquiry or trial and not necessarily before the commencement of the hearing, as under the old law, to notify to the Court his intention to make an application and the Court is bound to adjourn the case for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon. All proceedings held by the Magistrate after the accused notifies his intention would be void. Under the old section it is doubtful whether the Court was bound to adjourn after an application for transfer was made under s. 526. The section required that the Court should exercise the powers of postponement or adjournment given by s. 344 in such a manner as will afford a reasonable time for an application being made to the High Court and an

(1) 6 Bom. L. R. 480; 1 Cr. L. J. 589.

order being obtained thereon, before the accused is called on for his defence. The postponement was no part of the essence of the obligation laid upon the Court. The essence of the obligation was that the party should have a reasonable time to move the High Court and obtain its orders. In any case it was competent to the Magistrate before granting an adjournment to proceed with the case upto the point at which the accused would be called on for their defence. And the trial was good and valid in every case at least upto the close of the case for the prosecution: *Dhone Kristo* v. *King-Emperor* (2).

If the District or Sub-Divisional Magistrate is to be moved in the first instance before an application under the section as amended is made to the High Court, it would follow that the trial would have to be adjourned for a period sufficiently long to enable the applicant to obtain an order of the District or Sub-Divisional Magistrate, under s. 528, Cr. P. C., and if that order is unfavourable to obtain an order from the High Court. Again the anomaly would result that while s. 528, Cr. P. C., does not provide for a compulsory adjournment of the trial. s. 526 (8) renders an adjournment imperative.

It is only by notifying an intention to apply under s. 526 of the Cr. P. C., that a party aggrieved can obtain an adjournment. An application under that section lies direct to the High Court. There is nothing in the Statute which renders it necessary to move the District or Sub-Divisional Magistrate in the first instance. If the High Court cannot be moved until an order is obtained from the District or Sub-Divisional Magistrate, the trial will be unnecessarily delayed.

We would, therefore, answer the first question referred to us by saying that an application under s. 526 of the Cr. P. C. for a transfer of a criminal case pending before a Subordinate Magistrate lies direct to the High Court and it is unnecessary that such an application should be made in the first instance to the District or Sub-Divisional Magistrate under s. 523 of the Cr. P. C.

The next question referred to us is whether the Court is bound to adjourn or postpone the case whenever an intention to make an application under s. 526 is notified to the Court, even though there is no *bona fide* intention to make the application and the intention is notified merely for the sake of delaying proceedings. Instances of gross abuse of the provisions of this section are referred to in the order of reference Cases are brought to notice in which an intention to apply is notified merely because it does not suit the convenience of the Pleader to attend a hearing or because the party does not wish a particular witness who was shortly leaving the jurisdiction of the Court to be examined. Not infrequently criminal trials have been unnecessarily held up because of successive notifications by each of several accused persons on the same grounds or by several notifications from the same accused person. The Magistrates conceive that they are bound to grant an adjournment whenever an intention to make an application is notified. And at the adjourned date of hearing in a considerable number of cases the accused or his Pleader intimates to the Court that he has in the interval abandoned his intention to make the application and the trial may be proceeded with.

In this class of cases it is clear that there never was a *bona fide* intention under s. 526 of the Cr. P. C, but merely a pretence. There was no real "intention to make an application under the section" to quote the words of cl. (8). The question was considered by Pratt and Handley, JJ., in *Joharuddin Sarkar* v. *Emperor* (3) who observed as follows:—

"If in laying down that owing to a refusal to grant an application for postponement purporting to be made under s. 526 all the subsequent proceedings are necessarily illegal, it was intended by Stevens and Harrington, JJ., in *Queen-Empress* v. *Gayitri Prosunno Ghosal* (4) that such a dictum should be of general application, then we must respectfully beg to differ from them. It seems to us that such an interpretation of the law might have disastrous effects on the administration of justice as it would lie in the power of every accused person to delay and thereby possibly defeat justice by intimating to the Court that he intended to move the High Court for a transfer, no matter how frivolous, groundless or illusory the application might be."

The learned Judge went on to point out that if in every such case where the Magis-

(2) 6 C. W. N. 717.

(3) 31 C. 715; 8 C. W. N. 910; 1 Cr. L. J. 804.
(4) 15 C. 455; 7 Ind. Dec. (N. S.) 888.

trate had proceeded with the trial the accused could legally insist on a re-trial the result would be a grave anomaly which the Legislature could never have intended. For *ex hypothesi* there being no ground for a transfer the same Judge would re try the case precisely as before although there was no defect in the previous trial or any possible advantage to be gained by duplicating the whole process.

We concur with these observations and although they were made with reference to the old section we consider that they apply with equal force to the section as amended. The Select Committee to whom the present bill was referred were alive to the gross abuse to which the provisions of the section as they stood had lent themselves, and, therefore, felt that greater safeguards were necessary. For these reasons they maintained the principle of the new sub-s. 6-A which enables the High Court to award costs in dismissing an application. But they decided in favour of rejecting the proposal that discretion as to an adjournment should be left with the Court except when the applicant gave security in which case the adjournment should be compulsory. The result is that when an application that is made may be penalised if it is found to be frivolous or vexatious, no penalty attaches when no application is made at all, although an intention to apply is notified and an adjournment obtained.

No doubt where applications are made to the Trying Magistrate to stay proceedings on the ground that the petitioner was about to apply to the High Court to transfer the case to another Magistrate and no application is made to the High Court or the application when made contained no reference to the application for transfer the legal advisers of the accused are liable to severe censure [*Gunamony Sapui* v. *Queen-Empress* (5).] But in the vast majority of cases it is found that the legal advisers safeguard their position by making the accused person himself sign the application and disclaiming all responsibility.

We think that when an intention to apply under s. 526 of the Cr. P. C. is notified to the Magistrate he should satisfy himself that the party has a *bona fide* intention to move the High Court and that the notification is not a mere pretext to obtain an adjournment. It is, however, no part of the function of the Magistrate to investigate whether the grounds on which the intention purports to be based are valid or reasonable grounds. He should merely determine on the materials before him whether there are reasonable grounds for holding that the intention is entertained as a fact. If he comes to the conclusion that it is only a pretence of an intention he should decline to stay proceedings. If nevertheless it happens that the accused applies to the High Court and obtains an order of transfer, the only result will be that the proceedings subsequent to the notification of intention would be void.

We answer the second question referred to us by saying that whenever an intention to make an application under s. 526 of the Cr. P. C. is notified to the Court, the Magistrate is not bound to adjourn or postpone the case, unless he is satisfied that the accused person has a *bona fide* intention to make an application to the High Court.

Kennedy, J. C.—I concur, in the view taken by my learned brother, that it is in the power of the Magistrate to refuse to adjourn a case under s. 526 (8) when he is *bona fide* satisfied that the applicant has no intention to make an application for transfer. It seems to me that to interpret s. 526 (8) in the manner which has been pressed upon us will be in effect to lay it down that the Legislature has put into the hands of an accused person to say whether he shall or shall not ever be tried by a Magistrate. To put a very extreme case, it would be quite possible for an accused person to put a veto on the trial of the case pending against him. There is nothing so far as I can see in s. 526 (8) which prevents an accused person or a complainant from notifying his intention to apply anew for a transfer on a fresh ground as soon as the Magistrate after one adjournment calls anew and begins to hear the case. Apart from such an extreme case as that, it is quite clear that if s. 526 (8) is to be interpreted in the way pressed upon us, accused persons can by an easy device so delay the trial of cases that it would cause considerable harassment to the complainant and the witnesses and defeat the course of justice in the end. Similarly, of course, a complainant could harass and wear out an accused person. All this as shown in the judgment of my learned brother may be done without any penalty whatsoever. I apprehend that this is not

(5) 3 C. W. N. 758.

the intention of the Legislature. A reasonable interpretation must be given to the words of the section. Therefore the "intention" referred to in s. 526 must be a real *bona fide* intention and it is a matter for the decision of the Magistrate in each case in view of the circumstances to decide whether there is such a *bona fide* intention. Apart from interpretation of the section moreover, all Courts have jurisdiction to prevent all attempts to defeat the ends of justice by abuse of procedure.

Having said so, it is necessary to give a strict warning to the Magistrate that they are not to refuse applications for adjournments on conjectural grounds. It is only in such cases where the circumstances existing at the time of the filing of applications are such that it is quite clear to a Magistrate that there is no *bona fide* intention of applying for transfer that he can refuse to adjourn. And if he does so refuse to adjourn, he must take care that he passes no final or penal order against the applicant until the applicant has had a reasonable opportunity of demonstrating by making an application for actual transfer that his intention did really exist. A Magistrate should also remember that should he refuse such an application and should the applicant eventually make an application to the High Court, it is probable that whole of the proceedings subsequent to that application might be held to be void even if the High Court came to the conclusion that there was no ground for transfer.

With this explanation I answer the two questions under reference in the same way as has been done by my learned brother (Dr. De Souza).

P. B. A. *Answered accordingly.*
Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 138 OF 1925.
September 15, 1925.
Present :—Mr. Simpson, A. J. C.
Thakurain LACHMI KUER AND OTHERS —APPLICANTS
versus
PARTAB NARAIN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Dispute as to possession of immoveable property—Decree of Civil Court in favour of one party, effect of—Magistrate, duty of—Attachment of property, legality of.

In a proceeding under s. 145 of the Cr. P. C. the Magistrate has no right to compel a party who has obtained a decree from a Civil Court in respect of the property in dispute to go back to the Civil Court and get something else. The Civil Court would refuse to entertain his suit, the matter being *res judicata*. All that such a person can do is to execute his decree and to obtain possession of his property. The Magistrate can only keep possession of the property until a competent Court has determined the rights of the parties, and once that is done the Magistrate has nothing to do but to give effect to the decree of the Civil Court.

Application for revision against an order of the Sessions Judge, Fyzabad, dated the 6th July 1925, reversing that of the Magistrate, First Class, District Fyzabad, dated the 16th March 1925.

Mr. *Niamatullah*, for the Applicants.
Mr. *Khaliqzaman*, for the Opposite Party.

ORDER.—This is an application in revision against an order of a Magistrate taking possession of an estate under s. 146. The facts are that there was a dispute between *Musammat* Janki Kunwar, who was in possession, and B. Miter Sen Singh and others, who claimed possession. B. Miter Sen Singh was plaintiff, and he got a decree from the Subordinate Judge. *Musammat* Janki Kunwar appealed, and she got a decree from this Court. B. Miter Sen Singh appealed to the Privy Council. The decree of this Court was set aside and the decree of the Subordinate Judge was restored by an order, dated 25th July 1925. This decree was put into execution and formal possession was given. In the meantime *Musammat* Janki Kunwar conveyed the property to Pratab Narain Singh, and he began making collections from tenants. The learned Magistrate has come to a finding that it is probable that *Musammat* Janki Kunwar had wind of the Privy Council decree before she made the conveyance. It is of no consequence whether she had or not. That conveyance was either after the decree or it was *pendente lite*. In either case, it was not worth the paper it was written on. The Magistrate has no right to compel a party who has got a decree for land to go back to the Civil Court and get something else. The Civil Court would refuse to entertain his suit, the matter being *res judicata*. All he could do was to execute his decree and he has been put in possession. A Magistrate can only keep possession of property until a competent

Court has determined the rights of the parties thereof, or the person entitled to possession thereof. The Privy Council has decided this point, and the Magistrate has nothing to do but give effect to the decree of the Privy Council. The argument that Pratab Narain Singh has any title independent of *Musammat* Janki Kunwar is definitely negatived by the findings of fact in the Magistrate's own order. It is clear that B. Pratab Narain Singh is not in possession. Collecting a few rents from a few tenants is not possession.

I set aside the Magistrate's order and direct him to make over possession to the decree-holders.

Z. K. *Order set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 421 OF 1924.

November 14, 1925.

Present:—Mr. Justice Ross.

RAMPRATAB MARWARI—PETITIONER

versus

Sheikh SATIF AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 147—Muhammadan Law—Prayers whether can be said on land belonging to another—Right of way over land belonging to another in order to worship at grave, whether can be claimed.

Under the Muhammadan Law a Muhammadan cannot say his prayers on property belonging to another without an express or implied permission of the owner of the property.

Niadar v. *Tika*, 9 Ind. Cas. 45 relied on.

Therefore, a Muhammadan has no right to say prayers at a grave situated in land belonging to another and consequently cannot claim a right of way to go over land belonging to another in order to worship at a grave situated in that land.

Appeal against an order of the District Magistrate, Bhagulpur, dated the 17th June 1924, confirming that of the Deputy Magistrate, Bhagulpur, dated the 28th April 1924.

Messrs. *K. P. Jayaswal* and *M. N. Ray*, for the Petitioner.

Messrs. *Akbari* and *Khurshaid Husnain*, for the Opposite Party.

JUDGMENT.—This application is directed against an order passed under s. 147 of the Cr. P. C. in favour of the second party. The subject-matter of the litigation was a right of way claimed over land in the occupation of the first party in order that certain Muhammadans should go to worship at a grave on that land which they regarded as the grave of a *Peer*. The Courts below have found that they had this right of way. But in *Niadar* v. *Tika* (1), Mr. Justice Karamat Husain observed that "one of the well-settled rules of the Muhammadan Law is that a Muhammadan cannot say his prayers on the property belonging to another without an express or implied permission of the owner of the property." Here the action of the first party in erecting a wall round the land negatives the idea that there is any permission, express or implied, to worship on this land.

It is contended in support of the order that the right which is now in dispute is not the right to pray at the grave, but the right to go over the land to the grave; but, in my opinion, these two rights cannot be separated. It is not an independent right of way as an end in itself that is claimed: it is a right to go over the land of the first party in order to worship at the grave on that land. If the right to worship at the grave does not exist, as according to the authority above cited it does not, then the ancillary right cannot exist, and there can be no possession of it.

I, therefore, allow this application and discharge the order of the Courts below.

Z. K. *Application allowed.*

(1) 9 Ind. Cas. 45.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 139 OF 1925.

October 6, 1925.

Present:—Mr. Wazir Hasan, J. C.

Sheikh ABDUL WAHAB—ACCUSED—APPLICANT

versus

EMPEROR THROUGH MOHAMMAD HUSAIN—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Duty of Court to decide question of actual possession.

The crucial question to be decided in proceedings under s 145 of the Cr. P. C. is as to who is in actual possession of the subject in dispute and not who has the right to such possession. [p. 77, col. 2.]

Criminal revision against an order of the Sessions Judge, Rae Bareli, dated the 6th August 1925, confirming that of the First Class, Magistrate, Rae Bareli, dated the 26th May 1925.

Mr. *Wasi Hasan*, for the Applicant.

Mr. *H. Husain*, (*Md. Husain*), for the Opposite Party.

JUDGMENT.—This application arises out of the proceedings taken against the applicant Abdul Wahab under s. 145 of the Cr. P. C. The order of the Trial Court was that the opposite party Asmat Ullah shall retain possession of the property in dispute until evicted therefrom in due course of law. The order further directed Abdul Wahab to refrain from disturbing Asmat Ullah's possession until the latter was so evicted.

Abdul Wahab was dissatisfied with the order of the Trial Court. He took it in revision to the Court of the Sessions Judge of Rae Bareli. The learned Judge dismissed the revision and confirmed the order of the Trial Court. Abdul Wahab has now come to this Court under the revisional section of the Cr. P. C.

I have heard the arguments in this case at great length and have come to the conclusion that the order in question cannot be maintained and must be set aside. The judgment of the Trial Court and of the Court of Appeal were read to me by the Counsel of both sides and then I read them myself more than once. I also heard discussions at the bar on the merits of the case. I am convinced that neither the Court of first instance nor the Court below cared to look into the law applicable to the subject with which they had to deal.

The proceedings were initiated under an application dated the 24th March 1925 filed by one Mohammad Husain on behalf of his master Asmat Ullah in the Court of the Sub-Divisional Magistrate of Salon in the District of Rae Bareli. It appears that Asmat Ullah was appointed *lambardar* of *Mahal* Shekhana situate in village Jais, under an order of the Revenue Court dated 15th of May 1924. Before the appointment of Asmat Ullah, Abdul Wahab was the *lambardar* of the *mahal*. Asmat Ullah and Abdul Wahab are both co-sharers in the *mahal*. The application of the 14th March 1925, recites several acts of Abdul Wahab as tending to interfere with the possession which the newly appointed *lambardar* tried to recover by collecting rent from the tenants of the *mahal*. On the date the application was presented Abdul Wahab happened to be present in the Court of the Sub-Divisional Magistrate. The learned Magistrate recorded the statement of Abdul Wahab. Notice was then issued, under s. 145, calling on the parties to file written statements as required by that section. Abdul Wahab in response to that notice filed his written statement in which he contested the applicability of s. 145 to the facts of the case and asserted that he was in rent collecting possession of the *mahal* and certainly of his own share in it and also in actual possession of certain *khudkasht* lands. A mass of oral and documentary evidence was tendered by the parties to the case and accepted by the Trial Court. When the matter, however, came to be decided, the crucial point of actual possession on which the proceedings under s 145 depended was never approached and the case was decided with reference to the " right " of collecting rent. This would not have happened had the learned Magistrate taken the trouble of refreshing his memory with the contents of s. 145. Sub-s. (1) of s. 145 distinctly requires "written statements of their (parties) respective claims as respects the fact of actual possession of the subject of dispute." Sub-s. (4) distinctly excludes consideration of the " merits of the claims of any of such parties to a right to possess the subject of dispute." Finally the Magistrate is required by the Code to decide "whether any or which of the parties was at the date of the order before mentioned in such possession of the said subject." The word " such " qualifies the word " possession." This qualification refers back to sub-s. (1) of s. 145 as to the nature of the possession on which the decision is required by law to be made. As already stated sub-s. (1) says " claims as respects the fact of actual possession of the subject of dispute." The same result is reached when we consider the phraseology employed by the Legislature in enacting sub-s. (6) of s. 145 of the Cr. P. C. When I come to consider the judgments of the Courts below in the case before me I find that they lack in essentials required by the provisions of the law already referred to. The Trial Court puts the issue before it for decision in the following words : " Main point to be decided is whether in this *mahal* the *lam-*

bardar only realises rent or each co-sharer separately from their tenants." After this a reference is made to a judgment of the Court of the Sessions Judge of Rae Bareli, dated the 26th February 1919, and on the authority of that judgment it is held that the *lambardar* has the exclusive right under the law to make rent collections. The learned Magistrate sums up his conclusions as follows:—

"From the documentary evidence filed by the parties which are too many in number and the oral evidence produced by the parties I come to the inevitable conclusion that in *mahal* Shekhana *patti* Abdul Ghafoor the *lambardar* is only entitled to collect rent from the tenants. Consequently I order that the *mahal* be released in favour of Sheikh Asmat Ullah and in future Abdul Wahab should not interfere with the rent collection of entire *mahal*."

Having dealt with the question of *mahal* the learned Magistrate then proceeded to deal specifically with the question of *sir* plots. Abdul Wahab claimed exclusive actual possession of these plots and as the learned Magistrate observes evidence was adduced by the parties on this point. Here again the controversy as to actual possession is disposed of by a reference to a judgment of the Land Record Officer dated the 27th of August 1923 in which it was held that the so-called *sir* and *khudkasht* plots were actually cultivated by the tenants in the year 1330 and not hy Abdul Wahab. Whether there has been any change in the state of actual possession of these plots in the subsequent years the Magistrate does not pause to consider. At the hearing of the application in this Court a reference was made by the learned Pleader of the applicant to a report of the Tahsildar in respect of the state of possession in the subsequent years. I only mention this to point out that this piece of evidence was not considered at all. Be that as it may, the judgment of the learned Magistrate has at least the virtue of frankness. I quote the following from it:

"I did not go into the question of possession because it has already been held that in such cases of *lambardari* disputes the *lambardar* should be deemed to be in possession for the purposes of s. 145 of the Cr. P. C. [*vide Ram Dei* v. *Parbati* (1)]."

(1) A. W. N. (1890) 178.

The ruling mentioned in the above quotation was not read to me at the hearing of this application. The nature of possession which shall be the subject-matter of enquiry under s. 145 is clearly defined by that section itself as I have already shown in an earlier portion of the judgment, and I need not say more.

When the matter went in revision it appears that the discussion before the learned Judge centered on the 'right' to collect rent. This was naturally so in view of the findings of the Trial Court. Still the learned Judge should have seen with reference to the law that it was irrelevant. Instead the learned Judge also decides the question of right only. I quote one passage from the judgment of the learned Judge: "But the matter of the dispute was, who was entitled to collect rent of the *mahal*? It was clear that the party entitled to collect the rent of the whole *mahal* was entitled to be put in possession of it."

I accept this application and set aside the order passed by the Courts below. The learned Counsel for the opposite party stated before me with great emphasis that his client Asmat Ullah has been legally appointed *lambardar* of the *mahal* and that if his possession is not upheld his appointment will prove wholly futile. I entirely sympathise with Asmat Ullah's predicament but I cannot allow the abuse of law for purposes for which it was not framed. It will be open to Asmat Ullah to take further proceedings or other remedies whichever he is advised to do.

Z. K. *Application accepted.*

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 99 OF 1925.

April 22, 1925.

Present:—Mr. Justice Krishnan and Mr. Justice Wallace.

In re VODDE SUBBIGADU—ACCUSED—APPELLANT.

Penal Code (Act XLV of 1860), s. 84—Murder by accused—Insanity, plea of—Unaccountable conduct—Absence of motive—Effect—Acquittal—Procedure—Criminal Procedure Code (Act V of 1898), s. 471.

The accused on an evening followed two persons who were returning from their work with two stones in his hand and attacked them and struck one of them on the head with those stones and inflicted serious wounds on him, with the result that he died. It appeared that just before the offence was committed, the accused was behaving in an extraordinary manner and had been muttering something to himself that some persons had ruined him. No apparent sane motive could be alleged for the attack which was really unaccountable. The accused was in normal condition at the time of trial:

Held, (1) that at the time when the accused attacked the two persons he was really suffering from an impulse of *homicidal mania* and as a result of it he committed these offences, and the case fell under s. 84, Penal Code and the accused ought to be acquitted; [p. 79, col. 2.]

Queen-Empress v. *Kadar Nasyer Shah*, 23 C. 604; 12 Ind. Dec. (N. S.) 401, followed.

(2) that as the accused was no longer suffering from insanity, he should be detained in the Jail where he already was, not as convict, but in safe custody under s. 471, Cr. P. C., pending further action by Government. [p. 80, col. 2.]

Appeal against an order of the Court of Session of the Anantapur Division, in Case No. 68 of the Calendar for 1924.

The Public Prosecutor, for the Crown.

JUDGMENT.—In this case the accused Vodde Subbigadu has been convicted by the Sessions Judge of Anantapur, under s. 302, Indian Penal Code, for the murder of one Vodde Madduleti and also under s. 325, Indian Penal Code, for causing grievous hurt to Madduleti's wife Venkatamma on the evening of the 21st February 1924. In so doing, the Sessions Judge rejected a plea of insanity which was put forward on behalf of the accused. The plea was not that he was insane at the time of the hearing but that he was insane at the time when the occurrence took place. On the evidence in the case which has been set out by the learned Sessions Judge and discussed by him carefully, there can be no doubt that the accused did cause the death of Madduleti and also caused grievous hurt to his wife as the prosecution witnesses have deposed. It would seem that on the day in question the accused went to the place where Vodde Madduleti and his wife and some of the prosecution witnesses were working and asked for a drink of water. He was given a drink of water after some parleying by Venkatamma. He then seems to have sat at the place and behaved in a somewhat extraordinary manner muttering to himself for quite a long time. He seems to have been saying "Swami Narayanamurthi, that man spoiled me, this man spoiled me." In the evening after Madduleti and Venkatamma had finished their work and were returning home the accused seems to have gone behind Madduleti with two stones in his hand and to have attacked him and struck him on the head with these stones and inflicted serious wounds on him. Madduleti fell down when his wife ran up. She was also given a blow by the accused with the mud pot which she had on her head. She also fell down and lost her consciousness. These people were found subsequently by some witnesses and taken to the hospital but Madduleti died as the result of the wounds inflicted on him as soon as he reached the hospital. The woman suffered for sometime but has recovered and is now examined as P. W. No. 9. Her evidence is corroborated as far as possible by the evidence of witnesses who were working with her that day, P. W. Nos. 10, 11 and 12. There is no reason to doubt the truth of P. W. No. 9's evidence in this case. We, therefore, agree with the Sessions Judge in finding that the accused did commit the crimes with which he is charged. But the important question in this case is whether the accused is entitled to rely upon s. 84 of the Indian Penal Code and be excused for the facts he had done because at the time he did them, he was by reason of unsoundness of mind incapable of knowing the nature of his acts or that what he was doing was wrong or contrary to law. The learned Sessions Judge has discussed the question at some length but has taken a somewhat severe view of the matter. He has held that it is not proved that the accused was incapable of understanding the nature of the acts which he committed. After looking into the evidence carefully, we are inclined to think that that is not a correct view. It would seem from all the circumstances of the case that at the time when he attacked the deceased and his wife he was really suffering from an impulse of *homicidal mania* and it was probably as the result of it he committed these offences. In the first place as the learned Judge himself remarks there is no kind of motive for the crime, or as stated in *Queen-Empress* v. *Kadar Nasyer Shah* (1), no apparent sane motive at all is alleged. That of course is one of the *indicia* of the act being done by some kind of insane impulse. The accused was behaving as stated already, in an extraordinary manner just before the offence was committed. He was seated under a

(1) 23 C. 604; 12 Ind. Dec. (N. S.) 401.

bardar only realises rent or each co-sharer separately from their tenants." After this a reference is made to a judgment of the Court of the Sessions Judge of Rae Bareli, dated the 26th February 1919, and on the authority of that judgment it is held that the *lambardar* has the exclusive right under the law to make rent collections. The learned Magistrate sums up his conclusions as follows:—

"From the documentary evidence filed by the parties which are too many in number and the oral evidence produced by the parties I come to the inevitable conclusion that in *mahal* Shekhana *patti* Abdul Ghafoor the *lambardar* is only entitled to collect rent from the tenants. Consequently I order that the *mahal* be released in favour of Sheikh Asmat Ullah and in future Abdul Wahab should not interfere with the rent collection of entire *mahal*."

Having dealt with the question of *mahal* the learned Magistrate then proceeded to deal specifically with the question of *sir* plots. Abdul Wahab claimed exclusive actual possession of these plots and as the learned Magistrate observes evidence was adduced by the parties on this point. Here again the controversy as to actual possession is disposed of by a reference to a judgment of the Land Record Officer dated the 27th of August 1923 in which it was held that the so-called *sir* and *khudkasht* plots were actually cultivated by the tenants in the year 1330 and not hy Abdul Wahab. Whether there has been any change in the state of actual possession of these plots in the subsequent years the Magistrate does not pause to consider. At the hearing of the application in this Court a reference was made by the learned Pleader of the applicant to a report of the Tahsildar in respect of the state of possession in the subsequent years. I only mention this to point out that this piece of evidence was not considered at all. Be that as it may, the judgment of the learned Magistrate has at least the virtue of frankness. I quote the following from it:

"I did not go into the question of possession because it has already been held that in such cases of *lambardari* disputes the *lambardar* should be deemed to be in possession for the purposes of s. 145 of the Cr. P. C. [*vide Ram Dei* v. *Parbati* (1)]."

(1) A. W. N. (1890) 176.

The ruling mentioned in the above quotation was not read to me at the hearing of this application. The nature of possession which shall be the subject-matter of enquiry under s. 145 is clearly defined by that section itself as I have already shown in an earlier portion of the judgment, and I need not say more.

When the matter went in revision it appears that the discussion before the learned Judge centered on the 'right' to collect rent. This was naturally so in view of the findings of the Trial Court. Still the learned Judge should have seen with reference to the law that it was irrelevant. Instead the learned Judge also decides the question of right only. I quote one passage from the judgment of the learned Judge: "But the matter of the dispute was, who was entitled to collect rent of the *mahal*? It was clear that the party entitled to collect the rent of the whole *mahal* was entitled to be put in possession of it."

I accept this application and set aside the order passed by the Courts below. The learned Counsel for the opposite party stated before me with great emphasis that his client Asmat Ullah has been legally appointed *lambardar* of the *mahal* and that if his possession is not upheld his appointment will prove wholly futile. I entirely sympathise with Asmat Ullah's predicament but I cannot allow the abuse of law for purposes for which it was not framed. It will be open to Asmat Ullah to take further proceedings or other remedies whichever he is advised to do.

Z. K. *Application accepted.*

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 99 OF 1925.

April 22, 1925.

Present:—Mr. Justice Krishnan and Mr. Justice Wallace.

In re VODDE SUBBIGADU—ACCUSED—APPELLANT.

Penal Code (Act XLV of 1860), s. 84—Murder by accused—Insanity, plea of—Unaccountable conduct—Absence of motive—Effect—Acquittal—Procedure—Criminal Procedure Code (Act V of 1898), s. 471.

The accused on an evening followed two persons who were returning from their work with two stones in his hand and attacked them and struck one of them on the head with those stones and inflicted serious wounds on him, with the result that he died. It appeared that just before the offence was committed, the accused was behaving in an extraordinary manner and had been muttering something to himself that some persons had ruined him. No apparent sane motive could be alleged for the attack which was really unaccountable. The accused was in normal condition at the time of trial :

Held, (1) that at the time when the accused attacked the two persons he was really suffering from an impulse of *homicidal mania* and as a result of it he committed these offences, and the case fell under s. 84, Penal Code and the accused ought to be acquitted; [p. 79, col. 2.]

Queen-Empress v. *Kadar Nasyer Shah*, 23 C. 604; 12 Ind. Dec. (N. S.) 401, followed.

(2) that as the accused was no longer suffering from insanity, he should be detained in the Jail where he already was, not as convict, but in safe custody under s. 471, Cr. P. C., pending further action by Government. [p. 80, col. 2.]

Appeal against an order of the Court of Session of the Anantapur Division, in Case No. 68 of the Calendar for 1924.

The Public Prosecutor, for the Crown.

JUDGMENT.—In this case the accused Vodde Subbigadu has been convicted by the Sessions Judge of Anantapur, under s. 302, Indian Penal Code, for the murder of one Vodde Madduleti and also under s. 325, Indian Penal Code, for causing grievous hurt to Madduleti's wife Venkatamma on the evening of the 21st February 1924. In so doing, the Sessions Judge rejected a plea of insanity which was put forward on behalf of the accused. The plea was not that he was insane at the time of the hearing but that he was insane at the time when the occurrence took place. On the evidence in the case which has been set out by the learned Sessions Judge and discussed by him carefully, there can be no doubt that the accused did cause the death of Madduleti and also caused grievous hurt to his wife as the prosecution witnesses have deposed. It would seem that on the day in question the accused went to the place where Vodde Madduleti and his wife and some of the prosecution witnesses were working and asked for a drink of water. He was given a drink of water after some parleying by Venkatamma. He then seems to have sat at the place and behaved in a somewhat extraordinary manner muttering to himself for quite a long time. He seems to have been saying "Swami Narayanamurthi, that man spoiled me, this man spoiled me." In the evening after Madduleti and Venkatamma had finished their work and were returning home the accused seems to have gone behind Madduleti with two stones in his hand and to have attacked him and struck him on the head with these stones and inflicted serious wounds on him. Madduleti fell down when his wife ran up. She was also given a blow by the accused with the mud pot which she had on her head. She also fell down and lost her consciousness. These people were found subsequently by some witnesses and taken to the hospital but Madduleti died as the result of the wounds inflicted on him as soon as he reached the hospital. The woman suffered for sometime but has recovered and is now examined as P. W. No. 9. Her evidence is corroborated as far as possible by the evidence of witnesses who were working with her that day, P. W. Nos. 10, 11 and 12. There is no reason to doubt the truth of P. W. No. 9's evidence in this case. We, therefore, agree with the Sessions Judge in finding that the accused did commit the crimes with which he is charged. But the important question in this case is whether the accused is entitled to rely upon s. 84 of the Indian Penal Code and be excused for the facts he had done because at the time he did them, he was by reason of unsoundness of mind incapable of knowing the nature of his acts or that what he was doing was wrong or contrary to law. The learned Sessions Judge has discussed the question at some length but has taken a somewhat severe view of the matter. He has held that it is not proved that the accused was incapable of understanding the nature of the acts which he committed. After looking into the evidence carefully, we are inclined to think that that is not a correct view. It would seem from all the circumstances of the case that at the time when he attacked the deceased and his wife he was really suffering from an impulse of *homicidal mania* and it was probably as the result of it he committed these offences. In the first place as the learned Judge himself remarks there is no kind of motive for the crime, or as stated in *Queen-Empress* v. *Kadar Nasyer Shah* (1), no apparent sane motive at all is alleged. That of course is one of the *indicia* of the act being done by some kind of insane impulse. The accused was behaving as stated already, in an extraordinary manner just before the offence was committed. He was seated under a

(1) 23 C. 604; 12 Ind. Dec. (N. S.) 401.

babul tree and was muttering something unintelligible, of somebody having spoiled him. The learned Sessions Judge seems to think that his action showed a certain amount of deliberation and calculation. We do not think there is any evidence to show it except that he did not at once attack the deceased in the middle of the day. There is nothing to show deliberation at all. In fact the evidence is merely that he attacked them in the afternoon. There is no evidence to show that he actually followed them or how he came across them in the evening when he did attack. No doubt he took two stones in his hand but that, we think, is of no importance either way. It was not impossible that in the insane condition of his mind he thought that the deceased was one of the men who had spoiled him. We do not know anything more of the man's conduct at the time to draw any definite inference against the view we are taking. The learned Sessions Judge says he lay in wait on the open space near the house of P. W. No. 11 and followed P. W. No. 9 and her husband so as to attack them when they were by themselves. We do not think there is sufficient warrant for this inference from the evidence.

The accused was examined by the Assistant Surgeon, Mr. K. Govinda Menon, P. W. No. 8 about three weeks after this occurrence and his evidence is perfectly clear that the man was suffering from insanity at the time when he was under observation by him. Mr. Govinda Menon seems to have placed him under observation very soon after the occurrence, *i.e.*, within three weeks of it and he gives his opinion that even before three weeks he would have been of unsound mind. It is true that the Head Constable P. W. No. 6 who arrested him the next day, says he was all right when he arrested him but he goes on to say that all the people of the village told him that the accused had become mad, and that juice was poured in his nostrils and that he got no better. Taking all these circumstances into consideration and the fact that he seems to have acted altogether unaccountably, we think the inference is fairly strong he acted when he committed these crimes in a fit of insanity without understanding what the real nature of the act he was doing. The fact that long afterwards when he was placed under the observation of the District Medical Officer, that officer did not discover any signs of insanity and thought he was of sound mind is not of much importance, because by that time the symptoms of insanity had passed off. The evidence of that Medical Officer is important only in connection with the trial. That evidence shows clearly that the man was not insane at the time of the trial and, therefore, the trial was good. But it is of no importance for the purpose of deciding whether at the time these crimes were committed the accused was insane or not. The Public Prosecutor supports the case of the accused before us. We have, therefore, come to the conclusion that the proper inference in the case is that s. 84 applies to the accused and that he should be acquitted under that section of the offence charged against him; and we accordingly set aside the conviction and sentence against him.

The next question is, what orders are we to pass in the case. Sections 470 and 471 of the Cr. P. C. apply to the case. Under s. 471 we are required to say specifically whether the accused committed the act or not. We record a finding that he did commit the acts charged against him, namely, he caused the death, by beating with a stone on the head of Madduleti; and he also caused grievous hurt to his wife Venkatamma. Under s. 471 we think the proper order to pass in this case is to direct that the accused be detained in safe custody in the Bellary Central Jail in which he is at present. He will be detained there not as a convict but in safe custody as required by s. 471. As he is not at present suffering from insanity we think it is better to keep in jail rather than ourselves send him to the lunatic asylum. The papers will be sent to the Government with a report of the action we have taken under s. 471. It will be for the authorities concerned to take further action under s. 474 when it is thought necessary to do so.

V. N. V.
N. H. *Conviction set aside.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 927 OF 1924.

April 23, 1925.

Present:—Mr. Justice Odgers.

SREEDHARAN NAMBUDRI AND OTHERS—DEFENDANTS Nos. 8 TO 11—PETITIONERS

versus

VATTAKKAVIL KULANGARU MADATHIL PARAMESWARAN PERUMBRA NAIR AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 3, 5 TO 7 AND 12 TO 59 AND 62 TO 76—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7, cl. (ix)—*Suit for redemption of* kanom *and* purankadom—*Specified amount and paddy at fixed price treated as principal amount—Value for purposes of Court-fees and jurisdiction, calculation of.*

In a redemption suit Court-fee is to be paid under s. 7 (*ix*), Court Fees Act, according to the principal money expressed to be secured by the instrument of mortgage. Since the Suits Valuation Act has not fixed any method of valuing a redemption suit, the amount of the principal debt must be taken also as determining the jurisdiction of the Court under the Civil Courts Act.

Zamorin of Calicut v. *Surya Narayana Bhatta*, 5 M. 284; 2 Ind. Dec. (N. S.) 198, *Echaran Patter* v. *Appu Patter*, 19 M. 16; 6 Ind. Dec. (N. S.) 715, *Mandoth Veetil Chappan* v. *Puthanpurayil Ranu*, 15 Ind. Cas. 587; 37 M. 420; 13 M. L. T. 118, relied on.

In a suit for redemption of a *kanom* and *purankadom*, by which it was agreed that a particular sum of money and a quantity of paddy valued at a particular rate was fixed as the amount of the *purankadom*, the Court-fee is payable on the amount stated in the document and not on the price of paddy on the date of suit.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the District Munsif, Pattambi, dated the 28th October 1924, in O. S. No. 290 of 1923.

Mr. *P. S. Narayanasami Iyer* for the Petitioners.

Messrs. *S. Ranganada Iyer* and *A. V. K. Krishna Menon*, for the Respondents.

JUDGMENT.—This is a suit for redemption of a *kanom* and *purankadom* wherein it was agreed that Rs. 1,984-2-4 and 493 *paras* 2 *edangalais* and 2 *nalis* of paddy valued at Rs. 281-13-5 is fixed as the amount of the *purankadom*. The question is whether the Court-fee payable on the plaint is the amount stated in the document Ex. B. If so, it is undoubtedly within the jurisdiction of the learned District Munsif or whether the defendant is entitled to say that the plaintiff ought to value the paddy not at the price assessed by the parties at the time Ex. B was entered into, but at the market price on the day when the plaint was presented. The market value of the paddy per *para* in Ex. B works out at 10-annas a *para* whereas the learned District Munsif (who went into a question as a separate issue) has found that the market price at the time of the presentation of the plaint was 12 annas a *para*. If the latter valuation is to be adopted, then the valuation of the suit is above Rs. 3,000. If the other valuation is to be adopted the valuation of the suit is below Rs. 3,000. The learned Vakil for the petitioner argues two points: (1) that it is not the price in the document but the price at the date of suit which has to determine the Court-fee payable. The matter is governed by s. 7 (*ix*) of the Court Fees Act of 1870 wherein it is provided that in a redemption suit Court-fee is to be paid according to the principal money expressed to be secured by the instrument of mortgage. Even before the Act there was an authority in this Court to that effect: *vide Zamorin of Calicut* v. *Surya Narayana Bhatta* (1). Since the Act there is the authority of *Echaran Patter* v. *Appu Patter* (2) and *Mandoth Veetil Chappan* v. *Puthanpurayil Ranu* (3). In my view, therefore, the learned District Munsif was right in holding as he did that the sums of money in Ex. B ought to be taken as the principal money expressed to be secured under the Court Fees Act, s. 7 (*ix*). That disposes of the first point.

The second point taken is that the amount on which Court-fee is paid is not necessarily to be taken as the amount for purposes of jurisdiction. Mr. P. S. Narayanaswami Iyer points out that in s. 8 of the Suits Valuation Act, matters falling under s. 7 (*ix*) of the Court Fees Act are expressly excepted. As to this point he admits that I am concluded by the authority of a Bench of this Court in *Mahamad Jalaldeen Marakayar* v. *Vijayaswami* (4), wherein it was held that as the Suits Valuation Act has not fixed any method of valuing a redemption suit the authority of *Zamorin of Calicutt* v. *Suraya Narayana Bhatta* (1) remains unaffected and the amount of the principal debt must be taken as determining the jurisdiction under the Civil Courts Act. There is apparently a recent dissenting judgment in *Sarada Sun-*

(1) 5 M. 284; 2 Ind. Dec. (N. S.) 198.
(2) 19 M. 16; 6 Ind. Dec. (N. S.) 715.
(3) 15 Ind. Cas. 587; 37 M. 420; 13 M. L. T. 118.
(4) 28 Ind. Cas. 624; 39 M. 447; (1915) M. W. N. 239; 29 M. L. J. 142.

dari Basu v. *Akramannessa Khatun* (5), where this Madras decision is disapproved and I am asked to refer this matter to a Bench in order that the two decisions may be effectively examined. It seems to me that as I have decided the first point against the petitioner, the second point does not really arise because if the value of the paddy is to be taken at the price agreed between the parties on the date of Ex. B as I have held, there is no question that the amount is below Rs. 3,000 and, therefore, within the monetary jurisdiction of the learned District Munsif. Even taking Mr. Narayanaswami Iyer's valuation it exceeds Rs. 3,000 by a very small amount. For these reasons I am not disposed to refer the matter to a Bench and the civil revision petition must, in accordance with the above view, be dismissed with costs. As to the amount which may be decreed to the plaintiff the basis of Ex. B, I express no opinion.

V. N. V.

N. H. *Petition dismissed.*

(5) 78 Ind. Cas. 747; 51 C. 737; 28 C. W. N. 710; (1924) A. I. R. (C.) 783.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3139 OF 1924.

March 31, 1925.

Present:—Mr. Justice Martineau.

FEROZE DIN—DEFENDANT—APPELLANT

versus

Musammat WAZIR BEGAM—PLAINTIFF—RESPONDENT.

Muhammadan Law—Marriage, dissolution of—Impotency at time of marriage, proof of.

Under the Muhammadan Law a wife cannot be granted a decree for dissolution of marriage on the ground of the impotency of the husband unless she proves that he was impotent at the time of the marriage.

Second appeal from a decree of the District Judge, Jullundur, dated the 28th November 1924, reversing that of the Subordinate Judge, Fourth Class, Jullundur, dated the 27th August 1924.

Lala *Din Dial Kapur* for Mr. *Anant Ram*, for the Appellant.

JUDGMENT.—The plaintiff, who is the defendant's wife, sued for a dissolution of the marriage on the grounds that her husband was impotent and ill-treated her. Ill-treatment was not proved and the Trial Court also found that the defendant was not proved to be impotent and it dismissed the suit but the District Judge on appeal has found on the evidence of the Civil Surgeon, who examined the defendant, that the latter is impotent and he has passed a decree in the plaintiff's favour The defendant has filed a second appeal.

Under the Muhammadan Law the plaintiff cannot be given a decree unless she proves that the defendant was impotent at the time of the marriage. On this point there is no evidence whatever on the record. All that is shown is that the defendant is impotent at the present time. The suit must, therefore, fail.

I accept the appeal, reverse the lower Appellate Court's decree and restore the decree of the Trial Court dismissing the suit. The respondent will pay the appellant's costs throughout.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1586 OF 1922.

January 21, 1925.

Present:—Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

ECHIKAN CHARAKARA KELU NAIR —PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF SOUTH KANARA, MANGLORE—DEFENDANT—RESPONDENT.

Madras Revenue Recovery Act (II of 1864), s. 58—Ryotwari land—Revenue Settlement—Enhanced revenue, imposition of, during currency of period of settlement, legality of—Suit for declaration, maintainability of—Jurisdiction of Civil Courts—Limitation—Period of notice, deduction of—Civil Procedure Code (Act V of 1908), s. 80.

The duration of a *ryotwari* land Revenue Settlement in Madras according to the declared intention of the Government of Madras is 30 years and the rate fixed at such Settlement cannot be increased during the period for which the Settlement is made. [p. 84, col. 1.]

Where the Government by a Notification issued at the time of a *ryotwari* land Revenue Settlement fixes a certain amount as being payable for certain kinds of lands, the act of the Government amount to a release, grant or an engagement, but by whatever word it may be described, the clear effect is that the Government irrevocably undertakes not to enhance the assessment during the currency of the settlement. [p. 86, col. 2.]

The proprietorship of a *ryotwari* holder in his holding in the Madras Presidency is subject to the prerogative which the Crown has according to the Common Law of India of imposing by an executive act assessment on land and varying it from time to time. [p. 84, col. 2.]

But in the actual exercise of this prerogative the Crown is not supposed to proceed without any regard to definite and well-established principles such as that the Crown is not entitled to more than a fixed share of the produce and that the usual Settlement period is 30 years. [p. 85, col. 1.]

Madathapu Ramaya v *The Secretary of State for India*, 27 M. 386 at pp. 388, 396, *Sankaranvadivelu Pillai* v. *Secretary of State for India*, 28 M. 72 at p. 80; 15 M. L. J. 32, *Kandukuri Balasurya Prasadha Rao* v. *Secretary of State for India*, 41 Ind. Cas. 98; 44 I. A. 165; 40 M. 886; 33 M. L. J. 144; 22 M. L. T. 76; 15 A. L. J. 697; 21 C. W. N. 1089; (1917) M. W. N. 536; 19 Bom. L. R. 751; 6 L. W. 340; 2 P. L. W. 260; 26 C. L. J. 290 (P. C.) and *Secretary of State for India* v. *Ramanujachariar*, 85 Ind. Cas. 419; 47 M. L. J. 780; 20 L. W. 973; (1925) M. W. N. 264; (1925) A. I. R. (M.) 355; 48 M. 282, relied on.

Although by virtue of the provision contained in s. 58 of the Madras Revenue Recovery Act the Civil Courts are prohibited from deciding any question as to the rate of revenue or as to the amount of assessment, they have full jurisdiction to decide whether or not certain land is at all under any liability to be assessed to land revenue, and whether Government having entered into a binding engagement, by which the assessment is fixed at a certain rate for a certain period, they can alter the rate during that period. Section 58 of the Madras Revenue Recovery Act is not a bar to such a suit. [p. 86, col. 2; p. 87, col. 1.]

In computing the period of limitation for a suit against the Government to recover assessment alleged to have been wrongly collected, the period of two months required for a notice under s. 80 of the C. P. C. must be deducted. [p. 87, col. 1.]

Srinivasa Iyengar v. *Secretary of State for India*, 18 Ind. Cas. 617; 38 M. 92; 24 M. L. J. 41, followed.

Appeal against a decree of the Court of the Subordinate Judge, South Kanara, in A. S. No. 215 of 1921 (A. S. No. 159 of 1921 on the file of the District Court) preferred against that of the Court of the Additional District Munsif, Kasaragod, in O. S. No. 204 of 1920 (O. S. No. 927 of 1919 on the file of the Court of the Principal District Munsif, Kasaragod).

Mr. *C. V. Ananta Krishna Iyer*, for the Appellant.

The Advocate-General, for the Respondent.

JUDGMENT.

Ramesam, J.—The facts of this second appeal are stated by my learned brother whose judgment I had the advantage of perusing.

If the question before us is what is the proper rate of assessment on the suit land, we are precluded from entering upon its consideration by s. 58 of the Revenue Recovery Act. The Civil Courts have no jurisdiction to do the work of the Settlement Department, whether that department has come to a correct or incorrect conclusion in respect of a particular plot of land. In my opinion this is the proper scope of s. 58. But when the question before us is—whether Government having entered into a binding engagement, by which the assessment is fixed at a certain rate for a certain period—can alter the rate during that period to say that s. 58 is a bar to our consideration of the question is to say that the section enables the Government to avoid the binding nature of contracts relating to revenue. I do not think the words "any question as to the rate of land revenue payable to Government" were intended to support such a contention.

This leads me to the question—whether there is any binding engagement on the part of the Government. On this point, I see no reason to differ from my learned brother's conclusion, *viz.*, that the Notification of the Government, dated 6th November 1902, supplemented by the Government Order, dated 17th April 1903, as understood in the light of declarations of Government Policy, amount to a grant of rights on the *ryotwari* holders in the District of South Kanara for a period of thirty years. Though there are facts in *Secretary of State for India* v. *Ramanujachariar* (1), which distinguish that case from the present, it supports our conclusion to this extent.

On the question of limitation, it is true that I have always felt some difficulty in following the reasoning in *Srinivasa Aiyangar* v. *Secretary of State for India* (2). After the recent amendment of the Limitation Act, the matter is not of practical importance. I am, therefore, content to follow that decision. I agree with the order proposed by my learned brother.

Venkatasubba Rao, J.—The question of law that has been raised in this second appeal is, can Government revise and enhance the land tax during the currency of the 30 years' period of the Settlement contrary to the Notification introducing such Settlement?

The facts of the case may be shortly set forth. The plaintiff sues for a declaration that the assessment imposed by the Government on the suit *kumris* at the rate of eight annas per acre was illegal and that the Government could levy the tax only at two annas fixed at the time of the Settlement. The *kumris* in question were 165

(1) 85 Ind. Cas. 419; 47 M. L. J. 780; 20 L. W. 973; (1925) M. W. N. 264; (1925) A. I. R. (M.) 355; 48 M. 282.

(2) 18 Ind. Cas. 617; 38 M. 92; 24 M. L. J. 41.

odd acres in extent and the plaintiff claims the recovery of Rs. 493-3 0 being the amount collected in excess of what was actually due. The lands are situate in Kasargod *taluk* of the South Kanara District and the Government published on the 6th November 1902, in the District Gazetteer a Notification of the introduction of a new Settlement. The Notification begins with the statement that the Government had sanctioned the scheme for the revision of the land assessment of the South Kanara District and proceeds to say that the new rates will take effect from *Fasli* 1312 corresponding to July 1902. Then follows the definition and classification of lands and sanctioned rates are set forth along with the data for the calculation. Paragraph 20 is material.

"The Settlement will be for a period of thirty years, during which period no extra charge will be made on 'dry' converted into 'wet' or 'garden' or on 'wet' converted into 'garden' or on 'single' crop wet land converted into 'double' crop wet. Unoccupied land will be assessed according to the existing classification when cultivated or brought under occupation. At the end of the Settlement period the Government reserve the right to introduce such changes in the classification and assessment of 'wet', 'dry' and 'garden' lands as may then seem proper."

Kumri lands were by the Notification excepted from the Settlement and regarding them it was said that separate order would be issued later. See para. 13.

Accordingly a Government order, dated the 17th April 1903, was issued approving of a Notification fixing a rate of two annas per acre in respect of suit lands. This Government order is recited in the proceedings of the Board of Revenue, dated 27th April 1903. A *pattah* was issued to the plaintiff (appellant) in respect of certain lands and the *kumris* in question were then treated as Government *Kumris* and omitted from the *pattah* granted to him. On the 27th of May 1906 he presented a petition to the Collector of South Kanara asking that the said land might be included in his *pattah* but an order was made to the effect that his claim would be disposed of under the *dharkast* rules. Thereupon, the plaintiff filed two suits against the Secretary of State for India, O. S. No. 352 of 1911 and O. S. No. 3 of 1913 in the District Munsif's Court of Kasaragod asking for a declaration that he was the owner of the *kumris* in question and that he was entitled to get a *pattah* for them and these suits were ultimately disposed of in his favour. In respect of a portion of these lands, he got a declaration from the District Court of South Kanara in the following terms:—

"There will be a declaration that the plaintiff is the absolute owner and proprietor of the marginally noted plots falling within the plaint boundaries, and that as such he is entitled to get a *pattah* for the same subject to the payment of the Sovereign's share of the produce as assessment and there will be a permanent injunction restraining the defendant from interfering with his lawful possession and enjoyment of these properties".

In respect of the remainder of the lands, he got a similar declaration from the High Court. After the plaintiff was thus declared to be the absolute owner of the *kumris*, the Government issued to him a *pattah* charging an enhanced rate of assessment, namely, eight annas per acre, although the rate fixed in the Notification was two per acre. The plaintiff first sought redress from the Collector of South Kanara (See Ex. K) then from the Board of Revenue (See Ex. M) and then from the Government but met with no success. Thereupon, the present suit was filed. The Government's defence was twofold. First, they denied that the plaintiff was the owner of the *kumris* in question, secondly, they pleaded that Civil Courts had no jurisdiction to decide questions relating to rates of assessment and relied on *s. 58 of the Madras Revenue Recovery Act II of 1864*. They generally controverted the position that the Government had no right to vary the rates of assessment during the currency of the Settlement period. The first defence in view of the result of the litigation that preceded the suit, is obviously frivolous and was summarily rejected both by the District Munsif and the Subordinate Judge. In regard to the second plea, it must be said that the authority on the point is scanty and the question must be determined mainly with reference to general principles. It is now established that the proprietorship of the *ryotwari* holder in his holding is subject to the prerogative which the Crown has according to the Common Law of India of imposing by an executive act, assessment on land and varying it from time to time. The

right of the Government to assess land to land revenue and to vary it is not a right created or conferred by any Statute but as stated above, the Crown possesses the prerogative of exacting from a subject holding arable land, its share of the produce or the equivalent of such produce See observations of Bashyam Iyengar, J., in *Bell* v. *Municipal Commissioners for the City of Madras* (3) and *Madathapu Ramaya* v. *Secretary of State for India* (4) and of Subramania Iyer, J., in *Madathapu Ramaya* v. *Secretary of State for India* (4).

In the actual exercise of the prerogative of the Crown above referred to, the Crown is not supposed to proceed without any regard to definite and well-established principles, such as, that the Crown is not entitled to more than a fixed share of the produce; see Subramania Iyer, J., in *Madathapu Ramaya* v. *Secretary of State for India* (4). The learned Judge also refers to another well-established principle, namely, that the usual Settlement period is thirty years [See *Madathapu Ramayya* v. *Secretary of State for India* (4).] This feature of *ryotwari* Settlement is referred to over and over again in judgments of the Judicial Committee and of the High Court and in works of authority.

In *Sankaravavadivelu Pillai* v. *Secretary of State for India* (5) Subramania Iyer, J., refers to this incident.

In Maclean's Manual of the Administration of the Madras Presidency, Vol. I, the following passage occurs at page 110:—

"The term of the Madras *ryotwari* Settlement is according to the present intentions of Government 30 years from the date of completion of each particular local settlement at the end of which time not only the commutation money rates but the grain value themselves now assigned to the land are liable to revision".

Again at page 121:—

"The most important item in the yearly demand, namely, the normal land tex is fixed in advance and is liable to revision according to present arrangements only once in every 30 years from time of first Settlement".

Baden Powell in Vol. III on his Land Tenures at page 75 says:—

"The duration of Settlement is 30 years. During that period neither the grain values nor the commutation prices are altered".

The Board's Standing order on the subject runs thus:—

"At each Settlement or re-settlement of a district, Government will fix at their discretion the period for which such Settlement or re-settlement shall be in force The Collector shall then notifiy the period in the District Gazetteer and explain to the *ryots* that the new rates will not be liable to alteration during the currency of the Settlement period".

Referring to *ryotwari* Settlements, their Lordships of the Judicial Committee observe in *Kandukuri Balasurya Prasadha Row* v. *Secretary of State for India* (6):

"It has, however, long been the practice on Government estates to make periodical settlements with the *ryots* whereby the Government's share in the produce is commuted for a fixed annual payment in assessing which the wet lands are separately classified. The annual payment is incapable of increase during the period for which the Settlement is made".

I have shown that the Notification in question contains a definite undertaking that the rate fixed will not be varied during the 30 years' period of the Settlement. From the Standing Order referred to above, it is clear that not only was this Notification published in the District Gazetteer but that its clauses were explained by the Collector to the *ryots* in the *taluk*.

The reason for imposing a higher rate appears extremely curious. The Government have discreetly refrained from referring to it in their statement or in the course of the argument on their behalf. The plaintiff has discovered that a Notification, dated the 26th January 1913, was published in the District Gazetteer over the signature of the Revenue Divisional Officer, to the effect that the *Kumri* areas; to which claims may be established in Courts of Law may be assessed at the full dry rates instead of the *Kumri* rates. The action is thus intended to penalise persons who challenge in Courts of Law the Government's decision in regard to the ownership of the land. The Government having wrongfully denied the plaintiff's title seek to take advantage of their own wrong and to render

(3) 25 M. 457; 12 M. L. J. 208.
(4) 27 M. 386 at pp. 388, 393.
(5) 28 M. 72 at p. 80; 15 M. L. J. 32.
(6) 41 Ind. Cas. 98; 44 I. A. 166; 40 M. 886; 33 M. L. J. 141; 22 M. L. T. 76; 15 A. L. J. 697; 21 C. W. N. 1089; (1917) M. W. N. 536; 19 Bom. L. R. 751; 6 L. W. 340; 2 P. L. W. 260; 26 C. L. J. 290 (P. C.).

nugatory the decision of the Court by imposing an arbitrary rate and thus treating the land contrary to the finding, as land belonging to them and at their absolute disposal. That the act of the Government in going back upon their promise is impolitic, oppressive and indefensible can scarcely be denied. It is opposed to repeated declarations of the Government and accepted notions of established usage. The act constitutes a clear breach of faith. The question, however, remains, is the claim of the Government not merely unjust but also illegal and can Courts of Law deal with the question and protect the aggrieved party? In *Kandukuri Balasurya Prasadha Row* v. *Secretary of State for India* (6), the case referred to above, their Lordships of the Judicial Committee held that the Government could not impose upon a *zemindar* a cess, for the use of water, the right to use which was appurtenant to the land in respect of which the *jama* was payable, without increasing the amount of the *jama* and thus committing a breach of the obligation undertaken at the time of the Permanent Settlement. The Irrigation Cess Act conferred on the Government a right to levy a water cess and purporting to act under this Act, the Government levied the cess in question. Independent of, and apart from, the Act the Government did not claim any such right, but the Government contended that the settlement with the *zemindar* did not amount to an engagement within the meaning of the Act and in the absence of it they could exercise the right conferred by the Statute. The question in the present case is, is there any such engagement between the Government on the one hand and the *ryotwari* holders on the other. If there is, the Government's action is illegal, for they do not rely upon any Statute in their favour. The observations of their Lordships in this case referring to *ryotwari* tenure were in a sense *obiter*, but they are entitled to great weight as an argument based on them was used to support the conclusion at which they arrived with reference to the position of the *zemindar* which was then directly under consideration.

This case was treated by a Bench of this Court as an authority for the position that the assessment is incapable of increase in regard to *ryotwari* tenur during the period for which the settlement is made, *Secretary of State for India* v. *Ramanujachariar* (1). Incidentally, I may mention that this is the only direct ruling on the point.

On a construction of the Notification, I am clearly of the opinion that it amounts to a grant in favour of the *ryotwari* holders of the *taluk*. The state was possessed of the right, I shall assume, of levying any assessment it pleased. By the Notification it gives up the right to levy any tax over and above that fixed at the Settlement. Its right was indefinite. It was at liberty to fix a high or a low rate. By the Notification the right which was indefinite was made definite and whatever right it possessed to fix a rate in excess of what was actually fixed, it released in favour of the *ryotwari* holders. In other words, assuming that the Government had a right to a share of the produce above what was fixed at the Settlement, that right was by the Notification granted by virtue of the Settlement to the holders of the lands. The act of the Government might be described as a release, grant or an engagement, but by whatever word it may be described, the clear effect is that the Government irrevocably undertook not to enhance the assessment during the currency of the Settlement.

I have not the slightest doubt that their Lordships of the Judicial Committee in *Kandukuri Balasurya Prasadha Row* v. *Secretary of State for India* (6) understood the position in this sense when they observed, dealing with the *ryotwari* holders that the annual payment was incapable of increase during the period for which the Settlement was made.

There thus being a grant or release in favour of *ryotwari* holders, s. 58 of the Revenue Recovery Act cannot oust the jurisdiction of the Civil Courts. Section 58 runs thus:—

"No Court of Civil Judicature shall have authority to take into consideration or decide any question as to rate of land revenue payable to Government, or as to the amount of assessment fixed, or to be hereafter fixed on the portions of a divided estate".

The Courts are prohibited from deciding any question as to the rate of revenue or as to the amount of assessment. But they have full jurisdiction to decide whether or not the land or person is at all under liability to be assessed to land revenue. See *Madathapu Ramayya* v. *Secre-*

tary of State for India (4). Similarly if there is a binding engagement or a grant or a release, the section does not deprive the Civil Courts of their undoubted jurisdiction to give effect to and enforce its terms. Section 5[illegible], therefore, is not a bar to the action. As Subramania Ayyar J. points in *Madathapu Ramayya* v. *Secretary of State for India* (4), although the prerogative of the Crown is to be exercised in accordance with definite and well-established principles, s. 58 has been enacted in order to save the Crown from litigation to which but for such a provision, it would be exposed, that is to say, the Crown cannot be compelled by Courts of law to act in accordance with those principles, however, well settled they may be. The question assumes an entirely different aspect when the matter passes out of the region of ethics and state policy into the domain of law. When the obligations of the state have taken the form of an arrangement which Courts can recognise, the bar of s. 58 ceases to have operation.

In my opinion, therefore, the plaintiff is entitled to the declaration that the defendant cannot collect more than two annas per acre in respect of the *kumris* which are the subject of this suit.

There remains only the question of the recovery of the amounts actually paid. The appellant's learned Vakil concedes that the payments made in 1918 are barred by limitation. In regard to payments of 1919, it is sufficient to say that I am willing to follow *Srinivasa Aiyangar* v. *Secretary of State for India* (2), where it was held that the period of two months (the period of notice) should be deducted in computing limitation. If this period is deducted all the payments of 1919 are in time and the plaintiff will be entitled to a decree to that extent. In the result, the decree of the lower Appellate Court is set aside and the plaintiff's suit is decreed with full costs here and in the Courts below to the extent indicated above.

V. N. V.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 1370 OF 1921.

September 15, 1925.

Present:—Mr. Raymond, A. J. C.

SULLEMAN AND ANOTHER—PLAINTIFFS

versus

ESSO AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 99, O. XXXIV, r. 1—Transfer of Property Act (IV of 1882), ss. 72, 76—Limitation Act (IX of 1908), Sch. I, Arts. 134, 148—Plaint not signed by plaintiff—Procedure—Mortgage—Redemption suit—Person in possession, whether can be impleaded—Mortgagee in possession duties of—Transfer by mortgagee—Transferee taking with notice of mortgage—Adverse possession—Limitation.

The relief claimed in a suit for redemption is against the mortgaged property, and persons who are in possession of the property and claim an interest therein may be impleaded as parties thereto. [p. 89, col. 2]

When a mortgagee takes physical possession of the mortgaged property during the continuance of the mortgage, rightly or wrongly, with, without or even against the consent of the mortgagor, his act will not be allowed to limit the right of redemption and the law will treat his possession as that of a mortgagee. Limitation for a suit for redemption in such a case would still be 60 years under Art. 148 of Sch. I to the Limitation Act. [p. 90, col. 2.]

Awdh Sing v. *Nanhai*, 46 Ind. Cas. 872, relied upon.

A suit by a mortgagor to recover possession of the mortgaged property from an alienee of the mortgagee who has taken with notice of the mortgage is governed by Art 148 and not by Art. 134 of Sch. I to the Limitation Act. [p. 91, col. 1.]

Vishvanath Bhiva Raul v. *Tukaram Vithu*, 89 Ind. Cas. 189; 27 Bom. L. R. 661; (1925) A. I. R. (B.) 417, relied upon.

Both ss. 72 and 76 of the Transfer of Property Act refer to a mortgagee coming into possession of the mortgaged property, not necessarily at the time of the mortgage but during its continuance, and affirm the duties and obligations resting on the mortgagee when he thus comes into possession of the mortgaged property. His possession is recognised as that of a mortgagee alone. [*ibid*]

The absence of the signature of a plaintiff on the plaint is a formal defect, not affecting the merits of the case or the jurisdiction of the Court and may be condoned under s. 99 of the C. P. C., or may be cured at any time. [p. 91, col. 2; p. 92, col. 1.]

Mr. *Dipchand Chandumal*, for the Plaintiffs.

Mr. *Goverdhandas A. Kikla*, for Defendants Nos. 1 and 2.

JUDGMENT.—This suit was originally filed by one Sulleman son of Hashim, and was for the redemption of certain immoveable property described below which was alleged to be in the possession of the defendants, and for accounts.

Hashim, the father of Sulleman, owned a plot of land with buildings thereon bearing Survey No. 12 Survey Sheet K-12

situated in Lyari Quarter, Karachi. Attached to this building there was an oil mill with its accessories which were also owned by Hashim, and which he mortgaged with Motiram Hariram and Issermal the son of Motiram, by a mortgage-deed, dated December 20, 1878. A certified copy of this mortgage-deed has been produced, and is Ex. 10 in the case. Again on 16th January 1879, the said Hashim mortgaged with the same mortgagees the plot of land described above with the building thereon, with the equity of redemption in the moveables referred to in Ex. 10 in consideration of the sum of Rs. 1,000. A certified copy of this mortgaged-deed has also been produced, and is Ex. 11 in the case. The plaint recites that the mortgage of immoveable property was with possession, but this is not accurate. The plaint alleges that in pursuance of the mortgage-deed of 1879 the mortgagees Motiram and Issermal took possession of the building mortgaged with them. Within a couple of months after the execution of the mortgage-deed of 1879, Hashim left Karachi and proceeded to Africa, where he died about 30 years back. The plaint states that he left four sons, all of whom are dead except the plaintiff, Sulleman. By a deed, dated March 10, 1880, Motiram and Issermal assigned their interest in the mortgage-deed, Ex. 11 to one Kaderdino, since deceased, the husband of defendant No. 2 Fatmabai, and handed over possession of the property mortgaged to Kaderdino. Kaderdino died about 20 years ago leaving defendant No. 2 as his sole heir. Defendant No. 1 was Isso, a brother of Kaderdino, he died since the institution of the suit, and his sons were brought on the record as his legal representatives. Defendant No. 3 is Ismail son of Sattardino deceased, a second brother of Kaderdino. Both claim an interest in the estate of Kaderdino. The plaintiff, Sulleman, who resides in Africa came to Karachi in 1921, and called upon the defendants for redemption of the mortgaged property and for settlement of accounts and mesne profits, but they refused to do so. He thus filed the present suit by his duly constituted attorney, Umer son of Haji Ahmed.

It is admitted that the plaintiff's family are Cutchi Memons, and, therefore, governed by Hindu Law in matters of inheritance and succession.

After the suit was filed, a preliminary objection was taken that all the legal representatives of Hashim had not been brought on the record. The plaintiff was accordingly granted leave to amend his plaint, and he did so by adding as co-plaintiff with himself Abdul Rahiman son of Ayoob, his deceased brother.

The written statement of defendant No. 2 is virtually a denial *in toto* of all the allegations contained in the plaint. The mortgage-deeds of 1878, 1879 and the assignment deed of 1880, are all denied, and the plaintiffs are put to proof of them. It is also denied that Hashim was the owner of the property in suit, and it is said that Kaderdino purchased it. The defendant No. 2 states that she and her husband, Kaderdine, have been in possession of this property for over 40 years adversely to the plaintiffs, and the suit is, therefore, Statute barred. It is also urged that the suit is not maintainable as framed inasmuch as the plaintiff being out of possession, must sue for possession, and pay Court fees accordingly. It is denied that Esso and Satardino ever had any interest in this property, and neither defendant No. 1 nor 3 have any claim to any share therein.

The written statement of defendant No. 1, Esso, filed when he was still alive, is very brief. He contents himself with denying that he had any interest in the property in suit, but at the same time he adopts the written statement of defendant No. 2.

By this written statement, the defendant No. 3 claims to be the heir of Kaderdino, and states that defendant No. 2 is entitled to maintenance only. He admits he is in possession of the property in suit.

A supplementary written statement was filed by some defendants after the plaint had been amended, and by this they urge that all the legal representatives of Hashim are not on the record, and go the length of denying that Sulleman is the son of Hashim.

The Pleaders for the respective parties submitted a long array of issues for decision by the Court; some were framed before the plaint had been amended and some after the amendment.

The issues framed both before and after the amendment are the following.

Original Issues :

1. Is the suit time-barred?
2. Is the suit barred by adverse possession?
3. Is the plaint insufficiently stamped?
4. Is the suit not maintainable as framed?

5. Did Hashim own a plot of land bearing Survey No. 12 Sheet K-12?

6. Did Hashim mortgage his moveables with Motiram and Ismail as alleged in para. 2 of the plaint?

7. Did Hashim mortgage plot No. 12 and equity of redemption, with possession as alleged in para. 3 of the plaint?

8. Is the plaintiff alone interested in the property in suit. If so, what is the consequence thereof?

9. Did Motiram and Issermal transfer their interest in the mortgage-deed dated January 16, to Kaderdino and handed over possession of the property as alleged in para. 6 of the plaint?

10. Are defendants Nos. 1 and 3 interested in the property left by Kaderdino?

11. Has the plaintiff subsisting title to the property in suit?

12. Is the claim to the property in suit barred by adverse possession of Kaderdino and his wife?

13. What amount, if any, is the defendant No. 2 entitled to recover before redemption of property?

14. To what relief, if any, is the plaintiff entitled?

15. General.

Supplementary issues :

1. Has Hashim left any heirs. If so, are they necessary parties to the suit?

2. Is Sulleman son of Hashim ? If not what is the effect?

3. Is the plaintiff No 2 properly represented and the plaint properly signed ? If not, can the suit lie ?

4. Are the plaintiffs bound to prove their possession within 12 years from the date of the suit ?

The suit, as I have observed, was filed by Sulleman through his agent Umar Haji Ahmed. A general power-of-attorney dated May 12, 1920 Ex. 16 was executed by Sulleman in favour of Umer Haji Ahmed. By this power of attorney Umer was empowered to file all suits for the recovery of the estate of Hashim, and the present suit had been specifically referred to. The validity of this power-of-attorney has not been disputed.

Now, that the property in suit belonged originally to Hashim is indisputable. Umer Haji Ahmed, a relation of Hashim, aged about 60 years, has stated in his evidence that the property in suit belonged to Hashim, and I was purchased by him from a Borah, Alias Ahmed, a venerable man of 70 years of age, states from his personal knowledge that the house in suit was the property of Hashim, and that he had mortgaged it with Motiram and Issermal. This evidence has not been rebutted, nor has there been cross-examination directed against the allegations of these two witnesses that the property in suit was the property of the deceased Hashim.

Equally, there is not a vestige of a doubt that this property was mortgaged with Motiram and Issermal. The mortgage-deed of 1878 is a mortgage of certain moveables with Motiram and Issermal. The mortgage-deed, Ex. 11 of 1879, clearly recites the mortgage with Motiram and Issermal of the house in suit. The consideration shown is Rs. 1,000 payable within a period of two years, and the rate of interest is 2 per cent. per mensem.

It was contended that the mortgagees should have been parties to this action. Both Motiram and Issermal are dead, and there is no satisfactory evidence as to their having any legal representatives. But even if there were any, I do not think they are necessary or even proper parties to this suit. The plaintiffs' relief is against the mortgaged property, whoever may be in possession of it, and he had rightly impleaded the parties to this suit the persons who he alleges have an interest therein.

Two important questions now arise for determination. As I have observed, the property in suit was mortgaged without possession, but there is no doubt that Motiram and Issermal did acquire possession of it, and that they transferred their possession to Kaderdino, the husband of defendant No. 2 by a deed, dated March 11, 1880, Ex. 12. This document plays a very important part in this case in view of the main defences to this action, and it is necessary to consider it in some detail. There is no doubt as to its execution. It first refers to the mortgage-deed executed in 1879, the registration of which is admitted by Hashim in favour of Motiram and Issermal, mortgaging the property in suit. It also refers to the mortgage of 1878, Ex. 10, by which various moveables had been pledged with Motiram and Issermal. The latter filed a suit in the Small Cause Court for the recovery of the amount due on Ex. 10, and after obtaining a decree attached and sold the moveables and realised there-

from a sum of Rs. 483-11-6, the consideration in Ex. 10 being Rs. 500 only.

The following paragraph in Ex. 12 is of considerable importance:

"4. That the plot No. 14 mortgaged hereby is in our possession since last 12 months, and we have rented it on our behalf to Valiji Moosaji. Now we have sold our right and interest in the above mentioned mortgage-deed, plot No. 14, and other mortgaged property except that which is disposed of to Kaderdino son of Soomar for a sum of Rs. 150. We have received the consideration thereof owing to the execution of this sale-deed, I have handed over to the above mentioned purchaser, Kaderdino son of Soomar, the mortgage-deed, No. 31, possession of plot No. 14, and the sale-deed, dated 12th July 1879, in accordance with which plot No. 14 was purchased by Hashim son of Ali from Lookmanji son of Ismailji. He has received them after agreeing to the same, and he had taken possession thereof. All our rights which we had on the mortgaged property, and those for recovering the principal amount and interest thereon, now belong to Kaderdino son of Soomar".

Exhibit 12 has been duly registered. It appears to me to clearly establish the following points (1) Hashim was the owner of the property mortgaged (2) he mortgaged it with Motiram and Issermal in 1879, by a registered document Ex. 11, (3) they obtained possession of the mortgaged property within 1½ months after the execution of the mortgage-deed Ex 11, (4) they transferred their rights under the mortgage-deed including the right to recover the sum of Rs. 1,000 due by Hashim to Kaderdino alone in consideration of a sum of Rs. 150 and placed him in possession of the property.

Now, as mentioned above, Hashim died in Africa. He apparently left for this place shortly after the execution of Ex. 11. He had not discharged any part of the debt due to the mortgagees under the mortgage-deed, Ex. 11, and apparently being unable to do so, the probabilities seem to be that he handed over possession to the mortgagees, *qua*, mortgagees, to enable them to realise, if not the principal, at least the interest out of the rents and profits accruing from the mortgage property. It was contended by Mr. Kikla for the defendants that Motiram and Issermal were trespassers and illegally acquired possession of the property. This argument was advanced with the sole object of attempting to prove that Motiram and Issermal and their successors have been in adverse possession of this property ever since 1880. But this argument has no substance in fact. I have not the slightest doubt that the impecunious Hashim finding all the paraphernalia of his oil mill attached, and his residential house burdened with a heavy debt emigrated to fresh fields to retrieve his fortunes, and before doing so, he handed over possession of the mortgaged property to the mortgagees. By the assignment-deed Motiram and Issermal have clearly recognized themselves as mortgagees, and they have stated in this document in unmistakeable language that what they are assigning to Kaderdino were their rights in the property in suit, *qua* mortgagees. It is perfectly clear to my mind that Ex. 12 is not a sale out and out to Kaderdino, and hence the latter could not have a better right to the property in suit than his assignor, and could not, therefore, under any circumstances be regarded as owner of the property in suit. But even on the assumption that Motiram and Issermal wrongfully took possession of the property after the departure of Hashim for Africa, they could not by their unilateral act alter their character as mortgagees, and thus curtail the period of 60 years allowed for redemption of mortgaged property, by alleging adverse possession for more than 12 years. In *Awdh Singh* v. *Nanhai* (1) it was observed in the body of the judgment at page 874* as follows:

"It was urged, and I think rightly urged, on behalf of the respondents, that when a mortgagee...takes physical possession of the mortgaged property, rightly or wrongly, with, without or even against the consent of the mortgagor, his act will not be allowed to limit the right of redemption and the law will treat his possession as that of a mortgagee".

This is precisely the case here. However, Motiram and Issermal may have come by the possession of the property during the continuance of the mortgage, the law would still regard them as mortgagees, and by Ex. 12, they have themselves admitted their position to be that of mortgagees. It must further not be overlooked that Kaderdino did not come

(1) 46 Ind. Cas. 872.

*Page of 46 Ind. Cas.—[*Ed.*]

into possession of the property in suit without notice of the restricted rights which the mortgagees, Motiram and Issermal, had in it. He is a party to Ex. 12 and hence must have been aware that he was not acquiring an absolute right to the property in suit, but was assigned only the mortgagee's rights as mortgagees.

Both ss. 72 and 76 of the Transfer of Property Act refer to a mortgagee coming into possession of mortgaged property, not necessarily at the time of the mortgage, but during its continuance, and affirm the duties and obligations resting on the mortgagees when they thus come into possession of the mortgaged property. Their possession is recognised as that of mortgagees alone.

Mr. Kikla for the defendants relied on Art. 134, Indian Limitation Act; but as pointed out in *Vishvanath Bhive Raul* v. *Takaram Vithu* (2), "Art 134 of the Indian Limitation Act, 1908, does not apply to a suit by a mortgagor to recover possession of the mortgaged property from an alienee of the mortgagee who has taken with notice of the mortgage. Such a suit is governed by Art. 148 of the Act."

I now proceed to consider the various issues in the case:

Issue No. 1. I hold that the suit is not time-barred, and that Art. 148, Indian Limitation Act applies. The mortgagees could not be regarded in adverse possession of the property in suit, and Kaderdino who came into possession with full notice of the mortgage could not be in a better position than that of his transferor. Further, it has not been established that either Hashim or the plaintiff had any knowledge of the adverse possession. Sulleman was born in Africa, and he came to Karachi only in 1921.

My finding on issue No. 2 follows that on issue No. 1. No adverse possession has been proved.

Issue No. 3. The plaintiff has valued his relief at Rs. 200. The suit is for redemption and re-conveyance of the mortgaged property, and for such amount 'as may be due to him on a settlement of the account. He believes that on the account a sum of Rs. 500 will be found due to him, and is prepared to pay the Additional Court-fees thereon. The Court-fees for the recovery of the property mortgaged have been duly paid, and as far as the suit for an account is concerned, the plaintiff is to value the relief which he seeks under s. 7 of the Court Fees Act, cl. iv, sub cl. (*f*). My finding on issue No. 3, therefore, is that the plaint is sufficiently stamped.

Issue No. 4. A few observations on this issue are necessary. It appears that Hashim had four sons. Sulleman the plaintiff, Adam, Ayoob and Ali. Adam predeceased his father leaving no son but two married daughters, one of whom is dead. Aycob died after his father leaving a minor son Abdul Rahiman, the co-plaintiff in this suit. As to Ali nothing seems to be known of his present existence or his whereabouts. Umer Ex. 9, though he mentioned Sulleman, Ayoob and Adam as the sons of Hashim, did not refer to Ali at all. Apparently, he died many years back, and no one seems to know whether he is alive or dead at the present moment or even when the suit was filed. The parties, as I have observed, are Cutchi Memons, governed by Hindu Law, in matters of succession and inheritance. Abdul Rahiman, therefore, was the only male heir in existance of Hashim besides Sulleman at the time of the institution of the suit. It has, however further been urged that the authority to file this suit was granted to Umar Haji Ahmed by Sulleman alone, and on his behalf, and consequently, after Abdul Rahiman had heen brought on the record as a co-plaintiff, Umer Haji Ahmed had no power to sign and verify the plaint as he has done on behalf of the minor Abdul Rahiman. For the plaintiff it was argued that even if this be regarded as a defect in the plaint, Sulleman's signature to it could be procured if time were given. It is perfectly true that the power-of-attorney was executed by Sulleman on his behalf alone in favour of Umer Haji Ahmed. But this power authorises the agent to take all such steps as are necessary for the recovery of the estate left by Hashim, and Sulleman, though it was he alone that is the executant of the power-of-attorney, attempted to re-acquire the property for the benefit of the heirs of Hashim. As I have observed above, the minor Abdul Rahiman lives with Sulleman, and the latter is his natural and actual guardian. Even if the power-of-attorney be restricted to Sulleman alone, the defect in the plaint could be cured by Sulleman signing it. Now I regard the defect as but formal,

(2) 89 Ind. Cas. 189; 27 Bom. L. R. 661; (1925) A. I. R. (B.) 417.

not affecting the merits of the case or the jurisdiction of the Court, and, therefore, I would condone it under s. 99, C. P. C. This suit was filed on September 22, 1921, and is now, therefore, four years old. I do not think after having concluded the hearing, I should postpone it merely for the purpose of formally securing the signature of Sulleman to the plaint. My finding, therefore, on the issue is that the suit is maintainable as framed.

Issue No. 5 has not been pressed by the defendants in view of the overwhelming evidence that the property in suit did belong to Hashim.

Issue No. 6 has not been equally pressed, as it cannot be denied that Hashim did mortgage the property in suit with Motiram and Issermal.

Issue No. 7. The property in suit was not mortgaged with possession at the time of the execution of the mortgage-deed, but during the continuance of the mortgage, possession was given to Motiram and Issermal.

Issue No. 8. My finding on this issue is that only Sulleman and Abdul Rahiman son of Ayoob are interested in the property in suit.

Issue No. 9 has, as the defendants' Pleader himself admitted, been established by Ex. 12. Motiram and Issermal transferred their right under the mortgage of 1879 to Kaderdino. In connection with Kaderdino's rights to this property, I may usefully refer to the written statement filed by his wife Fatmabai in Suit No. 1220 of 1920. This suit was one for partition filed by Ismail son of Satardino, defendant No. 3 in this case, against Esso, the brother of Kaderdino, and Fatmabai, the widow. By her written statement, the latter in para. 6 with reference to the property in the present suit stated as follows:

"This property has been acquired by defendant No. 2 and her deceased husband, Kaderdino, by adverse possession and transfer of mortgage interests therein by Motiram and Issermal to whom it had been mortgaged by the original owner Hashim Ali."

Issue No. 10. Both these defendants have adopted the written statement filed by Fatmabai. The evidence however, does not show that either the heirs of Esso or Ismail, the son of Satardino, have any interest in the property in suit. They were apparently joined as co-defendants as close relations of Kaderdino, and as they asserted an interest in the property in suit. The mortgages Exs. 10 and 11 and the assignment deed Ex. 12, refer to Kaderdino alone and I hold, therefore, that neither the defendant No. 1 nor defendant No. 3 have any interest in the property in suit.

From the previous findings I hold on issue No. 11 in the affirmative.

Issue No. 12 is answered in the negative.

Issue No. 13 will be referred to the Official Commissioner. He is to determine the amount due on the mortgage of 1879 with interest thereon at 2 per cent. per mensem on the sum of Rs. 1,000 from the date of the execution of the mortgage-deed. He will have to deduct from this sum the amount of Rs. 483-11-6 admittedly received by Motiram and Issermal as stated in Ex. 12, as also such rents and mesne profits of which defendant No. 2 has had the benefit or to which they are liable during the period she and her husband Kaderdino have been in possession of the property in suit.

Issue No 14. The plaintiff is entitled to a decree for redemption of the mortgaged property, and re-conveyance of it on payment of any amount that may be found due by the Commissioner.

With regard to the supplementary issues, my findings thereon are as follows:

Issue No. 1 has been already disposed of. The necessary parties are on the record.

Issue No. 2. There is not a title of evidence on the record in support of the allegation that Sulleman was not the son of Hashim, but that he is son of Hashim's wife by another husband. The evidence clearly establishes that Sulleman was the son of Hashim.

Issue No. 3. I have discussed this issue above. I hold the suit does lie.

Issue No. 4. In the negative.

Issue No 15. I reserve the question of costs till the return of the Commissioner's report. The Commissioner's report to be returned within fifteen days. The plaintiff has to deposit within three days the Commissioner's fee Rs. 30.

Z. K. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL No. 15 OF 1925.
September 14, 1925.
Present :—Mr. Wazir Hasan, A. J. C., and Mr. Simpson, A. J. C.
JAGAN NATH SINGH AND OTHERS—DEFENDANTS—APPELLANTS
versus
JAG JEWAN DAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110, O. XXI, r. 89—Transfer of Property Act (IV of 1882), s. 72 (b)—Appeal to Privy Council—Substantial question of law—Mortgages, prior and subsequent—Decree obtained on subsequent mortgage—Sale in execution—Prior mortgagee, whether can apply to set aside sale—Money paid by prior mortgagee to save property from sale, whether can be added to principal.

Whether a prior mortgagee in possession of the mortgaged property can apply under O. XXI, r. 89, of the C. P. C. to set aside an auction sale held in execution of a decree obtained by a subsequent mortgagee on a simple mortgage in a suit to which the prior mortgagee was not a party, and whether cl (*b*) of s. 72 of the Transfer of Property Act applies to such a sale are substantial questions of law within the meaning of s. 110 of the C. P C.

Application under ss. 109, 110, C. P C., for leave to appeal to His Majesty in Council.

Messrs. *Niamt Ullah* and *Ali Zaheer*, for the Appellants.

Mr. *H. K. Ghosh*, for the Respondent.

ORDER.—This is an application for leave to appeal to His Majesty in Council from the decree of this Court, dated the 6th April 1925,* affirming the decree of the Court of the Subordinate Judge of Fyzabad, dated the 10th August 1923.

It is admitted that the value of the subject-matter of the suit in the Court of first instance and also the value of the subject-matter in dispute on appeal to His Majesty in Council exceeds the amount of Rs. 10,000. The application alleges that the appeal involves a substantial question of law. The respondent does not accept the accuracy of this allegation. He argues that there is no substantial question of law involved in the appeal.

We are of opinion that the appeal does involve at least two substantial questions of law. The one is as to whether a prior mortgagee in possession can apply under O. XXI, r. 89, of the C. P. C., 1908, to set aside a sale where such a sale has taken place in pursuance of a decree obtained by a subsequent mortgagee of a simple mortgage in a suit to which the prior mortgagee was not a party. The second substantial question of law in our opinion is as to whether cl. (*b*) of s. 72 of the Transfer of Property Act, 1882, applies to a sale such as the one in the case before us. On these grounds we grant the leave prayed for. No order as to costs.

Z. K. *Leave granted.*

*See 87 Ind. Cas. 829—[*Ed.*]

RANGOON HIGH COURT.

CIVIL REGULAR No. 261 OF 1925.
September 7, 1925.
Present:—Mr. Justice Cunliffe.
S. CASSIM—PLAINTIFF
versus
K. S. M. M. ABDUL KADER—DEFENDANT.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, r. 52, O. XXXVIII, r. 10—Attachment before judgment, effect of—Creditor obtaining decree prior to that of attaching creditor—Priority between decree-holders.

A mere attachment before judgment does not invest the person at whose instance the attachment is made, with a preferential right to have his decree satisfied out of the property attached as against other decree-holders against the same judgment-debtor. [p. 96, col. 1.]

Where a plaintiff obtains an attachment before judgment of the defendant's property but before he obtains a decree another decree-holder having a decree against the same judgment-debtor applies for execution of his decree against the property held under attachment at the instance of the former, he is entitled to have his decree satisfied out of the property so attached in preference to the creditor at whose instance the property was attached before judgment. [p. 95, col. 1; p. 96, col. 1.]

FACTS appear from the following order of the Deputy Registrar, High Court, Original Side, dated 8th August 1925:—

The facts of this case are :—

Suleiman Cassim filed a suit, Civil Regular No. 261 of 1925, in the High Court against K. S. M. M. Abdul Kader on 4th June 1925, and on the same day obtained an order for attachment before judgment on Rs. 2,392-5-6 in the hands of M. E. Olla & Company and belonging to the defendant. In consequence of this attachment the sum was lodged in the High Court on the 26th June 1925. Suleiman obtained an order for his money-decree for Rs. 2,956-12-0 on the 9th July 1925. In the meantime one Janoo Husein sued the same defendant in the Small Causes Court, Rangoon, Civil Regular No. 1669 of 1925, on the 26th February 1925, on a pro-note and obtained an order for his money-decree on the 22nd April 1925, and in execution of that decree obtained from the Small Causes Court an attachment on the same funds in the hands of M. E. Olla and Co., to the extent of his decretal amount

viz., Rs. 1,995. His execution application is dated the 9th June 1925. The attachment was issued on the 23rd June 1925, M. E. Olla and Co. having already deposited the amount in their hands into the High Court a notice was issued on the 26th June 1925, by the Small Causes Court to the High Court under O. XXI, r. 52 of the C. P. C. for the attachment of the amount in *custodia legis*. Subsequently on the 29th June 1925 a letter was received by the High Court from the Small Causes requesting that Rs. 1,995 out of the funds in *custodia legis* might be paid into the Small Causes Court if there was no objection. To this Suleiman raised an objection urging his attachment before judgment and praying that he should be allowed to withdraw the whole amount. On the 14th July 1925, Janoo Husein also put in an application to this Court not in the prescribed form under O. XXI, r. 11 (2) but for a prayer for payment to him of Rs. 1,995 out of the amount in the hands of the Bailiff of this Court. On the 30th July 1925, Mr. N. N. Sen for Suleiman asked for permission to put in a formal application for execution under O. XXI, r. 11 (2) and I acceded to this prayer as it in no way altered the existing situation.

Mr. N. N. Sen for Suleiman asks either for the payment of the whole amount to him or at least for a rateable distribution.

Mr. S. C. Das for Janoo Husein asks for full satisfaction of his decree out of the funds in Court.

Section 73 of the C. P. C. does not apply to this case as this is not a case where several decree-holders have applied to the Court which holds the assets for execution, before realization of the assets. Mr. Sen's client had not obtained his decree when the assets were realized and Mr. Das's client has not up to date put in any application for execution in the prescribed form to this Court which holds the assets. The section is quite clear on this point and the rulings are quite definite. *e. g.*, *Pallonji Shapurji Mistry* v. *Edward Vaughan Jordon* (1) *Snikeena Katum* v. *Mahamed Abdul Aziz* (2) and numerous other decisions make it quite clear that the present one is not a case for rateable distribution under s. 73, C. P. C. And as both the learned Advocates agree with me on this point I need not go further into it. Mr. Sen contends firstly that the money deposited into Court by M. E. Olla & Co. are assets which cannot be attached by another creditor. He quotes *Dost Mahomed* v. *Subramian Chetty* (3) which states that the money paid into Court for a specific purpose under s. 73 or under O. XXXVIII, r. 2 is not available for rateable distribution among other creditors. I cannot agree with the learned Counsel in this contention. The authority he quotes is not applicable here. In that case the defendant was arrested before judgment and was released on his depositing the amount claimed and later on he confessed judgment. The amount was held to have been deposited for a specific purpose, *viz.*, for the release of the defendant and for satisfaction of the plaintiff's claim and, therefore, held as not liable to attachment by other creditors. But the present case is quite different Here the amount is deposited by a garnishee on order for attachment before judgment. There is no specific purpose in this deposit excepting that it restrains alienation of the funds in *custodia legis* till further orders of the Court. It does not either explicity or by implication confer upon the plaintiff any right or title to the funds until the attachment before judgment enures and becomes an attachment in execution and until the decree-holder applies for execution in the prescribed form under the proper section of the Code. Attachment before judgment does not give plaintiff any right to preferential treatment over other creditors. It is in no sense an application for execution. It does not in any way create any charge or lien in favour of the plaintiff on the funds in the hands of the Court. All it does is to afford a security to the plaintiff that the funds shall not be disposed of by the defendant or the garnishee without the orders of the Court.

Mr. Sen further contends in the alternative that the provisions applicable to the present case are contained in O. XXI, r. 52 which deals with the attachment of a fund in the custody of a Court and the determination of the rights of rival claimants thereto. He states that where a fund in Court has been attached by several creditors of the same judgment-debtor none of the attaching creditors is entitled to pre-

(1) 12 B. 400; 6 Ind. Dec. (N. S.) 752.
(2) 29 Ind. Cas. 239; 38 M. 221.
(3) 29 Ind. Cas. 714; 8 Bur. L. T. 22.

ferential treatment by reason of his attachment as the attachments create no charge or lien upon the fund as long as it is in *custodia legis*. The Court should apply the rules of justice, equity and good conscience in the determination of the relative rights of the creditors who wish to proceed against the fund in satisfaction of their decrees. On these grounds he asks for a rateable distribution. He cites *Thakurdas Moti Lal* v. *Joseph Iskender* (4). I agree with him so far as the enunciation of the above proposition of law goes. There are other rulings also such as *Suikeena Katum* v. *Mahomed Abdul Aziz* (2) and the Privy Council decision in *Raghunath Das* v. *Sundar Das Khetri* (5) bearing on the same point and tending towards rateable distribution under O. XXI, r. 52 on principles of justice, equity and good conscience. But the cases are not applicable here. In all these cases the rival claimants were all decree-holders having equal legal status of uniform legal maturity. The question in these cases was the determination of the relative rights of rival decree-holders against the same judgment-debtor. It was not a question of an attaching creditor before judgment on one side and of a decree-holder in execution on the other. In the present case before me the contending claimants are a decree-holder in execution and an attaching creditor before judgment, each differing from the other in legal status and in legal maturity of their claims. Equities can only be equal when parties are on equal footing in legal development and determination. It is true that between decree-holders themselves priority of attachment gives no priorty of title. But between an attaching creditor before judgment and a decree-holder in execution the case assumes quite a different aspect Order XXXVIII, r. 10 clearly provides for the determination of the relative rights of a creditor attaching before judgment and a decree-holder in execution. It states: "Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any persons holding a decree against the defendant from applying for the sale of the property...in execution of such decree." Here of course there was to be no sale. But that does not alter the position. The question that arises here is what was the actual position and what were the rights of the two rival claimants on the date, the 29th June 1925, when the Small Causes Court asked for payment of Rs. 1,995 for Janoo Husein. On that date Janoo Husein was entitled to have his decree satisfied out of the money in *custodia legis*. It was already under his attachment. The Court that passed the decree had made an order directing payment to him. He was entitled to receive the same. Suleiman on the other hand had not yet obtained his decree and was far away from execution. It was a long way off from his attachment before judgment including all process incidental thereto, to his formal application for execution of his decretal rights. He could not have deprived Janoo Husein on that date of his right to get the money. Had Suleiman already obtained his decree on the 29th June 1925 and had he applied for execution different equities might have arisen to entitle both to a rateable distribution on rules of justice, equity and good conscience. As it was on the 29th June 1925 attachment before judgment gave enough to nullify the effect of attachment in execution by his rival.

Following the decision in *Bisheshar Das* v. *Ambika Pershad* (6) I hold that Mr. S. C. Das' client is entitled to have his decree satisfied out of the funds in the hands of the Court and that the surplus should go to Mr. Sen's client. As it was no fault of Mr. Sen's client that he could not keep peace with his rival in the legal race and having in view the fact that he was the first to attach the money I do not think I can be justified in mulcting him in costs.

Each party will bear its own costs.

Mr. *N. N. Sen*, for the Plaintiff.

Mr. *S. C. Das*, for the Defendant.

ORDER.—This is an appeal from a decision of the learned Deputy Registrar in which he gave preference to a decree-holder of the Small Cause Court against the interest of the decree-holder of the High Court. The High Court decree-holder had obtained an attachment of some property belonging to a person he was suing and has got that money paid into Court. This news of money having been paid into Court came to the ears of the Small Cause

(4) 41 Ind. Cas. 516; 44 C. 1072; 25 C. L. J. 595; 21 C. W. N. 887.

(5) 24 Ind. Cas. 304; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M L. T. 353; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 134; 42 C. 72; 41 I. A. 251 (P. C).

(6) 29 Ind. Cas. 622; 37 A. 575; 13 A. L. J. 732.

Court decree-holder and he put in his attachment so that we have two attachments, one by the holder of the decree of the Small Cause Court and other by the man who subsequently became, it is true, a decree-holder of the High Court; but, at the time the Small Cause Court decree-holder had put in his attachment, the party who originally obtained the money was not holding a decree. The question is, should the same money be divided rateably or was the learned Deputy Registrar right in putting the Small Cause Court decree-holder in preference to the High Court-decree-holder? In my opinion the circumstances of this case are such as are contemplated in O. XXXVIII, r. 10. It does seem at first sight to be exceedingly hard that a man who has taken steps to secure an asset should be deprived of the benefit of what he has done in part, at the same time there is no doubt in my own mind that a mere attachment does not invest the person making the attachment with a preferential right. The language of the rules is quite clear and has been dealt with in a case decided by the Allahabad High Court which seems to be absolutely on all fours with the present dispute.

Accordingly I think that the learned Deputy Registrar, although it took a very long time to deliver his judgment, was right. I must uphold his order and dismiss this appeal, with costs both here and in the Court below.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 113 OF 1925.

September 9, 1925.

Present:—Mr. Simpson, A. J. C.

SHAMS-UD-DIN—PLAINTIFF—APPLICANT

versus

GUR BAKHSH SINGH—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XLIV, r. 1—Appeal in forma pauperis—*Leave to appeal, refusal of—Revision.*

In dealing with an application for leave to appeal as a pauper under r. 1 of O. XLIV of the C. P. C., the Court has to proceed upon a perusal of the application and the judgment and decree appealed from. Where after perusing these documents the Court comes to a decision that the decree appealed from is not contrary to law and rejects the application, the High Court will not interfere with the decision in revision unless it appears that the Appellate Court has failed to exercise a judicial discretion in coming to such a conclusion.

Application for revision of an order of the District Judge, Lucknow, dated the 4th March 1925, reversing that of the Sub-Judge, Lucknow, dated the 27th September 1924.

Mr. A. *Rauf*, for the Applicant.

Mr. *B. N. Shargha*, for the Opposite Party.

ORDER.—This is an application under s. 115 of the C. P. C. in revision. The suit was one for share of profits brought by one partner against another in relation to a contract with the Railway Company. The plaintiff obtained a preliminary decree declaring that he was entitled to one-fourth of the profits. He then made an application to have an account taken and B. Indar Dayal, Pleader, was appointed Commissioner for that purpose. He submitted an account on the 3rd of July 1924. Both parties filed objections to this account and the Court directed the Commissioner to hear any other witnesses the plaintiff might produce. On 18th August 1924 the plaintiff filed an application in Court which is not before me. It appears that it was an application for the issue of a Commission to examine the accounts of the Railway Company. This application was rejected by the Court and as the plaintiff produced no other evidence and the defendant withdrew his objections, the original report of the Commissioner was accepted and became the basis of the final decree. The plaintiff then filed an appeal *in forma pauperis* in the Court of the learned District Judge, who dismissed the application under O. XLIV, r. 1, because he found no reason to think that the decree was contrary to law etc. It is in very exceptional cases indeed that the Court will interfere in revision with such an order. It would only be done where it appeared that the Court had failed to exercise a judicial discretion in coming to such a conclusion. I am asked now to set it aside on the ground that in fact the application of 18th August 1924, was wrongly rejected by the Subordinate Judge. I do not know whether it was rightly or wrongly rejected and I have no intention of enquiring. The District Judge was under no obligation to go into such a question as that. The proviso to O. XLIV, r. 1, is clear. The Court is to proceed upon a perusal of the applica-

tion and the judgment and decree appealed from. The Court evidently did persue these documents and came to a decision. I see no reason to believe that that decision was wrong, and even if I did think it wrong I would not interefere with it in revision. Jurisdiction has been exercised and there is no irregularity, material or otherwise, in the exercise of it. The application is dismissed with costs.

Z. K. *Application dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 4 OF 1924.

August 27, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

L. T. PINTO—DEFENDANT—APPLICANT

versus

DR. N. R. SETHNA—PLAINTIFF—OPPONENT.

Bombay Rent (War Restrictions) Act (II of 1918), s. 13—Standard rent, finding as to, whether binding on persons not parties—Procedure.

The finding of a Court under s. 13 of the Bombay Rent (War Restrictions) Act as to the standard rent of particular premises is not a judgment *in rem*. The fixing of the standard rent is a matter which must be decided between the parties to the suit on the evidence adduced by them.

Application to revise the judgment of the Judge of the Small Cause Court, Karachi, dated the 15th February 1924, in Suit No. 374 of 1924.

Mr. *Pahlajsing B. Advani*, for the Applicant.

Mr. *A. F. Billimoria*, for the Opponent.

JUDGMENT.—This was a case of a dispute between a landlord and a person occupying a portion of his house. There seems a good deal more behind this case than what has come out in the Court below but that need not concern us at present.

The question which the learned Small Cause Court Judge had to decide was "what was the standard rent of the premises". He fixed the standard rent at Rs. 90. He did so not after hearing the parties or after taking evidence in the present case but acting on his decision in a previous case. That case was a suit by the present opponent that is to say the landlord against Mahomed Bux. Mahomed Bux was not present and that case, therefore, proceeded *ex parte* and in that case on due consideration the learned Small Cause Court Judge found as above. He considered himself bound by that finding or at any rate he considered that in view of the similarity with that finding it was not obligatory for him to re-consider the question in the present trial. But we think that view of the learned Judge was wrong for there is nothing in the Rent Act that makes the finding of a Judge as to what the standard rent of particular premises is what might be called a judgment *in rem*. The fixing of the standard rent appears to be a matter to be decided between the parties. If the applicant had evidence to show that the standard rent as fixed in the case of Mahomed Bux was excessive he should have been allowed to call it and the standard rent ought to have been fixed after due hearing. This is perhaps more obligatory inasmuch as the case of Mahomed Bux was *ex parte*.

We think, therefore, that we should set aside the order of the learned Judge of the Small Cause Court and remand the case for decision according to law with costs of this application only.

P. B. A. *Order set aside: Case remanded.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 74 OF 1924.

September 14, 1925.

Present:—Mr. Dalal, J. C.

ABDULLAH KHAN—DEFENDANT—APPELLANT

versus

Thakur AMIR HAIDER KHAN—PLAINTIFF—RESPONDENT.

Adverse possession—Landlord and tenant—Gift, invalid, to tenant, effect of—Possession, nature of, alteration in.

Where a tenant holding land on payment of rent continues to hold it without any change in area or rent, the mere fact that an invalid gift is executed in his favour by a disqualified proprietor of the holding without the sanction of the Court of Wards, does not operate to alter the character of the possession and to convert it into adverse possession.

Varada Pillai v. *Jeevarathnammal*, 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 46 I A. 285; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.), distinguished.

First appeal against the judgment and decree of the Additional Sub-Judge, Rai Bareli, dated the 25th August 1924.

Messrs. *M. Wassim* and *Sharaf-uz-zaman*, for the Appellant.

Mr. *Niamatullah*, for the Respondent.

JUDGMENT.—This appeal was argued as follows. The plaintiff *taluqdar* sued in the Revenue Court to eject the defendant as an ordinary tenant whereupon he resisted the suit on the ground that he held the land under a deed of gift dated 26th March 1886, executed by the plaintiff's predecessor-in-interest in favour of the defendant's father Razamand Khan. The Revenue Court refused to eject the defendant whereupon the plaintiff *taluqdar* sued in the Civil Court for a declaration that the defendant was a tenant of the land and not an under-proprietor. This declaration was granted by the Additional Subordinate Judge of Rai Bareli.

In appeal the defendant's learned Counsel granted that the deed of gift was not effective by reason of the then *taluqdar* being disqualified proprietor, the *taluqa* being under the management of the Court of Wards. At that time the provisions applicable were those of s. 173 of the Oudh Revenue Act (XVII of 1876). They corresponded to s. 37 of the Court of Wards Act IV of 1912. The *taluqdar* had no right at the time to create without the sanction of the Court of Wards any charge upon his interest in the *taluqa* or any part thereof. No such sanction was obtained for the gift.

The argument then proceeded that though the deed of gift was invalid, it started the possession of Razamand Khan and from that date it must be considered to be adverse to that of the proprietor. Reference was made to the Privy Council ruling in the case of *Varada Pillai* v. *Jeevarathnammal* (1). In that case the gift was invalid as not being made by a registered deed, so the recitals were not used as evidence of a gift. The recitals, however, were accepted as explaining the nature and character of the possession thenceforth held by the person in whose favour the invalid gift was made.

There is, however, a clear distinction. It lies in this that in the Privy Council case the possession started with the transfer while in the present case Razamand Khan was previously tenant of the land and there was no change in the possession by virtue of the deed of gift. It is not pointed out that the area of the land held by Razamand Khan was smaller or that rent paid by him was larger and that there was a real change to the knowledge of the Court of Wards. Razamand Khan was a tenant of the land on payment of rent and continued to be such tenant of land on payment of rent. The execution of the deed of gift was invalid and started no adverse possession in his favour. It was admitted before me that prior to the deed of 1886, there was a deed of perpetual lease in his favour of 1884. The defendant's own written statement of 7th July 1922 in the rent suit (Ex. 7) explains the situation. According to him his father was a tenant and his position was improved in 1884 by a deed of perpetual lease and subsequently in 1886 by the deed of gift. The possession existed from before and I hold that the invalid deed of gift made no change in the character thereof. In the revenue papers Razamand Khan and after him the defendant continued to be recorded as tenant. In the account books of the plaintiff, which were for some years written by the defendant his servant, no distinction was made between the defendant and other ordinary tenants of the land. The property was released by the Court of Wards in 1896, and subsequent to that until the year 1915 we discover no assertion on the part of the defendant or his father to the effect that they were holding as under proprietors. The assertion of adverse title in 1915 was made within the period of limitation.

No adverse right of the defendant is established and I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 53 Ind Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 46 I. A. 285; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 944 OF 1924.

April 27, 1925.

Present :—Mr. Justice Spencer.

K. R. RADHAKRISHNA IYER—JUDGMENT-DEBTOR—PETITIONER

versus

VINAYAKASWAMIAR MINOR BY GUARDIAN T. A RAMACHANDRA RAO—DECREE HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. IX,

r. 13—Ex parte *decree, execution of—Objection to jurisdiction of Court which passed decree, whether can be taken—Remedy.*

An objection to the jurisdiction of the Court that tried the suit is not one of the questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree which are allowed by s. 47 of the C. P. C., to be dealt with in execution

Zemindar of Ettiyapuram v. *Chidambaram Chetty*, 58 Ind. Cas. 871; 43 M. 675 at p. 687; (1920) M. W. N. 460; 28 M. L. T. 75; 12 L. W. 217; 39 M. L. J. 203 (F. B.) and *Kalipada Sirkar* v. *Harimohan Dalal*, 35 Ind. Cas. 856; 44 C. 627 at p. 633; 24 C. L. J. 375; 21 C. W. N. 1104, relied on.

After the passing of an *ex parte* decree the only course open to a defendant who wishes to raise an objection to the jurisdiction of the Court that tried the suit is to apply under O. IX, r. 13 of the C. P. C. to have the *ex parte* decree against him vacated and the suit re-heard.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Sub-Collector Kumbakonam, in E. P. No. 75 of 1924, in S. S. No. 1 of 1921.

Mr. *N. S. Rangasami Aiyengar*, for the Petitioner.

Mr. *K. S. Sankara Iyer*, for the Respondent.

JUDGMENT.—An objection was raised to the execution of a decree in a suit for rent under Madras Act I of 1908, in which the petitioner did not appear and defend himself against the plaintiff's claim, the ground of the objection being that the Court had no jurisdiction to try the suit. The defence of want of jurisdiction is one that should have been raised at the trial of the suit itself. After the passing of the decree, the defendant's only course was to apply under O. IX, r. 13, C. P. C., to have the *ex parte* decree against him vacated and the suit re-heard. An objection to the jurisdiction of the Court that tried the suit is not one of the questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree which are allowed by s. 47, C. P. C., to be dealt with in execution [*vide Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (1) and *Kalipada Sirkar* v. *Hari Mohan Dalal* (2)] As the petitioner was in fact a party to the suit, though not represented at the trial, he cannot invoke the authority of the Privy Council decision in *Khiarajmal* v. *Daim* (3). The revision petition against the order of the Sub-Collector passed upon the decree-holder's execution petition is dismissed with costs.

V. N. V.

Petition dismissed.

(1) 58 Ind. Cas. 871; 43 M. 675 at p. 687; (1920) M. W. N. 460; 28 M. L. T. 75; 12 L. W. 217; 39 M. L. J. 203 (F. B.).

(2) 35 Ind. Cas. 856; 44 C. 627 at p. 633; 24 C. L. J. 375; 21 C. W. N. 1104.

(3) 32 C. 296; 32 I. A. 23; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 8 Sar. P. C. J. 734 (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.
FULL BENCH.

CIVIL REFERENCE No. 79 OF 1924.

November 10, 1924.

Present:—Mr. Kennedy, J. C., Mr. Raymond, A. J. C. Mr. Aston, A. J. C., Mr. Rupchand Bilaram, A. J. C., and Mr. Percival, A. J. C.

WALTER JOHN BROOKS—
PETITIONER

versus

NEE BARWICK *alias* MABEL ESTHER BROOKS AND ANOTHER—
RESPONDENTS.

Divorce Act (IV of 1869), ss. 3 (1), 17—Criminal Procedure Code (Act V of 1898), s. 4 (j)—Court of Judicial Commissioner of Sind, whether High Court—Decree nisi *passed on Original Side, whether can be confirmed.*

Per *Curiam (Rupchand, A. J. C., dissenting)*.—Since the amendment of the Cr. P. C. in 1923 the Court of the Judicial Commissioner of Sind has acquired jurisdiction under s. 17 read with s. 3 (1) of the Divorce Act to confirm a decree *nisi* of divorce passed by the Judicial Commissioner on the Original Side. [p. 105, cols. 1 & 2.]

Per *Rupchand, A. J. C.*—It is not the duty of the Court to make the law reasonable but to expound it as it stands. [p. 102, col. 2; p. 103, col. 1.]

Section 4 of the Cr. P. C. is an interpretation clause or section. Its legitimate function is to declare that certain words and expressions used in the Code, shall, wherever permissible, not only have the meaning which is generally attached to such words and expressions but such meaning as is assigned by the interpretation clause. It is not intended to annex to such words or expressions every incident which may seem to be attached to them by another Act of the Legislature. [p. 102, col. 2.]

Reference to the Full Bench on the point of jurisdiction.

Mr. *Lunidaram T. Bolkani*, for the Petitioner.

Mr. *T. G. Elphinston*, for the Respondents.

Mr. *C. M. Lobo*, *Amicus Curiæ*.

JUDGMENT.—This Reference raises matters of the highest importance and the question must, I think, ultimately be settled by legislation. In the meantime all we can do is to express our view of the law. That view may not commend itself to other Courts not Subordinate to us and if such Courts hold that our views are wrong and come to a different conclusion as to the necessary elements of confirmation of a decree *nisi* of divorce pronounced by the Judicial Commissioner of Sind then grave hardship may occur, but as I have said that is a matter for the Legislature. Up to the present all decrees *nisi* for divorce between parties residing in Sind have been pronounced by the Judicial Commissioner, who is for the purpose of the Act universal District Judge throughout Sind, and his decrees *nisi* have been made absolute or set aside by the High Court of Bombay. I may say in passing that there is now no conceivable reason why the District Judges of the Districts in Sind should not have the same jurisdiction as their brethren in the Presidency, and that if the Legislature acts, it might well prevent the hardship imposed on poor Christians, resident in remote Districts of this Province by being forced to apply in matrimonial causes to this Court. Any such legislation should of course put beyond doubt the confirmatory power of this Court which is the most natural Court to exercise it. After the decree *nisi* has been pronounced by the District Judge, that is, in this Court by the Judicial Commissioner of Sind it must go for confirmation to the High Court or Chief Court to whose original criminal jurisdiction the petitioner is subject if he were an European British subject—Act IV of 1869, ss. 17 and 3. That Court was certainly the High Court of Bombay by virtue of s. 22 of the Charter which gives ordinary criminal original jurisdiction to that Tribunal over all such persons who at the time of the promulgation of the Charter were subject to such original jurisdiction and who were not removed from it by competent legislative authority.

Since 1st September 1923 the Indian Legislature has abolished the Original Jurisdiction of the Bombay High Court over Europeans outside the limits of the Presidency Town or at least in Sind. Thus the Bombay High Court is no longer the Court referred to in s. 3, cl. (1) of Act IV of 1869. What then is the High Court now having jurisdiction?

I at first thought that Non-Regulation Province in that cl. (1) might mean a Province like Coorg or Baluchistan wholly unattached to any Presidency and not a Province like Sind which is attached to a Presidency, but that view was incorrect, *vide* s. 3, cl. (2) where Sind is specifically mentioned as a non-Regulation Province.

It would seem then that the High Court referred to must be the High Court which in Sind has original criminal jurisdiction over European British subjects resident in Sind. But that by virtue s. 4, cl. (*j*) of the Cr. P. C., that High Court is now the Court of the Judicial Commissioner. Therefore, I think that that Court is the Court which has power to deal with the decree *nisi* of the Judicial Commissioner.

But it may be said that it is true that the Court of the Judicial Commissioner of Sind has, no doubt, as a High Court full jurisdiction originally over European British Subjects resident in Karachi, and that the jurisdiction of the High Court of Bombay over such persons is by the Cr. P. C. in supersession of the Charter wholly quashed and annulled, and that thus the Court of the Judicial Commissioner is the High Court in respect of residents in Karachi, but that the same Court has no such original criminal jurisdiction over persons residing in Sukkur and that, therefore, the said Court has not jurisdiction to confirm decrees in such cases. To that it must be answered that the Legislature could not have intended that the residents of Karachi should be subject to one jurisdiction and one of less authority than the jurisdiction to which *mufassil* residents are subjected and that there is no reason to suppose that the law is so strange. For according to the scheme of the Divorce Act, Districts and, therefore, Sessions Divisions in Sind are not at all recognised, but for the purposes of the Act the whole Province is regarded as one District and one Sessions Division and the persons prosecuting divorce or other matrimonial petitions are forced to come to Karachi and submit themselves to the original jurisdiction of this Court

which jurisdiction would, if occasion arose, include the criminal original jurisdiction. Thus all persons concerned in matrimonial causes within this province may be said without violence to be subject to the original criminal jurisdiction of this Court. It would appear, therefore, *salva reverentia* that the High Court of Bombay has no longer jurisdiction to confirm the decrees *nisi* of the Judicial Commissioner and that that duty is now thrown on the Court of the Judicial Commissioner.

The thanks of the Court are due to Mr. C. Lobo who ably argued as *amicus curiæ* in favour of the view that the High Court of Bombay is still the confirming authority.

I regret that we are not unanimous but that regret is nullified by the pleasure I have derived from reading Rupchand Additional Judicial Commissioner's learned and interesting judgment. Moreover the fact that there is disagreement will gradually facilitate that operation of the legislative power which we all agree to be essential.

* * * *

DIFFERING JUDGMENT.

Rupchand Bilaram, A. J. C.—With due deference to the learned Judicial Commissioner and to my learned brothers who have concurred with him, I am unable to see my way to agree with them.

The jurisdiction exercised by the Judicial Commissioner of Sind in divorce proceedings is a special jurisdiction conferred on him by Act IV of 1869 as the District Judge of the Province of Sind, and a decree *nisi* passed by him requires confirmation by a High Court as defined by the Act.

Section 3 of the Act contains the following definition of "The High Court" and "The District Judge" for the purposes of the Act :—

"Clause (1) 'High Court' means, in any Regulation Province the Court there established under the Act of the 24th and 25th of Vict. C. 104;...and in any other non-Regulation Province and in any place in the dominions of the Princes and States of India in alliance with Her Majesty—the High Court, or Chief Court to whose original criminal jurisdiction the petitioner is for the time being subject, or would be subject if he or she were a European British subject of her Majesty".

"Clause (2) 'District Judge' means, in the Regulation Provinces—a Judge of a principal Civil Court of original jurisdiction; (in the non-Regulation Provinces, other than Sind and Burma—a Commissioner of a Division: In Sind the Judicial Commissioner of that province").

Section 4 of the Act provides that "the jurisdiction now exercised by the High Courts in respect of divorce *a mensaet toro* and in all other causes, suits and matters matrimonial, at the date of the passing of the Act shall subject to the provisions of the Act be exercised by such Courts and by the District Courts *and not otherwise*" except with regard to granting of marriage licenses. It expressly confers jurisdiction on the High Court and District Court as defined in that Act and excludes the jurisdiction of other Courts in British India.

When this Act was passed, the High Court of Bombay exercised original criminal jurisdiction over European British subjects residing in this Province which though a Non-Regulation Province, formed part of the Bombay Presidency. This Province then possessed a separate judiciary of its own constituted under Bombay Act XII of 1866 and in no way subordinate to the Bombay High Court. Bombay Act V of 1872 declared that the High Court of Bombay had at no time jurisdiction and was deemed never to have had jurisdiction over the Province of Sind, and further declared that nothing in that Act shall affect the criminal jurisdiction of the Bombay High Court so far as regards European British subjects.

From 1869 to 1923 the orders passed by the Judicial Commissioner of Sind under the Indian Divorce Act have been submitted for confirmation to the High Court of Bombay. It is contended at the Bar that the effect of the recent amendments of the Cr. P. C., has been to oust the original criminal jurisdiction of the Bombay High Court over European British subjects in the Province of Sind, and to vest such jurisdiction in the Court of the Judicial Commissioner of Sind, and that this Court is now constituted the High Court within the definition of s. 3 of the Indian Divorce Act. Reliance has been placed on the amendments of the definition of "High Court" in s. 4, cl. (*j*) and in s. 266 of the Cr. P. C. and the repeal of certain sections and the

amendment of certain other sections in Ch. XXXIII of the Cr. P. C. It is further urged that if this Court does not exercise its powers as a High Court to confirm the decree *nisi* passed in this case by the learned Judicial Commissioner of Sind it would not be open to the Bombay High Court to confirm the decree, and the divorce proceedings would be rendered futile.

In my opinion the only question for our consideration is, whether any or all of the recent amendments of the Cr. P. C. purport to constitute this Court as High Court of original criminal jurisdiction. If so it is a High Court within the meaning of s. 3 and has jurisdiction to confirm the decree *nisi*. If not, no argument of inconvenience, hardship, absurdity or *chaos* should prevail. Every Court of Justice in British India owes its establishment and jurisdiction either to an Act of Parliament or to an Act of the Indian Legislature made in pursuance of the powers given by Parliament. In the absence of such Parliamentary Legislative Authority, a Court is not competent to try a case or to perform any other judicial act. If this Court has no jurisdiction vested in it by Legislative Authority to confirm a decree *nisi*, it cannot assume jurisdiction merely because the High Court of Judicature at Bombay has, as alleged at the Bar, ceased to have original criminal jurisdiction over European British subjects and that the refusal to exercise such jurisdiction would under s. 17 of the Act be a dead letter so far as confirmation of decrees *nisi* passed by the Judicial Commissioner of Sind go. In *Percy* v. *Percy*(1), the Allahabad High Court declined to exercise appellate jurisdiction under s. 55 of the Act against an order passed by a District Judge in the Province of Oudh dismissing a petition for dissolution of marriage, notwithstanding the plea urged at the bar that there was no other Court to which an appeal could be preferred and that the refusal by the High Court to entertain an appeal would work a great hardship. As a matter of fact s. 55 of the Act is also said to be a dead letter in this Province and if s. 17 has similarly been rendered ineffective now, it is for the Legislature to remedy both the defects and not for us to arrogate to ourselves the powers of the Legislature or to assume jurisdiction which we do not possess. It is not our duty to make the law reasonable but to expound it as it stands *R.* v. *Forde* (2) and *Hirioma* v. *Hazarising* (3). Do then the amendments in question vest this jurisdiction on this Court?

It is said that the first part of cl. (*j*) of s. 4, Cr. P. C., confers this jurisdiction. It is difficult to concede to this proposition. Section 4 is an interpretation clause or section. Its legitimate function is to declare that certain words and expressions used in the Code shall wherever permissible, not only have the meaning which is generally attached to such words and expressions but such meaning as is assigned to such words and expressions by the interpretation clause. But by no means it is intended to annex to such words or expressions every incident which may seem to be attached to them by any other Act of the Legislature. *Umachurn Bag* v. *Ajadanissa Bibee* (4). Section 4 provides in express terms that the words and expressions defined in that section shall not have the meaning given in the definitions if a different intention appears from the subject or context. A High Court would ordinarily refer to a Chartered High Court, but cl. (*j*) of s. 4 attaches two other meanings to it in addition to its ordinary meaning and declares that a High Court, *firstly*, means in reference to proceedings against European British subjects or persons jointly tried with them, only certain specified Courts, and *secondly*, in other cases it means the High Court of criminal appeal or revision for any local area or where no such Court is established under any law for the time being in force such officer as the Governor-General in Council may appoint in this behalf. Neither the first part of this definition declares or constitutes any of the specified Courts as Courts of original criminal jurisdiction, or purports to confer such jurisdiction on them, nor does the second part of the definition constitute any Courts as the Highest Courts of appeals or revision. Whether any of the specified Courts is a Court of original criminal jurisdiction, or if any particular Court is the Highest Court of Appeal in any particular local area, we have to look for elsewhere. Bombay Act XII of 1866 as amended by

(1) 18 A. 375; A. W. N. (1896) 110; 8 Ind. Dec. (N. S.) 957.

(2) (1923) 2 K. B. 400; 92 L. J. K. B. 501; 17 Cr. App. R. 99; 128 L. T. 798; 27 Cox C. C. 406; 87 J. P. 76; 67 S. J. 539; 39 T. L. R. 322.

(3) 78 Ind. Cas. 583; 18 S. L. R. 19; (1925) A. I. R. (S.) 49.

(4) 12 C. 430 at p. 433; 6 Ind. Dec. (N. S.) 293.

Bombay Act I of 1906 declares the consitution of the civil and criminal Courts in Sind. Section 1 of the Act declares that.—

"There shall be for the Province of Sind ...a Court of Appeal in civil and criminal matters...and which shall be the District Court and the Court of Session of Karachi"—

It further provides that all the Regulations. Acts, Notifications and Rules applicable to the old Sadar Court of Sind which was substituted by the Court of the Judicial Commissioner shall apply to the Court of the Judicial Commissioner. Section 1-A of the Act declares *inter alia* that the Judicial Commissioner and each of the Additional Judicial Commissioners shall within the District and Sessions Division of Karachi exercise all the jurisdiction and have all the powers of a Judge of a District Court and of a Sessions Judge and that all Regulations, Acts, and Notifications applying to the Judge of the District Court or Sessions Judge of Karachi shall apply to each Judicial Commissioner and Additional Judicial Commissioner. Section 2 of the Act provides that there shall be in each District in the Province of Sind a District Court, and s 3 defines the jurisdiction of a District Court. There is no corresponding section defining the jurisdiction of the Sessions Court, such jurisdiction being defined by the Cr. P. C.

Prior to the Amending Act I of 1906 the Sadar Court exercised no original criminal jurisdiction but appellate jurisdiction both civil and criminal over all the other Courts in the Province of Sind. The Judge of the Sadar Court who was also appointed as the Judicial Commissioner of Sind in his capacity as such Judicial Commissioner exercised administrative control over the subordinate judiciary in the Province, the appointment of the judicial Commissioner to superintend the Judicial administration of Sind having been made by the Secretary of States' Despatch No. 1411, dated 16th June 1866, just about the time when Bombay Act XII of 1866 was passed declaring the constitution of the Courts in Sind.

The effect of the Amending Act of 1906 appears to have been to re-christian the two Courts by one name, *viz.*, the Court of the Judicial Commissioner of Sind, but to leave untouched the ordinary jurisdiction of the two Courts, the Court of the Judicial Commissioner exercising jurisdiction, *firstly*, as the Highest Court of Appeal for the Province of Sind, and, *secondly*, as the District and Sessions Court of Karachi District, each Judge of the Court being the District and Sessions Judge of the Karachi District.

In view of s. 1, cl. (2) of the Cr. P. C, which provides that nothing in the Code "shall affect any special or local law now in force, or any special jurisdiction or power conferred.....by any other law for the time being in force," can it be said that s. 4, cl. (*j*) as amended, was intended impliedly to affect the provisions of Bombay Act XII of 1866 or to confer jurisdiction on this Court as a High Court of original criminal jurisdiction in the Province of Sind, in subsitution of or in addition to the original criminal jurisdiction which each Judge of this Court possessed as a Sessions Judge in the Karachi District. In passing it may be noted that even if this Court were a High Court of original criminal jurisdiction for the District of Karachi it would have no jurisdiction to confirm this decree as the petitioner is said to reside at Rohri within the jurisdiction of the Sessions Judge of Sukkur.

The History of the criminal legislation in British India shows that the Cr. P. C., Act XXV of 1861 provided for the procedure of Courts of criminal jurisdiction not established by Royal Charter. It declared the constitution of the different provincial Courts and vested such Courts with jurisdiction to try certain offences. Section 19 of the Act provided that in any part of British India to which this Act was subsequently extended, the expression "Sadar Court" which under the Code exercised appellate and revisional powers, would denote the Highest Court of appeal or revision. The jurisdiction to try European British subjects referred to in the old Statutes as British subjects was vested in the then Supreme Courts, established by His Majesty in certain Presidency Towns.

Such Courts had original criminal juris diction to try European British subjects not only within their ordinary local civil limits but throughout the whole Presidency. (See Trevelyan on Civil Courts in India, page 18, s. 14 of the East India Act 1772 and s 67 of the East India Act, 1793 for the Supreme Court of Calcutta. The Government of India Act, 1800 for the Madras Supreme Court and s. 7 of the Indian Bishops and Courts Act 1823 for the Bombay Supreme Court.)

In 1866 the old Supreme Courts were substituted by the Chartered High Courts under the Indian High Courts Act, 1861 (24 and 25 Vict. C. 104) and the original criminal jurisdiction to try European British subjects outside Presidency Towns was transferred to such Courts under their respective Charters and by virtue of ss. 9 and 11 of the Act.

The Cr. P. C., Act X of 1872, which repealed Act XXV of 1861 consolidated the procedure applicable to all Courts whether established by Charter or otherwise. It declared the constitution of certain Provincial Courts of original criminal jurisdiction but left untouched the constitution of Courts established either under the Charter or any other special or local law. Prior to 1872 the High Court for the North Western Provinces and the Chief Court of Punjab were established and had been vested with original criminal jurisdiction over European British subjects. The expression "High Court" was used in the Code in different senses as meaning (*a*) the Highest Court of Appeal or Revision (*b*) a Court of the original criminal jurisdiction vested with jurisdiction to try offences committed within the local limits of Presidency Towns and (*c*) a Court vested with jurisdiction to try offences committed by European British subjects outside such limits.

The definition of High Court was accordingly divided in two parts in s. 4 of Act X of 1872. The first part specified Courts having both original and appellate criminal jurisdiction over European British subjects and provided that in certain sections of the Code where the expression High Court was used, it referred to such specified Courts. The second part of it reproduced the definition of "Sadar Court" in the Act of 1861 by substituting "The High Court" for the Sadar Court.

The Courts specified in the first part of the section were not vested with any new jurisdiction by being included in the definition but already possessed jurisdiction under the respective enactments under which they were established. When the Lower Burma Chief Court was constituted, s. 4, cl. (*j*) of the Code was amended so as to include this Court. But again the power to try European British subjects was vested in the Chief Court of Lower Burma under s. 8, cl. (1), sub-cl. (*b*) of the Lower Burma Chief Court Act VI of 1900.

The Criminal Law Amendment Act XII of 1923 known as the Racial Distinction Act aimed at removing the racial distinctions between Indian and Non-Indians with reference to trials before Courts of original criminal jurisdiction for offences committed outside the Presidency Towns by European British subjects. They may now be tried by the ordinary Courts, of Session. All the sections of the Code which provided for their exclusive trial by Courts higher than the Sessions Courts have now been repealed.

The right of appeal, reference or revision and particularly confirmation of a sentence of death, however, stands on a different footing. Some of the Courts exercising such powers are presided over by Single Judges and the Legislature though prepared to abolish racial distinction does not appear to have been disposed to vest such powers against European British subjects in Courts presided over by Single Judges though willing to extend the exercise of such powers to the Court of the Judicial Commissioner of Sind and Nagpur which by their constitution require two or more Judges to hear appeals and applications in revision. This desire evidently accounts for the retention and amendment of the definition of s. 4, cl. (*j*), part I so as to include the Courts of Judicial Commissioner of Sind, Central Provinces and Oudh, within the ambit of a High Court. This amendment, however, does not as already pointed out purport to confer any new jurisdiction on the Courts included in the amended definition. If, with reference to proceedings against European British subjects, an attempt were made to substitute in the different sections of the Code, the Court of the Judicial Commissioner for the expression "High Court" it would appear that only such sections as now deal with an appeal, revision, reference or confirmation of death sentence would permit of such substitution.

The definition of a High Court in s. 266 of the Code is limited to certain sections of Chs. XVIII and XXIII of the Code which provide for the procedure to be adopted at certain trials against both Indians and Non-Indians. This section was also amended in consequence of Act XII of 1923 and the Cr. P. C. (Amendment Act) XVIII of 1923

so as to include within its ambit the Courts of the Judicial Commissioners of Sind and of the Central Provinces and Oudh.

In *Khudabux* v. *Emperor* (5), a Full Bench of this Court considered the effect of the amendment of s. 266 of the Code with reference to the right of appeal of an Indian convicted at a trial by a Judge of this Court.

This Court was unanimously of the opinion that with regard to trials of Indians under Ch. XXIII of the Act, s. 266 had not the effect of transforming a Judge of this Court into a Judge of a High Court of original jurisdiction, but had the effect of making the procedure of a High Court as laid down in certain sections of Ch. XXIII applicable to a trial held by a Judge of this Court, who was and continued to be a Sessions Judge for the District of Karachi. Section 266, like s. 4, cl. (*j*), is an interpretation section and the same considerations which prevailed with this Court equally apply to the interpretation of s. 4, cl. (*j*). I see no reason to differ from the view taken by me in my judgment in that case.

To hold that this Court is a High Court of original criminal jurisdiction in the Province of Sind, with reference to proceedings against European British subjects would be in my opinion, to violate well recognised canons of construction by reading into s. 4, cl. (*j*), the words "of original criminal jurisdiction in the Province of Sind" which do not find place there and to assume that the Legislature intended to materially affect the local law by amending an interpretation clause in another Statute and to vest the jurisdiction of a High Court of original criminal jurisdiction over the Province of Sind or even over the Sessions Division of Karachi on this Court without providing the necessary machinary for the exercise of such powers. If this Court is not a High Court of original criminal jurisdiction within the meaning of s. 3 of Act IV of 1869, it is hardly necessary to discuss the further question whether the High Court of Bombay has ceased to be a High Court of original criminal jurisdiction within the meaning of s. 3 of Act IV of 1869. I, however, venture to submit that the High Court of Bombay still continues to be the High Court under s. (3) and is competent to confirm the decree *nisi* passed by the Judicial Commissioner of Sind.

The High Court of Bombay has been declared by statutory authority to possess original criminal jurisdiction over European British subjects throughout the Presidency of Bombay including the Province of Sind. Clause 22 of the Letters Patent empowers the High Court to exercise all powers which that Court or rather its predecessor called the Supreme Courts exercised at the date of the grant of letters. Though cl. 22 of the Letters Patent confers criminal jurisdiction on the High Court, cl. 23 of the Letters Patent limits the exercise of such jurisdiction in respect of such persons as are brought before it in due course of law. The jurisdiction of the Court and the occasion when it may be exercised are two distinct things. It would be conceded that the jurisdiction of the High Court of Bombay has not been expressly taken away by any Statute. No doubt the effect of the recent amendments of the Cr. P. C., is that the High Court of Judicature at Bombay will now probably have no occasion to exercise such jurisdiction, as a European British subject who commits an offence at Poona or at Karachi cannot claim the privilege of being tried by the Bombay High Court. Does it follow therefrom that by necessary implication the original criminal jurisdiction of the Bombay High Court over European British subjects has been taken away altogether? It would rather appear from s. 194 of the Cr. P. C., that only the occasion for its exercise has been greatly limited.

Though a Committing Magistrate cannot now send up under Ch. XXIII of the Code, a European British subject for trial to the High Court for an offence committed by him outside the limits of a Presidency Town, the Advocate-General may under s. 194, cl. (2), exhibit *ex officio* information against a European British subject of Sind in respect of certain enormous misdemeanours as peculiarly tend to disturb or endanger His Majesty's Government and the like which His Majesty's Attorney General may exhibit on behalf of the Crown in the High Court of Justice in England. The High Court can only take cognizance of such offences on information by the Advocate-General in the exercise of its original criminal jurisdiction. I am of the opinion that though the exercise of its powers to try offenders committed

(5) 85 Ind. Cas. 706; 26 Cr. L. J. 562; (1925) A. I. R. (S.) 249.

by the Magistrate under Ch. XXIII of the Code has become inoperative, the High Court of Bombay still possesses original criminal jurisdiction over British subjects.

Though I am unable to concur with the learned Judicial Commissioner as to our powers to confirm the decree *nisi* in this case, I agree with him that the question involved in this reference is a matter of the highest importance and should be dealt with by the Legislature. If this Court has no jurisdiction to confirm the decree *nisi* and either party believing himself or herself free to marry, contracts a marriage, the children of such party would be illegitimate and subject to all the disabilities of illegitimate children and may find another Court holding them to be illegitimate. It may not be out of place to express a hope that the Legislature would not only see its way to set at rest the doubts raised by this reference but would further consider the desirability of conferring jurisdiction on the District Judges in this province of entertaining divorce petitions and of conferring jurisdiction on this Court as the Highest Court of Appeal in the Province not only to confirm decrees *nisi* but to entertain appeals in all matrimonial causes under the Act.

Z. K. *Reference answered accordingly.*

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 12, 13 AND 14 OF 1921

AND

CIVIL MISCELLANEOUS PETITIONS NOS. 505, 508, 506, 507, 1674 1675, 1678, 1679, 1680, 1785 AND 1786 OF 1921.

August 19, 1921.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

Srila Sree SUBRAMANIA DESIKA PANDARA SANNADHI—APPELLANT

versus

ARUMUGA THAMBIRAN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, O. XL, r. 1—Suit for removal of trustee and for scheme—Allegations of personal misconduct—Death of trustee—Abatement of suit—Appeal—Receiver, appointment of.

A suit under s. 92 of the C. P. C., for removal of the Pandara Sannadhi of a *mutt* on grounds of personal misconduct without any reference to the absence of any means of preventing it, cannot be revived ag ins his successor for the purpose even of framing a scheme, merely because there was also a prayer for a scheme in the plaint. In such a case, no Receiver would be appointed pending an appeal against a decree by which the Court dismissed the suit as having abated by reason of the defendant's death. [p. 106, col. 2.]

L. P. A. Nos. 12, 13 AND 14 OF 1921.

Appeals, under cl. 15 of the Letters Patent, against an order of Mr. Justice Odgers, dated the 24th March 1921, in C. M. P. Nos. 505, 507 and 508 of 1921 respectively in Appeals Nos. 43 and 44 of 1921, on the file of the High Court.

C. M. P. No. 505 of 1921.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to appoint a Receiver, in O. S. No. 71 of 1918, on the file of the Court of the Subordinate Judge, Kumbakonam, pending disposal of Appeal No. 43 of 1921, on the file of the High Court, preferred against the decree in the said O. S. No. 71 of 1918.

Messrs. *T. Rangachariar* and *V. N. Venkata Varadachari*, for the Appellant.

Mr. *S. Srinivasa Iyengar*, for the Respondent.

JUDGMENT.—These appeals raise the question whether the appointment of a Receiver is justified pending the decision of Appeal Suits Nos. 43 and 44 of 1921. The order under appeal deals with that question with reference to the two usual headings the strength of the case of plaintiffs, here respondents, and the necessity for protecting temporarily the interests at stake, and we follow the same course. The discussion under both headings is complicated by the fact that the appeals are not against any decision on the merits but against orders declaring that the suits in question have abated owing to the death of the person impleaded as defendant in O. S. No. 71 and 1st defendant in O. S. No. 72, corresponding respectively with the two appeals, who (it is claimed) is now represented by appellant. We have, therefore, to deal with the considerations, which arise not only directly on the appeals, but also on the allegations so far not tested by any trial, on which the suits are based; and there is the further fact that the death above referred to has made some of these allegations either not relevant at all or relevant only in a different way.

Both suits relate to the administration

by the deceased of the *mutt*, of which he was Pandara Sannadhi, and the plaint allegations in both are largely identical. In O. S. No. 71 four plaintiffs, as representing the public, with the Advocate-General and with his sanction, sued the deceased, alleging misconduct on his part, for his removal from office, for the appointment of another Pandara Sannadhi in his stead and of trustees for the administration of the *mutt* properties, for an account and inventory and for a scheme for the future management of the institution. In O. S. No. 72 the same four persons sued as Thambirans of the *mutt* with a fifth, a *sishya* or disciple, against the Pandara Sannadhi and the other Thambirans, for the removal of the former, the appointment of a successor, and for connected reliefs, but not for a scheme. Whether the learned Judge, against whose order this appeal is brought, noticed this difference between the scope of the two suits is not clear. But it can be said at once that, the relief asked for in Original Suit No. 72 being claimed only against the deceased Pandara Sannadhi personally and on account of his conduct, there is no reason for supposing that it can be revived or that A. S. No 44 in respect of it can succeed. The learned Judge's order must accordingly be supported, if at all, in connection with A. S. No. 43.

The same conclusion no doubt follows, so far as the plaint allegations in A. S. No. 43 impute misconduct to the deceased Pandara Sannadhi and the prayer asks for his removal. But it has been suggested that we should regard the prayer for the appointment of a successor, which follows that for his removal, as applicable to the contingency, which occurred since the suit was filed, of his death and that we should have regard to the allegations against the present appellant in respondents' affidavit before this Court as indicating the lines, on which they would amend their plaint if the suit were revived and as affording ground, if established, for his removal and for grant of the other reliefs already asked for, including the appointment of a successor to him and the framing of a scheme. The first of these suggestions, however, does not correspond with the language used in the plaint or with any tenable view of the law. For the bad conduct of a deceased incumbent is no reason why the Court should order the appointment of a successor to him, which would presumably take place or have taken place in the ordinary course. It is true that the Court might be justified in so ordering an appointment, if the proper person refused to make one or some usurper were in the field, and that such usurpation is one part of the misconduct attributed to appellant in respondents' affidavit in this Court—para. 8. But then, the first answer is that we are concerned, not with what respondents may include in their plaint; if the suit is revived and they are allowed to amend it, but with what they have at present included in it; and the second is that, as the death and usurpation are alleged as having taken place after the plaint was filed, it is difficult to see how they do not constitute a distinct cause of action from that originally relied on and it is improbable that any amendment with reference to them will be permitted. The same difficulty moreover arises as regards the other allegations in the affidavit, those in paras. 9 and 29 which impute to appellant ineligibility for the office on the ground of his complicity in the deceased's misconduct and those in paras. 25, 26 and 30 which impute to him misconduct since his accession. For it is more than doubtful (and that is sufficient at this stage in the proceedings) whether a suit for the removal of one man on account of his misconduct has the same cause of action as or can be converted by legitimate amendment into a suit based on the misconduct of another for a declaration of the nullity of the latter's appointment. For the rest of the portions of respondents' affidavit in question are contradicted by the counter affidavit of appellant's agent and, as they are general in the extreme and are supported by nothing, giving particulars or from independent persons, it would not be safe to act on the assumption that any part of them is true. So far accordingly there is no sufficient reason for regarding respondents' case as strong or for thinking that they have any interest which will be jeopardised by appellant's remaining in possession.

There remains, however, the fact that the plaint asks also for the framing of a scheme for future management and we have been pressed with the argument that this, not the removal of the deceased incumbent, is the main relief asked for and the right to an adjudication on it has not

been determined by his death; or more fully, that the possibility of the misconduct imputed to the deceased Pandara Sannadhi, and its repetition by his successors are alleged as inherent in the conditions, under which the *mutt* and its properties are at present managed and that a scheme, which would terminate the existence or minimise the effect of those conditions, is a relief legitimately consequential on proof of such misconduct, even though the guilty person is deceased. Of the authorities referred to *Anand Rao* v. *Ramdas Daduram* (1) did not discuss the point raised in any detail. But in *Sivagnana Desika Gnanasambanda Pandarasannadhy* v. *Advocate-General of Madras* (2), it was no doubt held that, when a scheme is asked for, not merely as auxiliary to the removal of the trustee concerned, but as the main relief the suit does not abate on that trustee's death, and there is doubtless no objection to the application of the principle thus enunciated, when the case put forward is of that nature. But that is not clearly the case put forward here. For, whatever might have been said or may be said in future, the plaint before us deals only with misconduct of the deceased Pandara Sannadhi and does not refer to the absence of any means of preventing it, as it occured or to the necessity for providing such means in future, and in fact in para. 21, where the necessity for a scheme is suggested, it is referred to only in connection with the removal of the then incumbent, not as independently justifiable on its merits. Here again it is not clear that the respondents' claim to a scheme, the only relief for which they can now ask, can be supported separately on the allegations they have made; nor is the probability that they will have an opportunity of altering or adding to those allegations in the future so clear that we can act upon it.

These conclusions entail respondents' failure, and it is, therefore, unnecessary to consider the fundamental objections, which appellant has taken to their suit, so far as it is for a scheme, that the expenditure and management of a Pandara Sannadhi cannot be subjected to control in the manner or to the extent proposed. The objection it may be observed was argued with reference to two important authorities, which were not cited, when the order under appeal was passed, the decisions of the Judicial Committee in *Nataraja Tambiran* v. *Kailasam Pillai* (3) confirming a Full Bench decision of this Court and *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (4). But in the circumstances it would serve no useful purpose at present to deal with their scope or application to this case.

Appeal Suits Nos. 12 and 14 of 1921 are accordingly allowed, the orders appealed against and the order requiring security from appellant being set aside. Respondents Nos. 1 to 4 are liable for appellant's costs before us and in the lower Court.

Appeal Suit No. 13 is also allowed with costs. The connected petitions are dismissed with costs as between appellant and respondents except Nos. 1675, 1785 and 1786. They also are dismissed. Petitioners in these to pay appellant's costs.

V. N. V. *Appeals allowed.*

(1) 62 Ind. Cas. 737; (1921) M. W. N. 24; 48 C. 493; 13 L. W. 318; 17 N. L. R. 37; 25 C. W. N. 794; 30 M. L. T. 194; 48 I. A. 121 (P. C.).

(2) 27 Ind. Cas. 874; 28 M. L. J. 174; 2 L. W. 148; (1915) M. W. N. 185.

(3) 57 Ind. Cas. 564; 44 M. 283; (1920) M. W. N. 371; 39 M. L. J. 98; 18 A. L. J. 1041; 25 C. W. N. 145; 13 L. W. 301;; 48 I. A. 1 (P. C.).

(4) 65 Ind. Cas. 161; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R (P. C.) 62; 15 L. W. 78; 30 M. L T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 837; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 139 OF 1925.

September 23, 1925.

Present:—Mr. Dalal, J. C.

GURCHARAN—PLAINTIFF—APPLICANT

versus

KHAGESAR—DEFENDANT—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 15—Specific Relief Act (I of 1877), s. 21, (a)—Suit for recovery of silver and gold made over to defendant for making ornaments, nature of—Specific performance—Jurisdiction of Small Cause Court—Jurisdiction, whether can be excluded by consent.

A suit for the recovery of a certain weight of silver and of gold which the plaintiff alleges he had given to the defendant to make ornaments out of, is not a suit for specific performance of a contract, inasmuch as for the breach of such a contract there can be an adequate compensation in money and specific performance of such a contract cannot be enforced under s. 21 (*a*) of the Specific Relief Act. The suit does not

fall, therefore, within the purview of Art. 15 of Sch. II to the Provincial Small Cause Courts Act and is not excluded from the cognizance of a Small Cause Court. Such a suit must be treated as one for the recovery of the value of the silver and the gold.

An agreement by the plaintiff that a certain Court has not jurisdiction to entertain his suit is not sufficient to oust the jurisdiction of that Court, though it may be a ground for compensating the defendant in costs for proceedings taken with the consent of the plaintiff.

Civil revision from an order of the Additional Judge, Small Cause Court, Lucknow, dated the 6th July 1925.

Mr. *Moti Lal*, for the Applicant.

ORDER.—A Court of Small Causes refused jurisdiction and returned the plaint of the plaintiff-applicant here on the ground that Art. 15 of the Second Schedule of the Provincial Small Cause Courts Act barred the jurisdiction of that Court. The plaintiff's Pleader agreed to this view of the law but such an agreement is not sufficient to oust jurisdiction. Of course the Court can compensate the defendant in costs for proceedings taken with the consent of the plaintiff.

The suit was one for the recovery of a certain weight of silver and of gold which the plaintiff alleged that he had given to the defendant goldsmith to make ornaments out of. There can be no specific performance of such a contract. It is not as if the plaintiff had demanded ornaments alleged to have been prepared already by the defendant. For the breach of such a contract there can be an adequate compensation in money and so specific performance of such a contract cannot be enforced under s. 21 (*a*) of the Specific Relief Act. The main prayer, therefore, must be one for the recovery of money Rs. 101-3-0.

I set aside the order of the lower Court and direct it to try the suit as if it were a money suit. The defendant shall be entitled to receive costs here and costs of the lower Court upto date except Court-fee which shall follow the event.

Z. K. *Order set aside.*

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 43 AND 44 OF 1921.

February 26, 1925.

Present :—Mr. Justice Phillips and Mr. Justice Krishnan.

ARUMUGHA THAMBIRAN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

NAMASIVAYA PANDARA SANADHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 11, 92—Suit for removal of trustee and for scheme—Plaint confined to allegations of misconduct of trustee—Absence of grounds for scheme—Death of defendant—Abatement—Cause of action, whether survives—Receiver, petition for appointment of, pending appeal—Order as to merits of appeal—Res judicata—*Madras Religious Endowments Act (I of 1925), retrospective operation of.*

In a suit under s. 92 of the C. P. C. the plaint was mainly taken up with allegations of mis-conduct on the part of the trustee and the plaintiffs asked on that ground for the removal of the trustee. There was also a prayer for a scheme which was mentioned at the end of the plaint without giving any special reasons why the scheme was necessary. The trustee died during the pendency of the suit :

Held, (1) that the two reliefs prayed for in th plaint were distinct, although the second relief was to a certain extent dependent on the first, inasmuch as it was necessary to allege a breach of trust in order to constitute the necessary cause of action; [p. 110, col. 2.]

Anand Rao v. *Ramdas Daduram*, 62 Ind. Cas. 737; 48 C. 493; 13 L. W. 318; (1921) M. W. N. 24; 17 N. L. R. 37; 25 C. W. 794; 30 M. L. T. 194; 48 I. A. 121 (P. C.) and *Sivagnana Desika Gnanasambanda Pandarasannadhy* v. *Advocate General of Madras*, 27 Ind. Cas. 874; 28 M. L. J. 174; 2 L. W. 148; (1915) M. W. N. 185, relied on.

(2) that on the death of the trustee, the cause of action did survive against the representative of the deceased trustee for the purpose of framing a scheme, and the suit did not abate. [*ibid.*]

Where in an application for the appointment of a Receiver pending the disposal of an appeal, the High Court held that the cause of action alleged in the plaint had abated on the death of the defendant and on that ground dismissed the application:

Held, that the order on Receiver application did not operate as *res judicata* in the appeal itself on the question of abatement. [p. 111, col. 1.]

Massam v. *Thorley's Cattle Food Co.*, (1880) 14 Ch. D. 748; 42 L. T. 851; 28 W. R. 966, relied on.

The Madras Religious Endowments Act of 1925 is not retrospective in effect in respect of proceedings already instituted. [p. 111, col. 1.]

Appeals against the decrees of the Court of the Subordinate Judge, Kumbakonam, in O. S. Nos. 71 and 72 of 1918.

Messrs. *S. Srinivasa Iyenyar* and *S. Muthiah Mudaliar*, for the Appellants.

Messrs. *T. Rangachariar*, *A. Srianga-chariar* and *V. N. Venkata Varadachari*, for the Respondents.

JUDGMENT.—The plaintiffs in this case have brought their suit under s. 92 of the C. P. C., for the removal of the defend-

ant from the office of Pandara Sannadhi and for the framing of a scheme in relation to the *mutt*. The Advocate-General has also joined the suit as a supplemental plaintiff. After the institution of the suit and before it was tried, the defendant died and the Subordinate Judge has held that owing to the defendant's death the suit has abated and cannot be revived, on the ground that it is a personal action against the defendant and that the second relief in the suit, namely, that of the framing of the scheme, is an ancillary relief dependent on the removal of the defendant from his office of trustee. Against this decision the plaintiffs have appealed, and it is contended in the appeal that as two reliefs are claimed, namely, the removal of the defendant and the framing of the scheme which are distinct and separate reliefs, the suit may well be prosecuted with reference to the second relief, namely, the framing of the scheme. It is pointed out that in a very similar case it was held by the Privy Council that the cause of action did survive *Anand Rao* v. *Ramdas Daduram* (1). Apart from this authority we have also a case in this Court, *Sivagnana Desika Gnanasambanda Pandarasannadhy* v. *Advocate General of Madras* (2) in which the same conclusion was arrived at. Although the plaint is mainly taken up with allegations of misconduct on the part of the respondent and the prayer for the scheme is only mentioned at the end of the plaint without giving any special reasons why the scheme is necessary, yet, when we come to read s. 92 of the C. P. C., it is quite clear that in order to provide a cause of action for a scheme suit, there must be allegations of a breach of trust, or it must otherwise be necessary to obtain directions of the Court. In order, therefore, to justify this suit for a scheme, it is necessary for the plaintiffs to allege a breach of trust and it is very difficult to see how this second relief can be deemed to be ancillary to the removal of the defendant. It is absurd to suppose that the plaintiffs and the Advocate-General have merely brought this suit to satisfy a vindictive spite against the defendant and that that is their sole cause of action and consequently that the rest of the suit must fail as the defendant can no longer be held responsible. The two reliefs are distinct, although the second relief is to a certain extent dependent on the first, because it is necessary to allege a breach of trust in order to constitute the necessary cause of action.

Mr. Rangachariar for the respondent has not referred us to any authority against those cited, above; and we are satisfied that the cause of action does survive against the respresentative of the deceased defendant for the purpose of framing a scheme. We may also observe that in addition to the prayer for the scheme generally, there is a prayer for directions as to the utilization of the surplus funds of the institution which are alleged to be very large indeed.

A further objection is taken for the respondents that this question is *res judicata* in that it has already been decided by a Bench of this Court which disposed of an application for the appointment of a Receiver in this suit.* No doubt that Bench in its judgment says: "the plaint before us deals only with the misconduct of the deceased Pandara Sannadhi and does not refer to the absence of any means of preventing it," and again, "in para. 21, where the necessity for a scheme is suggested, it is referred to only in connection with the removal of the then incumbent, not as independently justifiable on its merits." It is contended that this judgment has decided the present appeal. This appeal was not before that Bench, nor do we think that it purported to decide it. Mr. Rangachariar relies on three decisions of the Privy Council reported as *Ram Kirpal* v. *Rup Kuari* (3), *George Henry Hook* v. *Administrator-Genaral of Bengal* (4) and *Rameshwar Singh Bahadur* v. *Hitendra Singh* (5). In these cases the principle was laid down that s. 11 of the C. P. C. is not exhaustive on the question of *res judicata*, but all these cases can be distin-

(1) 62 Ind. Cas. 737; 48 C. 493; 13 L. W. 318; (1921) M. W. N. 24; 17 N. L. R 37; 25 C. W. N. 794 30 M. L. T. 194; 48 I. A. 121 (P. C.).

(2) 27 Ind. Cas. 874; 28 M. L. J. 174; 2 L. W. 148; (1915) M. W. N. 185.

(3) 11 I. A. 37; 6 A 269; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.).

(4) 60 Ind Cas. 631; 48 C. 499; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 918; 14 L. W. 221; 48 I. A. 187 (P. C.).

(5) 81 Ind. Cas. 576; 47 M. L. J. 286; 5 P. L. T. 491; (1924) A. I. R. P. C.) 202; 20 L. W. 456; 35 M. L. T. 182; 26 Bom. L. R. 1153; 22 A. L. J. 968; 40 C. L. J. 431 L. R. 5 A. (P. C.) 175; 29 C. W. N. 413; 1 L. C. 457; 3 Pat. L. R. 180 (P. C.).

*Sree Subramania Desika Pandara Sannadhi v. Arumuaga Thambiran, 91 Ind. Cas. 106.—[Ed.]

guished from the present one in that the prior decision which was relied upon as binding on the parties in subsequent proceedings between them was with reference to a question which directly arose and had to be decided in the prior proceedings, being directly in issue. In the present case, however, there was no necessity to decide this appeal in an application for the appointment of a Receiver, and although the Bench expressed an opinion as to the meaning of the plaint in this suit as a reason for refusing to appoint a Receiver, it can certainly not amount to *res judicata* in the sense applied by the Privy Council in the above cases. For this proposition we need only refer to *Massam* v. *Thorley's Cattle Food Co.* (6). Apart from this we are not at all clear that that Bench of this Court did really decide the point, for they merely said "it is not clear that the respondents' claim to a scheme, the only relief for which they can now ask, can be supported separately on the allegations they have made." That merely amounts to saying that they have not definitely proved in those interlocutory proceedings the question which has now been argued before us. In any case it does not amount to *res judicata*. With all respect for the opinion expressed in that judgment, we have now come to a contrary conclusion.

A further suggestion is made that this suit may be affected by the recently passed Religious Endoments Act, but there is nothing in that Act which gives retrospective effect in respect of proceedings already instituted and, therefore, this objection also must fail.

This appeal, therefore, is allowed with costs and the suit will be remanded to the lower Court for disposal according to law. Court-fee on appeal memorandum will be refunded.

Appeal No. 44 of 1921 is not pressed and is dismissed with costs of the 20th respondent.

These appeals having been set down to be spoken to this day, the Court delivered the following

JUDGMENT.—Appellants Nos. 3 and 4 are allowed to withdraw and the judgment in Appeals Nos. 43 and 44 of 1921, will stand as regards appellants Nos. 1, 2 and 5.

V. N. V. *Appeal No. 43 allowed;*
Appeal No. 44 dismissed.

(6) (1880 14 Ch. D. 748; 42 L. T. 851; 28 W. R. 966.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 1 OF 1925.
September 23, 1925.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Simpson, A. J. C.

RAM BHAROS—DEFENDANT—APPELLANT
versus
Thakur RAMPAL SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 35, O. XXIII, r. 1 (3)—Withdrawal of suit—Costs, award of—Discretion of Court—Appellate Court, interference by.

The general law as to costs is laid down in s. 35 of the C. P. C. Under that section the Court is invested with a discretion in the matter of awarding costs, and sub-r. (3) of r. 1 of O. XXIII of the C. P. C. has not the effect of divesting the Court of that discretion. That sub-rule does not impose an unavoidable obligation on the Court to award costs in all cases in which the suit is withdrawn. The word "shall" as used in that sub-rule is merely directory and not mandatory. [p. 112, col. 1.]

An Appellate Court will not interfere with an exercise of discretion by a lower Court unless the latter has proceeded on a manifestly wrong ground such as the application of an erroneous principle or a mis-apprehension of facts. So long as the discretion is in fact exercised, an Appellate Court will not interfere simply because it would itself have exercised the discretion differently. [p. 112, col. 2.]

First appeal against the decree and order of the Subordinate Judge, Fyzabad, dated the 25th September 1924.

Mr. *H. D. Chandra*, for the Appellant.

Mr. *H. Husain*, for the Respondent.

JUDGMENT.—This is the defendant's appeal from the decree of the Subordinate Judge of Fyzabad dated the 25th of September 1924. The appeal relates to the question of costs only.

The plaintiff-respondent brought a suit for pre-emption. The defendant-appellant was the vendee of the property in respect of which the suit for pre-emption was brought. The suit was instituted on the 26th of May 1924. Summonses were issued to the defendants. Defendant No. 1 filed his written statement on the 27th of August 1924. On the date fixed for framing the issues that is the 25th of September 1924 the plaintiff filed an application to withdraw the suit under O. XXIII r. 1 sub-r. (1) of the C. P. C. To this the defendant No. 1 took no objection but asked for his costs. The Court then recorded the statement of the plaintiff who said that he had filed the suit at the instance of the defendant No. 1 who was first providing him with the expenses of the suit and that he has now given up financing

the case and, therefore, he wanted to withdraw the suit. Having recorded the above statement the Court passed the following order :—

"Plaintiff is allowed to withdraw from the suit. No costs are allowed. Order XXIII, r. 3, C. P. C."

This order in so far as it relates to the question of costs is the subject-matter of this appeal.

It is argued on behalf of the defendant-appellant that under sub-r. (3) of r. 1 of O. XXIII of the C. P. C., the Court was bound to award costs. The necessary portion of the sub-r. (3) bearing on the question under consideration is as follows :—

"Where the plaintiff withdraws from a suit.....he shall be liable for such costs as the Court may award."

We are of opinion that the rule does not impose an unavoidable obligation on the Court to award costs in all such cases. The word "shall" as used in the context is merely directory and not mandatory. The general law as to costs is laid down in s. 35 of the C. P. C. Under that section the Court is invested with a discretion in the matter of awarding costs and we are of opinion that sub-r. (3) of r. 1 of O. XXIII has not the effect of divesting the Court of that discretion. Subsection (2) of s. 35 prescribes the procedure of recording its reasons in writing where the Court directs that costs shall not follow the event. The statement made by the plaintiff in the present case immediately precedes the order of the Court and we think that the circumstance stated by the plaintiff was the reason which induced the Court to make the order as to costs. The order was, therefore, passed in the exercise of the discretion vested in the Court. In *Bew* v. *Bew* (1) Lindley, J., laid down the rule in the following words "that if the costs are in the discretion of the Judge the Court of Appeal will assume that the Judge exercised his discretion unless it is satisfied that he has not exercised his discretion." This rule was quoted and applied by Sir Lawrence Jenkins, C. J., in *Parshram Bhawoo* v. *Dorabji Pestonji* (2). The decision of the learned Chief Justice is correctly stated in the head-note of the report which we quote here. "Court has absolute discretion in the matter of costs according to s. 220, C. P. C. And an Appellate Court will not interfere with an exercise of discretion of a lower Court unless it has proceeded on a manifestly wrong ground such as the application of an erroneous principle, or a mis-apprehension of the facts. So long as the discretion was in fact exercised, an Appellate Court will not interfere simply because it would itself have exercised the discretion differently."

We are of opinion that no case is made out for an interference by this Court with the order of the Court below. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) (1899) 2 Ch. 467 at p. 472; 68 L. J. Ch. 657; 48 W. R. 124; 81 L. T. 284.

(2) 2 Bom. L. R. 254.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 32 OF 1925.

October 6, 1925.

Present:—Mr. Ashworth, A. J. C.

ATMA RAM—DEFENDANT—APPELLANT

versus

SHAMBHU DIN—PLAINTIFF—RESPONDENT.

Appeal, second—Malicious prosecution, suit to recover damages for—Finding as to innocence of plaintiff and absence of just and reasonable cause, nature of.

In a suit to recover damages for malicious prosecution a finding that the plaintiff was innocent of the charge brought against him by the defendant and that the defendant had no just and reasonable cause for making the charge is a finding of fact and cannot be questioned in second appeal. [p. 113, col. 1.]

Appeal against the judgment and decree of the Additional Subordinate Judge, Sitapur, dated the 16th December 1924, reversing that of the Munsif, Sitapur, dated the 28th April 1924.

Messrs. *K. P. Misra* and *G. N. Misra*, for the Appellant.

Mr. *Salik Ram*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff-respondent against the defendant-appellant for damages for malicious prosecution. For the purposes of this appeal it is sufficient to say that the plaintiff's case against the defendant was that the defendant had prosecuted him and his two sons for an assault, under s. 323, on a certain date. The defence on behalf of the

plaintiff was an *alibi*. This *alibi* consisted in the evidence of two pilgrim ladies, who said, that at the time when the offence was alleged to have taken place, they had been engaged in some religious ceremony with the accused, who was their *panda*. The Criminal Court believed the evidence of the ladies, and acquitted the plaintiff. The plaintiff, accordingly, brought his suit in the Court of the Munsif. The Munsif dismissed the suit on the ground that the plaintiff furnished no evidence of his innocence except his own deposition in Court, and omitted to produce the two ladies by whose evidence he had been acquitted in the Criminal Court. Upon appeal the Additional Subordinate Judge reversed the Munsif's decision, and granted the suit for damages. He held that the plaintiff's evidence on oath, in the absence of any evidence by the defendant himself, and having regard to the worthlessness of the evidence of the witness produced by the defendant, was sufficient to prove the innocence of the plaintiff. He also held that the fact that there had been long standing enmity justified the finding that the complaint was lodged without just or reasonable cause, and was actuated by malevolence.

It has been urged that the plaintiff's evidence was biased and unreliable, and that his plea that he was in his own house was inconsistent with the plea set up in the Criminal Court that he was with the two ladies, who appeared as his witnesses in the Criminal Court. It is also maintained that his evidence, even if it be held to prove his innocence, fails to show that the defendant had no just or reasonable cause.

The question, however, arises whether this Court on second appeal is entitled to go behind the finding of fact arrived at by the lower Appellate Court. The finding of fact was that the plaintiff was innocent of the charge, and that the defendant had no just and reasonable cause for lodging the criminal complaint. The evidence on which these facts were found was the evidence given by the plaintiff himself in the witness-box. The fact that the witness could have produced other and more independent evidence affects only the value but not the admissibility of the evidence produced. I cannot go behind the decision of fact of the lower Appellate Court. No question of law arises. For the above reasons the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 2817 OF 1923.

May 19, 1924.

Present:—Mr. Justice Page.

TILOKECHAND SURANA AND ANOTHER —PLAINTIFFS

versus

J. B. BEATTIE & Co.—DEFENDANT.

Assignment—Assignment of interest by landlord—Tenant in possession—Payment of rent, without notice of assignment, effect of—Payment of rent in advance, whether fulfilment of obligation to pay rent—Assignee, position of—Assignee, whether bound to make enquiries—Non-enquiry by assignee, effect of—Collateral agreement, whether binding.

If a person enters into a contract and without notice of assignment of the contract, fulfils it to the person with whom he made the contract, he is discharged from his obligation. [p. 116, col. 1.]

Payment of rent by a tenant before it is due is not a fulfilment of the obligation imposed by the covenant to pay rent but is an advance to the landlord with an agreement that on the day when the rent becomes due such advance will be treated as a fulfilment of the obligation to pay rent. [*ibid.*]

Where the proprietary title to premises in the occupation of a tenant is assigned, it is incumbent upon the assignee to make enquiries of the tenant as to the extent of his rights and interest in the premises. If the tenant misrepresents his rights and the assignee relies upon the statement of the tenant, the latter will be precluded as against the assignee from asserting his rights to be other than those which he has stated. But if the tenant correctly represents his rights or no enquiry is made by the assignee, in either case the assignment will be subject to the tenant's rights and interests in the premises. This principle applies alike in cases where the assignee is a mortgagee, as in cases, where he is a purchaser of the premises. [p. 116, col. 2.]

If a mortgagee is privy to and has sanctioned a collateral agreement between the mortgagor and a tenant of the mortgaged property, a subsequent assignee of the mortgagee's interest is not to be permitted to assert that his interest in the premises is not affected by the agreement, because the agreement was entered into at a date subsequent to that on which the mortgage was executed. [p. 118, col. 2.]

JUDGMENT.—This case raises an important question as to the rights of a mortgagee of premises which at the time when the mortgage was executed were in the occupation of a tenant of the mortgagor. The material facts are as follows:—

In 1907 two persons by name Hyam and Jones, who at that time were the owners of the premises in suit, No. 3-1 Mangoe Lane,

let a portion thereof to the defendants as monthly tenants at the rent of Rs. 150 a month. On the 13th July 1914 Hyam and Jones mortgaged certain premises, including the premises in suit to M. A. Sassoon and others. On the 13th January 1917 the mortgagees filed a mortgage suit against Hyam and Jones for an order for the sale of the mortgaged premises. On the 16th March 1917 M. A. Sassoon, one of the mortgagees, was appointed receiver of the said premises by order of the Court. On the 17th July 1917 a preliminary decree for sale was passed. Now, Hyam was accustomed to make out the defendant's rent bills, and to obtain the rent up till the time when the appointment of the Receiver was made, and thereafter until the date of the agreement to which I am about to refer, the course adopted for the purpose of collecting the rent was that Hyam made out the rent bills and endorsed them to Sassoon and the money was collected by Sassoon's peon. In 1920 the premises in suit were in need of repair, and on the 7th June 1920 an agreement was entered into between Hyam and Jones on the one hand and the defendants on the other, whereby the defendants advanced to Hyam and Jones Rs. 7,800 on that date, Rs. 1,500 on the 20th October 1921, and Rs. 2,500 on the 29th December 1921 in order to provide funds for the repair and improvement of the premises while Hyam and Jones on their part undertook to expend the money advanced on repairs, and to treat the sums so paid as rent paid in advance. It was further agreed that after the work of repair and improvement had been carried out the rent payable should be increased to Rs. 200. After the 7th June 1920 no further rent bills were made out or rent collected. I find that this agreement was made, and that the above statement of facts correctly represents the arrangement which was made, and what took place in respect thereof. Further, although the defendants were not aware that the mortgage to Sassoon and others had been executed, I am satisfied on the evidence that the mortgagees were fully apprised of the nature of the agreement of the 7th of June 1920, and from the evidence adduced before me I draw the inference that the mortgagees gave their sanction to it. I am invited by the plaintiffs to come to a conclusion from the evidence that the mortgagees neither knew nor approved of this agreement, but, in my opinion, the natural and reasonable inference to be drawn is to the contrary effect. Sassoon was not only a mortgagee, but the receiver of the rents and profits derived from the mortgaged premises. I am at a loss to understand, when Sassoon after the 7th June 1920 found that the rent was no longer being paid monthly as heretofore or at all why he did not protest, and demand payment of the rent unless he was aware and approved of the agreement between Hyam and Jones and the defendants. In my opinion, the true view is that the Sassoon mortgagees fully understood, and were privy to, this agreement. In July 1921 Hyam and Jones were minded to pay off the Sassoon mortgage and on the 12th July 1921 they granted a mortgage of the said premises to the plaintiffs for six *lakhs*, and interest thereon at 12 per cent. On the same day with the proceeds which resulted from the execution of the plaintiffs' mortgage Hyam and Jones (as appears from the petition of the Sassoon mortgagees dated 22nd February 1922) paid to the Solicitors for the said mortgagees a sum of Rs 6,92,093 which admittedly was accepted by Messrs. Morgan & Co., their attorneys, in full satisfaction of the Sassoon mortgagee's claim for principal and interest due under the decree passed in the mortgage suit. Thereupon Morgan & Co., gave to Hyam and Jones a receipt in the following terms:—

Suit No. 270-16

M. A. SASSOON *v.* J. I. J. HYAM.

Received from Messrs. Hyam and Jones a cheque for Rs. 7,02,000 only, *viz.*, Rs. 6,92,093-3 in full satisfaction of the plaintiff's claim for principal and interest due under the decree herein and Rs. 9,906-13-2 on account of the costs of the suit. We undertake to refund excess, if any, on adjustment of the costs of this suit. (Stamped with a one-anna stamp and dated 12th July 1921)".

On completion of the transaction the title-deeds were handed to Hyam and Jones' Solicitors. Subsequently it transpired, according to the computation made by Morgan & Co., that the claim of Sassoon mortgagees by mistake had been underestimated to the extent of Rs. 25,779-8-3 and on the 2nd March 1922 the said mortgagees applied by petition to the Court for an order for the sale of the mortgaged premises for recovery of the amount alleged still to be outstanding in respect of the sum

due under the said mortgage-decree. An order for sale was made, and pursuant thereto, on the 24th March 1923, at an auction-sale held by the Registrar of the High Court, the plaintiff purchased the mortgaged premises including the premises in suit for Rs. 1,00,000 subject to the mortgage dated 12th July 1921 in favour of the plaintiffs (see condition of sale XV, the order of 26th April 1923, and the order of 17th May 1923). It appears that the mortgage to the plaintiffs was executed on the 12th July 1921, and not on the 12th July 1922. But, in my opinion, for the purpose of this suit, it is immaterial upon which of those dates it was granted. On the 28th March 1923 B. N Basu & Co., Solicitors for the plaintiffs wrote to the defendants the following letter:—

"Dear Sirs, *Re.* 3 and 3-1 Mangoe Lane.

We are instructed by our clients Messrs. Tilokechand of No. 8-3 Rupchand Roy Street Calcutta, that at a sale held by the Registrar of the High Court on the 24th instant, the above property was sold and our clients Messrs. Tilokechand were declared the highest bidders and purchasers at the sale. We are instructed to call upon you not to pay any rent to any person other than our client. Should you do so, such payment will be entirely at your own risk and penalty, and will not be recognised by our client.

Yours faithfully,
(*Sd.*) B N. BASU & CO.

On the 31st May, the current rent not having been paid to the plaintiffs, the plaintiffs' Solicitors again wrote to the defendants:

"Dear Sirs, *Re.* 3-1 Mangoe Lane.

We are instructed by our clients Messrs. Tilokechand the owners of the above premises, to call upon you, which we hereby do, to quit and vacate the portion of the said premises occupied by you on expiry, of the month of June 1923. Should you fail to vacate in pursuance of the above notice, legal proceedings will be taken to eject you without further reference. You have not paid rent for the above premises for a long time."

Now, the defendants did not vacate the premises as requested in accordance with the said notice to quit, or at all. If the agreement between the mortgagors and the defendants of 7th June 1920 is valid and binding upon the plaintiffs, the plaintiffs by reason of the Calcutta Rent Act are not entitled to eject the defendants. The question therefore, which I have to determine is whether or not the agreement of 7th June 1920 is valid and binding upon the plaintiffs. The plaintiffs contend that if the payments made by the defendants in June, October and December 1920 are to be treated as payments of rent in advance the payment of rent to a mortgagor, before it has accrued due, does not bar the claim of a mortgagee of the premises, after notice of his interest therein has been given to the tenant to recover the rent accruing therefrom as and when it falls due. On the other hand, if these payments are not to be treated as payments of rent, but as advances to Hyam and Jones as landlords from the defendants as tenants, upon the terms that on the dates when the rent becomes due, such advances were to be treated as the fulfilment of the tenant's obligation to pay rent, the plaintiffs contend that such a transaction amounted to a collateral agreement which will not affect or control the mortgagees' rights and interest in the premises and is one which the plaintiffs as mortgagees or as auction purchasers are not under any obligation to respect.

As regards the first contention, if the premises upon which it is based are sound, I am not disposed to disagree with the conclusion which is drawn therefrom. But, in my opinion, these sums were not, and are not to be regarded as having been paid as rent for this reason: that on the dates when the rent becomes payable, the landlords, having assigned the reversion, had rendered themselves incapable of giving a valid release of the same, or a valid discharge for the sums so paid as rent. Payment of rent to them was not payment of rent to persons entitled to receive it, and such payments would afford no defence to a claim for payment of the rent by the person to whom the reversion had been transferred. As Mr. Justice Willes pointed in *De-Nicols* v. *Saunders* (1).

"It is clear that the Common Law authorities which say that payment before notice is good against a mortgagee, and which are represented by *Watts* v. *Ognell* (2), have no application to the present case; they apply only to a person fulfilling his obligation

(1) (1870) 5 C. P. 589 at p. 593; 39 L. J. C. P. 297; 22 L. T. 651; 18 W. R. 1106.
(2) (1791) Cro. Jac. 192; 79 E. R. 167.

to one who, at the time it is fulfilled, is the apparent reversioner: which is similar to payment to a creditor who has assigned the debt without notice to the debtor. These cases depend upon a rule of general jurisprudence not confined to choses in action, though it seems to have been lost sight of in some recent cases, *viz.*, that if a person enters into a contract, and without notice of any assignment, fulfils it to the person with whom he made the contract, he is discharged from his obligation; that is a rule which is declared rather than enacted by 4 Anne, C. 16, s. 10. That Statute did away with the necessity for attornment, but protected the tenant in cases where he had paid the rent due from him before notice of the assignment; this provision of the Statute, however, clearly applies to the fulfilment of an obligation to pay rent imposed by the lease. There has been no such payment here, for payment of rent before it is due is not a fulfilment of the obligation imposed by the covenant to pay rent, but is, in fact an advance to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent."

Although the correctness of this decision appears to have been doubted by Farwell, L. J., in *Green* v. *Rheinberg* (3), in my opinion the *ratio decidendi* of Mr. Justice Willes' judgment which was repeated by the Court of Common Pleas to which decision he was a party in *Cook* v. *Guerra* (4), is unimpeachable and is an accurate statement of the law. [See *Ashburton* v. *Nocton* (5).]

As regards the second contention which Counsel for the plaintiffs has urged before me, I find as a fact that the agreement of the 7th June 1920 was prior in date to the mortgage of the 12th July 1921 and, in my opinion, the plaintiffs must be deemed to have received constructive notice of this agreement before they became parties to the mortgage, and are under an obligation to the defendants to respect the terms thereof. The equitable principle to be applied in the circumstances of this case may be gathered from a perusal of the following cases: *Daniels* v. *Davison* (6) *Allen* v. *Anthony* (7), *Barnhart* v. *Greensheilds* (8), *Holmes* v. *Powell* (9), *Morrogh* v. *Alleyne* (10), *Hunt* v. *Luck* (11) *Hunt* v. *Luck* (12) *Green* v. *Rheinbarg* (3), and *Ashburton* v. *Nocton* (13). *Ashburton* v. *Nocton* (5).

In cases where the proprietary title to premises in the occupation of a tenant is assigned, it is incumbent upon the assignee to make enquiries of the tenant as to the extent of his rights and interest in the premises. If the tenant in answer to such an enquiry represents his rights in the premises to be other than those which he possesses, no doubt in a case where the assignee has accepted the assignment in reliance upon such a representation he will thereafter be precluded as against the assignee from asserting his rights to be other than those which he has stated. But assuming that a correct answer is received, or that no enquiry is made by the assignee, in either case, in my opinion, the assignment will be subject to the tenant's rights and interests in the premises. And the principle is to be applied alike in cases where the assignee is a mortgagee as in cases where he is a purchaser of the premises. [See *Green* v. *Rheinberg*] (3). It would offend the conscience where it to be held that the rights of the tenants in such circumstances were subject to defeasance or curtailment and in my opinion, the mortgagor by transferring his interest in the reversion is not entitled thereby to resile from his agreement or to derogate from his grant and the assignee takes the reversionary interest subject to the rights and interest of the tenant in the premises. In *Daniels* v. *Davison* (6), Lord Eldon (Lord Chancellor) observes that "there is considerable authority for the opinion I hold; that, where there is a tenant in possession under a lease, or an agreement, a person, purchasing part of the estate, must be bound to enquire, on what terms that person is in possession." Again in *Allen* v. *Anthony* (7), Lord Eldon re-stated the principle, which was an interesting case in which a

(3) (1911) 104 L. T. 149 at p. 151.
(4) (1872) 7 C. P. 132; 41 L. J. C. P. 89; 26 L. T. 97; 20 W. R. 367.
(5) (1915) 1 Ch. 274 at p. 291; 84 L. J. Ch. 193; 111 L. T. 895; 59 S. J. 145; 31 T. L. R. 122.
(6) (1809) 16 Ves. Jun 249; 33 E. R. 978; 10 R. R. 171.
(7) (1816) 1 Mer. 282; 35 E. R. 679; 15 R. R. 113.
(8) (1853) 9 Moo P. C. 18; 14 E. R. 204; 105 R. R. 1.
(9) (1856) 8 Deg. M. & G. 572; 44 E. R. 510; 114 R. R. 255.
(10) (1869) Ir. R. 7 Eq. 487.
(11) (1901) 1 Ch. 45; 70 L. J. Ch. 30; 49 W. R. 155; 83 L. T. 479; 17 T. L. R. 3.
(12) (1902) 1 Ch. 428; 71 L. J. Ch. 239; 50 W. R. 291; 86 L. T. 68; 18 T. L. R. 265.
(13) (1914) 2 Ch. 211; 30 T. L. R. 565; 83 L. J. Ch. 831.

bill was filed in Chancery by the owner of the fee simple of an estate for an account of timber felled by the defendant on the estates of the plaintiff and for incidental relief. It appeared that the predecessor of the plaintiff in 1799 had agreed to demise to one Izard for 21 years, at a certain rent, the premises in question, with reservation to herself and her heirs of all the timber and timber like trees and liberty to cut and carry away the same. Nine years later the defendant obtained possession of the premises under an execution in an action brought by him against Izard, and in the following year 1809 the then owner of the estate, Sarah Kier, agreed to sell to the defendant all the timber except fruit trees for £ 200. Subsequently Sarah Kier conveyed the reversion to Archer from whom the plaintiff's father purchased it, and the question in the case was whether the proprietary interest of the plaintiff in the estate was subject to the agreement which had been made by Sarah Kier with the defendant.

In the course of his judgment Lord Eldon observed :

"It is so far settled as not to be disputed, that a person purchasing, where there is a tenant in possession, if he neglects to inquire into the title, must take, subject to such rights as the tenant may have. [*Douglas* v. *Whitterwrong* (14).] And there is no doubt that, if the defendant had been entitled to the trees on the estate, under the agreement by which he held the estate itself, the plaintiff would be bound by the authority of the several cases in which it has been so decided. But the question here is, whether there is any difference in the case when the right of the tenant to the timber arises by a contract made independent of, and posterior to, the contract under which he holds possession of the estate, and on the best consideration that I am able to give to the subject, I think it would be going on a distinction much too thin to determine that he may be restrained from the exercise of that right in the latter case, although he could not have been so restrained if his title to the timber had bean coincident with his title to the possession of the estate. There is no more reason in the one case than in the other to say that the purchaser was not bound to make enquiry as to the nature and extent of the tenant's interest. He must, therefore, suffer the consequence of his neglect to take that obvious precaution."

In *Barnhart* v. *Greensheilds* (8), Mr. Pemberton Leigh (afterwards Lord Kingsdown stated the principle thus :—)

"With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of the land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor* v. *Stibbert* (15), but also to interests under collateral agreements as in *Daniels* v. *Davison* (6) and *Allen* v. *Anthony* (7) the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact, is bound, according to the ordinary rule, either to enquire what that interest is, or to give effect to it, whatever it may be."

The language of Lord Eldon in *Daniels* v. *Davison* (6) is to the same effect; and when some years after he had again to consider the circumstances, he states the rule in these words :—

"It is so far settled as not to be disputed that a person purchasing, where there is a tenant in possession if he neglects to enquire into the title, must take subject to such right as the tenant may have."

In *Holmes* v. *Powell* (9) Lord Justice Knight Bruce states the principle in somewhat different language. In the course of his judgment he observes :—

"I apprehend that by the law of England when a man is of right and *de facto* in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistent with the title or alleged title under which he is in possession or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who knows or cannot be heard to deny that he knows another to be in the possession of a certain property, cannot for any civil purpose, as against him at least, be heard to deny having thereby notice of the title or alleged title under which or in respect of which the former is and claims to be in that possession."

(14) (1802) 7 Ves Jun. 436n; 32 E. R. 177; (1808) 14 Ves. Jun. 596*n*.; 33 E. R. 649.

(15) (1794) 2 Ves. Jun. 437; 30 E. R. 713; 2 R. R. 278.

Lord Jüstice Swinfen Eady in *Ashburton* v. *Nocton* (5) laid down that :—

" A pre-payment will be good, to the amount of the rent which becomes actually, due before notice has been given to the tenant by the mortgagee, although not as to the residue : *Cook* v. *Guerra* (4), *Green* v. *Rheinberg* (3) was a clear case, as there the landlord had, prior to the mortgage, released the rent to the lessee and tenant in possession, and under the doctrine of *Daniels* v. *Davison* (6) the subsequent mortgagee was affected with notice of the interest which the tenant had in the land. If the arrangement between mortgagor and tenant for pre-payment of rent, or for setting off future rent against money due from the tenant to the mortgagor, be made subsequent to the date of the mortgage, such arrangement will be treated as a collateral bargain between those parties and not binding upon the mortgagee."

The decision in *Municipal Permanent Building Society* v. *Smith* (16), to which I was referred, turned upon the true construction to be given to certain sections of the Conveyancing Act of 1881, and is not an authority adverse to the principle of law to which I have referred. The plaintiffs admitted in the plaint which they filed in this suit that at the date when they became auction purchasers of the premises they were first mortgagees of the same and puchased the same subject to their mortgage. Did the plaintiffs obtain any higher rights against the defendants than they possessed as first mortgagees by becoming purchasers at the auction-sale? What was it that they purchased? The property subject to their own mortgage, and the rights and interest of the defendants in the pemises. In other words, they purchased for one *lakh* the equity of redemption of the premises being or including the interest of the mortgagors therein. But if the interest which they possessed as first mortgagees was subject to the rights of the defendants under the agreement of 7th June 1920, did they become exempted from their obligations under the agreement of 7th June 1920 by acquiring subsequntly the equity of redemption? In my opinion, clearly not. I go further and say that as at the date when they purchased the equity of redemption the mortgagor's interest in the premises was subject to the agreement, the interest of the mortgagors which in effect the purchasers acquired at the auction sale, was saddled with the mortgagor's obligation under the agreement. It was further contended that by acquiring the property at the auction-sale the plaintiffs became entitled to the interest of the Sassoon mortgagees and that as the Sassoon mortgage, was not subject to the agreement of the 7th June 1920 (having been executed on a date prior to that on which the agreement was entered into) their interest as assignees of the Sassoon mortgage was not affected thereby. For the reasons which I have given, in my opinion, that is not the true effect of the transaction, but assuming this contention to be so far in accordance with the fact that it might reasonably be urged that after the purchase the plaintiffs stood in the place of the Sassoon mortgages, in my opinion, the plaintiffs remained equally bound by the agreement of the 7th June. As I have already stated the Sassoon mortgagees were aware and approved of the agreement of the 7th June 1920 and if a mortgagee is privy to, and has sanctioned a collateral agreement between the mortgagor and the tenant [see the observations of Denman, C. J. in *Evans* v. *Elliot* (17)] in my opinion a subsequent assignee of the mortgagee's interest is not to be permitted to assert that his interest in the premises is not affected by the agreement, because the agreement was entered into at a date subsequent to that on which the mortgage was executed. Upon what basis of reason or fairness is a contention to the contrary to be supported ? I can see none and I know of no authority in favour of so inequitable a proposition. On the contrary, in my opinion, the principles and authorities to which I have referred are opposed to any such contention. For these reasons, in my opinion, the plaintiff's claim cannot be sustained and the suit must be dismissed.

Z. K. *Suit dismissed.*

(16) (1889) 22 Q. B. D. 70; 58 L. J. Q. B. 61; 37 W. R. 42.

(17) (1838) 9 Ad. & E. 342 at p. 353: 1 P. & D. 256; 8 L. J. Q. B. 51; 112 E. R. 1242; 48 R. R. 520.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 115 OF 1925.

September 9, 1925.

Present:—Mr. Simpson, A. J. C.

Sheikh GHULAM HUSSAIN—PLAINTIFF—APPLICANT

versus

SINGER SEWING MACHINE COMPANY—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 6—Ex parte *decree, when can be passed—Absence of defendant—Duty of plaintiff to prove claim.*

A decree cannot be passed *ex parte* merely because the defendant does not appear. The plaintiff must prove *prima facie* that his claim is true.

Revision against the judgment and decree of the Additional Judge, Small Cause Court, Lucknow, dated the 14th April 1925.

Mr. *Sailen Roy*, for the Applicant.

ORDER.—This is an application under s. 25 of the Provincial Small Cause Courts Act. Before deciding this application I note that there is no appearance for either of the opposite parties. As regards defendant No. 2, Mohammad Shafi, I do not think that he is a necessary party. No relief is asked for against him in this application. As regards the Singer Sewing Machine Company, it appears that the notice was taken to their office in Lucknow where notices were served in the suit itself. The process-server was told that the *Sahib* was out, and he was to return in the evening. He went back in the evening, and saw some one whom he calls the *Sahib*, who wrote on the back of the summons, "Mr. Lashkari is in Delhi so please forward there." It is signed "J. B. Mistri". I regard this service as sufficient. Mr. Mistri is the supervisor and ought to have accepted summons on behalf of the Company.

The judgment which is objected to is an unusual one. The Singer Sewing Machine Company, defendant No. 1, has its head office at Lahore, and one of its branches at Lucknow. Defendant No. 2 Mohammad Shafi was manager of the Lucknow branch. He took the plaintiff-applicant, Sheikh Ghulam Husain, into the employment of the Company on 15th June 1924 as a sales man on Rs. 20 a month. The plaintiff worked till 18th November 1924 when his services were dispensed with. The plaintiff says that he executed a deed of agreement and deposited Rs. 50 as security money with the defendant No. 2, and he wants to get this back so he brought a suit to recover Rs. 50 together with Rs. 6 4-0 interest, and he claimed it both from Mohammad Shafi to whom he had paid it, and from the Company, as the principal whose agent Mohammad Shafi was in taking the money. Mohammad Shafi never appeared. Indeed Counsel says that he absconded with some money belonging to the Singer Sewing Machine Company. The Company put in an appearance and denied that they had ever received the money.

The Court found that the plaintiff had proved payment as against Mohammad Shafi but had not proved it as against the Company. This would, of course, have been a perfectly consistent finding if it had been based on a decision that Mohammad Shafi took this money on his own account and not as agent for the Company. But the decision was not based on any finding on that point. That point was expressly left open in the judgment. What the Court said was this—

"The plaintiff has no receipt to prove payment of Rs. 50 There is also no bond which he alleges he executed. His oral statement is the only evidence on the point. I cannot believe it as against the defendant No. 1, but as the defendant No. 2 to whom the money is said to have been paid, has not come forward to contest the payment I do not see why an *ex parte* decree should not be passed against him."

He then proceeds to hold that the same evidence which justifies a decree against Mohammad Shafi would not justify a decree against the Company. There are inconsistent findings. A decree cannot be passed *ex parte* merely because the defendant does not appear. The plaintiff must prove *prima facie* that his claim is true. Therefore, the decree against Mohammad Shafi must be based on a finding that plaintiff has proved *prima facie* that he paid the money to Mohammad Shafi. It follows that plaintiff proved *prima facie* as against the Singer Sewing Machine Company, too, not that they were liable, but that he had paid the money to Mohammad Shafi, so it was necessary that the Court should go on to decide the remaining issue whether the Company is liable to re-pay the sum received by Mohammad Shafi. Therefore, under s. 25 I set aside the dismissal of the suit against the Company. I do not set aside the decree against defendant No. 2, but I direct the Court to take up

and decide the remaining issues and then pass a decree with regard to the Company. I make no order as to whether further evidence should be admitted or not admitted. The Small Cause Court is to decide that question for itself.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 205 OF 1921 AND 393 OF 1923.

January 27, 1925.

Present:—Sir Victor Murray Coutts-Trotter, KT., Chief Justice, and Mr. Justice Krishnan.

LANKA TULASAMMA—PLAINTIFF—APPELLANT

versus

GUNTAPALLI VENKATASUBBIAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Trustee—Executor de son tort—*Trust funds, mixing of, by trustee with private funds—Accountability—Burden of proof.*

Where a trustee or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort*, by virtue of his intermeddling with the estate of a deceased person, is proved to have amalgamated monies of the testator with his own and especially if he can reasonably be suspected of having destroyed the evidence which would otherwise be available to separate the estates, he is liable to account for all the sums that he alleges to be his own and to prove his ownership in them. [p. 120, col. 2.]

Where there has been an amalgamation, the burden will shift from the person in the position of a *cestui que trust*, and will rest on the person responsible for confounding the two funds and thereby rendering identification difficult on the former's part. [p. 121, col. 1.]

Lupton v. *White*, (1808) 15 Ves. Jun. 432: 33 E. R. 817; 10 R. R. 94, *In re Oatway, Hertslet* v. *Oatway*, (1903) 2 Ch. 356; 72 L. J. Ch. 575; 88 L. T. 622; *Magaluri Garudiah* v. *Narayana Rungiah*, 3 M. 359, 6 Ind. Jur. 24; 1 Ind. Dec. (N. S.) 805 and *Burogapalli Sriramulu* v. *Nandigam Subbarayadu*, 10 Ind. Cas. 57; 10 M. L. T. 313, referred to.

Appeals against the decrees of the Court of the Additional Subordinate Judge, Guntur, in O. S. No. 40 of 1918 (O. S. No. 49 of 1918, on the file of the Temporary Sub-Court, Guntur).

Mr. *K. Kameswara Rao*, for the Appellant.

Mr. *N. Suryanarayana*, for the Respondents.

JUDGMENT.

APPEAL NO. 205 OF 1921.

Coutts-Tortter, C. J.—The question that arises in this appeal is that raised by the 12th paragraph of the memorandum of appeal. This was a suit brought by Narasiah's widow to reclaim certain properties and choses in action as being part of her husband's estate though actually in the hands of the defendant, the plaintiff in the adoption suit. The son-in-law to use a term that will cover him in both the suits, has admitted at p. 322 of the record that he adopted a course of business which resulted in his mixing up monies which he contends are his own with monies which in some cases, he himself says are, and in other cases which are alleged by the other side to be monies belonging to the estate of Narasiah. It also appears from p. 316 of the record that there are the gravest reasons to suspect, as the learned Judge suspected, that the son-in-law after the death of his father-in-law had suppressed documentary evidence in the shape of account books which might have thrown light upon the question to whose estate these various suggested items in the account belonged.

The learned Judge appears not to have had his attention drawn to the authorities applicable to a case of this nature. He took the view that the plaintiff having claimed certain specific items of property was bound to give evidence with regard to each item sufficient to make a *primafacie* case that the particular item belonged to the estate of her deceased husband. As we understand the authorities, that is not the law. The law appears to be this, and it has been settled by a long chain of authorities both in England and in this country; where a trustee, or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort*, by virtue of his intermeddling with the estate is proved to have amalgamated monies of the testator with his own and especially if he can reasonably be suspected of having destroyed the evidence which would otherwise be available to separate the estates, then he is called upon to account for all the sums that he alleges to be his own and to prove his ownership in them. That was laid down in the leading case of *Lupton* v. *White* (1), and the headnote is this "Agent, or bailiff, confounding his principal's property with his own, charged with the whole; except what he can prove to be his own; and, in this instance, the case of a breach of the

(1) (1808 15 Ves. Jun. 432; 33 E. R. 817; 10 R. R. 94.

terms, upon which the Court dissolved an injunction, the enquiry was directed with costs". That is clear authority for the proposition that, where there has been an amalgamation the burden will be passed from the person in the position of a *cestui que trust.* That has been consistently followed in the English Courts of Equity and a comparatively recent application of it, will be found in the case of *In re Oatway, Hertslet* v. *Oatway* (2) and the doctrine is by no means unknown to India. It was followed in two cases in this Court which have been cited to us, *Magaluri Garudiah* v. *Narayana Rungiah* (3), a decision of Sir Charles Turner, C. J., and Muthuswami Iyer, J., and more recently in a case decided by Benson and Sundara Iyer, JJ., *Burugapalli Sriramulu* v. *Nandigam Subbarayadu* (4). In those cases the principle laid down by Lord Eldon has been fully recognised and acted upon; namely ,that the onus of proof clearly rests on the person responsible for confounding the two funds and thereby rendering identification difficult on the plaintiff's part.

We, therefore, think that this case must be referred back for a finding in accordance with the view of the law that we have laid down, namely, that this man must prove that all the items enumerated in para. 16, sub-para. 4 of the judgment belong to himself, the burden being on him. There is general evidence to lead to a very strong suspicion that this man has got into his hands some considerable portion of the deceased man's estate. There is evidence that it was a large estate at one time, and there is evidence that just a few years before his death it amounted to Rs. 40,000. And there are available sources of evidence which are not before us but can be resorted to by the learned Judge in the Court below as to how much of that estate is now left in the hands of the widow. If there is a deficit after taking into account the sums of money recovered by the Receiver, then the burden will lie upon the defendant. The general principle is clear that this man must show that those items which he alleges to be his own moneys belong to him. It is no great hardship in this case, because the debts are mostly evidenced by promissory notes and it cannot be very difficult, if his case is a true one, to rebut the presumption that they are really notes taken by him in respect of monies due to Narasayya's estate, by proving that he himself lent the money at a particular date, that it was his own money and that the negotiable security was given to him to secure a debt due to himself and to nobody else. The case must go back for a finding with regard to those items with the onus of proving that they are his cast upon the defendant. Both parties can adduce fresh evidence. Finding will be returned in three months. Ten days will be allowed for objections.

APPEAL No. 393 OF 1923.

This appeal is withdrawn and is dismissed with costs (no Vakil's fee). The respondent will also get her costs in C. M. P. No. 1348 of 1923.

Krishnan, J.—I agree.

V. N. V.

Z. K. *Appeal dismissed.*

(2) (1903) 2 Ch. 356; 72 L. J. Ch. 575; 88 L T. 622.
(3) 3 M. 359; 6 Ind. Jur. 24; 1 Ind. Dec. (N. S.) 805.
(4) 10 Ind. Cas. 57; 10 M. L. T. 313.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 50 OF 1924.
September 21, 1925.
Present:—Mr. Dalal, J. C., and Mr. Wazir Hasan, A. J. C.
BIPIN CHANDRA CHATERJI—PLAINTIFF—APPELLANT
versus
DAWAN SINGH—DEFENDANT—RESPONDENT.

Landlord and tenant—Suit for declaration of under-proprietary rights, dismissal of—Appeal by one of several claimants—Decree in appeal, operation of—Treatment as under-proprietors, effect of.

In 1870 certain holders of land brought a suit against the proprietor for a declaration that they were under-proprietors in respect of their holdings. The suits were decreed by the Assistant Settlement Officer but were dismissed on appeal by the Settlement Officer. Only one of the original claimants appealed to the Financial Commissioner and in his case the Financial Commissioner set aside the order of the Settlement Officer and restored that of the Assistant Settlement Officer. It was assumed, however, both by the Settlement Officers and by the parties that the decision of the Financial Commissioner had accorded he status of under-proprietors to all holders of land in the village who held under similar conditions to those which had been dealt with by the Financial Commissioner in his order, and on the basis of this assumption even those claimants whose suits had been dismissed by the Settlement Officer and who had not

appealed to the Financial Commissioner were treated as under-proprietors in subsequent litigation with regard to the fixing of rent and in other respects:

Held, that although the order of the Financial Commissioner in the appeal preferred to him could not be said to have modified the Settlement Officer's decree dismissing the suits of the other claimants who had not appealed to the Financial Commissioner, yet as they were all treated in a manner as if that judgment governed their case also they must be held to have acquired the footing of under-proprietors. [p. 125, col. 1.]

Second appeal against a decree of the District Judge, Fyzabad, dated the12th November 1923, reversing that of the Subordinate Judge, Fyzabad, dated the 14th April 1923.

ORDER.

Dalal, J. C. (*February 3, 1925.*)—This second appeal raises an important point of law and I am somewhat hampered in its decision by an unreported judgment of a learned Judge of this Court dated 21st January 1921 on nearly the same facts as arise in this appeal (Second Civil Appeal No. 187 of 1920). The plaintiff is a lessee of the *zemindar* of the village of Intgaon and the defendant Dawan Singh claims to be an under-proprietor. The declaration sought by the plaintiff is that Dawan Singh is only a tenant. The cause of action accrued for a declaratory suit because the Revenue Court refused to allow interest to the plaintiff in a suit for recovery of arrears of rent from the defendant on the ground that the defendant was an under-proprietor and not liable to pay interest.

The defendant is in possession of three holdings which were at the time of the first settlement in 1869 in the possession of three separate holders: his father Ramhet Singh and his two uncles Ramphal Singh and Ramcharan Singh. Along with other holders of land, who claimed to be old proprietors of the village, these three men sued the proprietor Thakurain Raghunath Kuar at the time of the settlement for a declaration that they were under-proprietors. A number of separate suits were filed and the principal suit was that of one Prag Singh. The Assistant Settlement Officer passed separate decrees in favour of the different suitors on 1st June 1869 (Ex. 7). Both parties appealed in every suit; the lady proprietor against the declaration of an under-proprietary title in favour of the agricultural holder and the suitor on the question of rent. The lady succeeded in her appeals and the Settlement Officer held on 22nd September 1869 in all the different suits that the agricultural holders were merely occupancy tenants and not under-proprietors. The assessment made by the Assistant Settlement Officer was upheld. Separate decrees were undoubtedly passed in every case though one common judgment was delivered in Prag Singh's case as was done by the Assistant Settlement Officer (see Exs. 1 to 6 and 9 to 11.)

Prag Singh appealed to the Financial Commissioner who set aside the decree of the Settlement Officer and restored that of the Assistant Settlement Officer. The decree of the Financial Commissioner was passed on review on 24th February 1870 (Ex. A-40)

It may be taken as certain that only one agricultural holder Prag Singh appealed and the decree of the Financial Commissioner was passed in his case only. At the same time, it is also certain that this finding and decree were taken to govern the cases of all similar agricultural holders of village Intgaon and entries were made in the Settlement Record accordingly of all of them being under proprietors. According to this construction of the decree of Prag Singh as one passed in favour of Prag Singh in his representative capacity, the names of Rambet Singh, Ramphal Singh and Ramcharan Singh were recorded as under-proprietors in *khewat* Register No. 5 prepared under s 56 of Act XVII of 1876. In the earlier *khatauni* prepared under Circular No. 23 of 1864 they were also recorded as under-proprietors (Ex. A 4?).

The question, therefore, is whether the defendant can take advantage of the decree of the Financial Commissioner in Prag Singh's case or whether his three predecessors in-interest must be treated as occupancy tenants only, in accordance with the decree of the Settlement Officer dated 22nd September 1869. In a similar case of the same village a learned Judge of this Court held, as pointed out by me above, that the order passed by the Settlement Officer became final in the case of those agricultural holders who did not appeal to the Financial Commissioner and that they must be treated as occupancy tenants only. It does not appear, however, that in that case any argument was advanced that Prag Singh's case must be treated as one in his representative capacity and may be taken advantage of by Ramhet Singh, Ramphal Singh and Ram Charan Singh in view of

he uncertainty of procedure in those days and obvious acceptance by all parties that the judgment and decree in Prag Singh's case were to govern similar agricultural holders of the village, who had taken their cause only up to the Settlement Officer's Court and not to the Court of the Financial Commissioner. I think that this point ought to be decided by a Bench of two Judges.

There has also been further litigation. There is a decree of a Settlement Officer dated the 27th February 1875 (Ex. A-41) to which Ramhet appears to have been a party. That decree and certain other litigation prosecuted in the Courts of the Judicial Commissioner and the Commissioner indicate that Ramhet was treated as an under-proprietor and the amount of his *nankar* payment was fixed under that decree. I am not in a position to state at present how this litigation arose, whether it was independent or it was in continuation of the Financial Commissioner's decree in Prag Singh's case dated 24th February 1870. In order that some light may be thrown on the subject I direct that the plaintiff-appellant shall produce in Court at the time of the hearing by the Bench all the original records of the Settlement Court. The defendant-respondent also will be at liberty to send for similar records which he may desire the Bench to consider. As regards this decree also the question will arise whether Ramhet alone can take advantage of it or whether the plaintiffs of that suit also sued in a representative character, so that all the agricultural holders of that description may take advantage of the decree. The judgment would indicate that the question was considered as a whole as to the liability of all such holders to pay a certain sum as *nankar* due to the *zemindar*.

The defendant claimed to have acquired the right of an under-proprietor by prescription. It is to be decided how far such a defence is tenable in view of the observations of their Lordships of the Privy Council in the case of *Mohammad Mumtaz Ali Khan* v. *Mohan Singh* (1). Finally there is an issue whether the plaintiff *zemindar* is estopped for any reason from denying the defendant's title as an under-proprietor.

I certify this appeal to be a fit one to be heard by a Bench of two Judges.

I permitted the plaintiff who came from Fyzabad yesterday to be absent to-day when this order was passed. He shall be informed by a letter by the office that he must acquaint himself with the contents of this order and carry out the directions given to him.

Mr. *J. K. Banerji*, for the Appellant.

Mr *M. Wasim* for Messrs. *P. G. N. Misra* and *Sunder Lal*, for the Respondent.

JUDGMENT.

Dalal, J. C. and Wazir Hasan, A. J. C.—(*September 21, 1925.*)—This appeal was heard by a Bench of two Judges on a reference made by one of us The facts may be repeated from the order of reference with such corrections as appeared on a further inquiry during the hearing of the appeal.

The plaintiff is a lessee of the *zemindar* of the village of Intgaon and the defendant Dawan Singh claims to be an under-proprietor. The declaration sought by the plaintiff is that Dawan Singh is only a tenant. The cause of action for a declaratory suit accrued to him when the Revenue Court refused to allow interest in a suit filed by him for the recovery of arrears of rent from the defendant on the ground that the defendant was an under-proprietor and, therefore, not liable to pay interest.

The defendant is in the possession of three holdings which were at the time of the first Settlement in 1869 in the possession of three separate holders: his father Ramhet and his two uncles Ramphal Singh and Ram Charan Singh. Along with other holders of land, who claimed to be old proprietors of the village, these three men sued the proprietor Thakurain Raghunath Kuar at the time of the settlement for a declaration that they were under-proprietors. A number of separate suits was filed and the principal suit was that of one Prag Singh. The Assistant Settlement Officer passed separate decrees in favour of the different suitors on 1st June 1869 (Ex. 7). Both parties appealed in every suit: the lady proprietor against the declaration of an under-proprietary title in favour of the agricultural holder and the suitors on the question of rent. The lady succeeded in her appeals and the Settlement Officer

(1) 74 Ind. Cas. 476; 26 O. C. 231; (1923) A. I. R. (P. C.) 118; 21 A. L. J. 757; 45 A. 419; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O. L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 33 M. L. T. 321; 50 I. A. 202 (P. C.).

(the Appellate Court) held on 22nd September 1869 in all the different suits that the agricultural holders were merely occupancy tenant and not under-proprietors. The assessment made by the Assistant Settlement Officer was upheld. Separate decrees were prepared for every appeal, the one common judgment was delivered in Prag Singh's case as was done by the Assistant Settlement Officer (see Exs. 1 to 6 and 9 to 11).

Prag Singh and some other agricultural holders appealed to the Financial Commissioner, Ramhet, Ramcharan and Ramphal, however, did not.

We sent for the file of the Court of the Financial Commissioner in Prag Singh's case. It appears that this appeal which was at that time known as special appeal was dismissed at first on 10th January 1870 and the order was that the dismissal governed Appeals Nos. 54 to 65 also. Those were appeals by agriculturists other than Ramhet, Ramcharan and Ramphal. Subsequently there was a review and, in deciding that review application, the Financial Commissioner on 24th February 1870 upheld the decree of the Assistant Settlement Officer and set aside the decree of the Appellate Court of the Settlement Officer, declaring that the appellant Prag Singh was an under-proprietor. This order also governed Appeals Nos. 54 to 65.

Reference was made to this Bench to decide whether the decree of the Financial Commissioner on review set aside the decree of the Settlement Officer in the cases of Ramhet, Ramcharan and Ramphal also or not. Under similar circumstances a learned Judge of this Court sitting singly held in Second Appeal No. 187 of 1920 that the decree of the Settlement Officer was final with respect to these three particular agriculturists and in consequence they could not claim to have the right of an under-proprietor having been decreed to them.

We accept this decision so far as the decree itself is concerned.

On further inquiry, however, we find that though the final decree in favour of Ramhet, Ramcharan and Ramphal was of occupancy tenancy in their favour they were consistently treated at the time of settlement and afterwards as under-proprietors. There was a subsequent litigation during settlement operations to fix the *nankar* payments due to these old *zemindars* and during that litigation they were all treated as under-proprietors (see Ex. A-43 dated 30th June 1875). When the Settlement Record was prepared showing the nature of the tenure of the Subordinate holders and the rent payable by them, Ramhet for himself and as successor-in-interest of his brothers Ramphal and Ramcharan was treated as a *sir* holder (see Ex. A-46). The abstract statement prepared at the time of the first settlement (Ex. A-45) contained the names of Ramphal, Ramhet and Ramcharan and the rent made payable by them was that of under-proprietors. Each page of this record is initialed in the original by the Settlement Officer.

It was argued that occupancy tenants also were entered in the same register so the entry of the names of these men in this particular register did not prove that they were entered as under-proprietors. This argument is not correct. The Settlement Officer declared Ramhet, Ramcharan and Ramphal to be holders in occupancy right only and not as *sir* holder (Ex. 11). It is clear, therefore, that the distinction at the time between an occupancy holding and under-proprietary title was expressed in the term of an occupancy holder or a *sir* holder. A *sir* holder was one who owned under-proprietary rights. In Ex. A-46 Ramhet is entered as a *sir* holder of all the lands in his possession at the time, his own and those which he inherited from his brothers.

At the time of the current Settlement also the defendant was entered in the village records as an under-proprietor.

Under the circumstances of the case we are of opinion that the principles of the ruling of their Lordships of the Privy Council in the case of *Pirthipal Singh* v. *Ganesh Din Singh* (2) will apply. In that case in the settlement of 1867 the predecessors of the defendant held no greater interest in the village in suit than that of a *thekadar* and a decree was also passed in 1868 declaring that they had only *thekadari* and not *pukhtadari* rights. But ever since 1869 in the *wajib ul-arz* the *khewat*, the recent Settlement and the various other Court proceedings they were recorded and treated as *pukhtadars*. Their Lordships held that whatever may have been the

(2) 71 Ind. Cas. 641; 25 O. C. 396; (1922) A. I. R. (P. C.) 383; 44 M. L. J. 29; 37 C. L. J. 219; 9 O. L. J. 649; 32 M. L. T. 109; 9 O. & A. L. R. 541; 18 L. W. 41; 50 I. A. 210*n* (P. C.).

original effect of the decree the title of the defendants as *pukhtadars* so long recognized could not be over-thrown by that suit.

It was argued on behalf of the appellant that the principles enunciated in the ruling were modified by the subsequent ruling in the case of *Mohammad Mumtaz Ali Khan* v. *Mohan Singh* (1). We do not think that there is any conflict between the two rulings. What was decided in the latter case was that the simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which was unfounded at the date when it was made cannot by the mere lapse of 6 or 12 years convert what was an occupancy or tenant title into that of an under-proprietor.

In the present case there were not only a assertion by the holder and declaration by a Revenue Court. On the basis of the under-proprietary title of Ramhet, Ramcharan and Ramphal the rent was assessed at a far smaller figure than it would have been if they had been occupancy tenants and the rent was not enhanced in consequence of the under-proprietary title at the time of the recent Settlement. When the present plaintiff sued the present defendant for recovery of rent at the rate payable by an occupancy tenant his suit was dismissed and this decree was upheld by a learned Judge of this Court (Second Rent Appeal No. 43 of 1921, decided on 11th January 1920).

Though according to law the order of the Financial Commissioner in Prag Singh's case cannot be said to have modified the Settlement Officer's decree against Ramhet, Ramcharan and Ramphal, these old *zemindars* were treated in a manner as if that judgment governed their case also. When such treatment was accorded since 1870 to the present time it is too late now for the plaintiff to refer back to the decree of the Settlement Officer. The defendant must be treated on the footing of an under-proprietor.

We dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION No. 151 OF 1925.

October 7, 1925.

Present :—Mr. Neave, A. J. C.

CHHOTEY LAL—PLAINTIFF—APPELLANT

versus

RAM BALI AND OTHERS—DEFENDANTS —OPPOSITE PARTY.

Hindu Law—Widow, debt incurred by, whether binding on reversioners—Necessity, absence of.

A debt incurred by a Hindu widow which is not shown to have been incurred for legal necessity and which is not charged upon the property of her deceased husband in the hands of the widow, is not binding on the estate and a decree in respect of such a debt cannot be passed against the reversioners after the death of the widow.

Application for revision against the judgment and decree of the Judge, Small Cause Court, Bara Banki, dated the 4th December 1924.

Messrs. *Rama Shankar Srivastava* and *Motilal Saksena*, for the Appellant.

Mr. *H. Husain*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the Judge of the Small Cause Court of Bara Banki decreeing the plaintiff's claim against certain defendants only.

The plaintiff brought this suit against four defendants, two of these, Nos. 1 and 4, admitted the claim. Nos. 2 and 3 resisted it. The learned Judge has found that the debt was a simple one and that it was incurred by a Hindu widow, that the defendants are in possession as reversioners of the husband's property and that such a debt cannot bind the estate of the husband in the hands of the reversioners. Consequently he has granted a decree only against the two defendants who admitted the claim.

In this case there is no evidence that the debt was incurred for legal necessity. It is admitted that the property in the hands of the defendants was not mortgaged by the widow. *Dhiraj Singh* v. *Manga Ram* (1) is an authority in support of the legal proposition laid down by the learned Judge of the Court below. No case is shown for interference with his order and this application is dismissed with costs.

Z. K. *Application dismissed.*

(1) 19 A. 300; A. W. N. (1897) 69; 9 Ind. Dec. (N. S.) 196.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION NOS. 1012 AND 1017 OF 1924.

April 14, 1924.

Present:—Mr. Justice Ramesam and Mr. Justice Wallace.

IN C. M. P. No. 1012 OF 1924.

THE OFFICIAL ASSIGNEE OF RANGOON—PETITIONER

versus

THE OFFICIAL ASSIGNEE OF MADRAS AND OTHERS—RESPONDENTS.

IN C. M. P. No. 1017 OF 1924.

ANNAMALAI CHETTY—PETITIONER

versus

THE OFFICIAL ASSIGNEE OF MADRAS AND ANOTHER—RESPONDENTS.

Letters Patent (Mad.), cl. 39—Civil Procedure Code (Act V of 1908), s. 109—Insolvency jurisdiction of High Court, order in—Appeal to Privy Council, whether lies.

In an insolvency matter (original or appellate), an application for leave to appeal to Privy Council against an order of the High Court lies under cl. 39 of the Letters Patent even if no such application lies under s. 109 of the C. P. C. [p. 126, col 2.]

The words "on appeal" in cl 39 of the Letters Patent mean the same thing as "in appellate jurisdiction". [p. 127, col. 1.]

Petitions, under s. 8 of cl. 2 (*h*) of the Presidency Towns Insolvency Act and under ss. 109 and 110 and O. XLV, rr. 2, 3 and 8 of Act V of 1908, respectively, praying for the grant of a certificate to enable the petitioners to appeal to His Majesty in Council against an order of this Court (Sir Walter Schwabe, KT., Chief Justice and Mr. Justice Ramesam) dated the 21st November 1923, in C.M P. No. 3032 of 1922 reported as 83 Ind. Cas, 174, praying for an order to rescind the order of this Court, dated the 27th August 1918, and made in its Appellate jurisdiction in O.S.A. No. 39 of 1918, annulling the order of adjudication, dated the 23rd April 1917 and made in the exercise of its Ordinary Original Insolvency Jurisdiction in I. P. No. 83 of 1917 and to revise the insolvency proceedings in the High Court, Madras.

Messrs. *T. R. Venkatrama Sastriar, L. S. Veeraraghava Iyer, A. Krishnaswami Iyer, N Chandrasekhara Iyer* and *S. M. Subbaroya Iyer*, for the Petitioner.

Mr. *G. Krishnaswami Iyer*, for the Respondents.

ORDER.—This is an application by the Official Assignee of Rangoon for leave to appeal to His Majesty in Council against the order on C. M. P. No. 3032 of 1922 [*Official Assignee of Madras* v. *Official Assignee of Rangoon*(1)] passed by Schwabe, C. J., and myself, That order was passed under s. 8 of the Presidency Towns Insolvency Act of 1909 annulling a prior order of Wallis, C. J., and Seshagiri Iyer, J

The first and second respondents now contend that there is no appeal to His Majesty in Council against the order under s. 8 of Act III of 1909. Upto 1909, the insolvency jurisdiction in Presidency Towns was governed by 11 and 12 Vict. C. 21. In 1848 there were no High Courts in India and the Supreme Court had no insolvency jurisdiction and the Act of 1848 constituted an Insolvency Court. Even after the issue of the Letters Patent in 1862, it was generally supposed that the Insolvency Court was, strictly, a Court separate from the High Court. Having regard to cl. 18 of the Letters Patent, it is doubtful how far such a view was correct. Clause 18 of the Letters Patent shows that the insolvency jurisdiction was part of the civil jurisdiction of the High Court and there was an original and appellate jurisdiction in insolvency matters also.

All these doubts were certainly resolved after the Act of 1909. Section 3 makes the High Court the only Court competent to exercise insolvency jurisdiction. That being so, in an insolvency matter (original or appellate) an application for leave to appeal lies under cl. 39 of the Letters Patent even if no such application lies under s. 109 of the C. P. C. The Advocate-General contends that the C. P. C. itself applies. He points out that s. (2) of the C. P. C. was repealed by Act III of 1909 with the result that all the portions of the Code applying to the Original Side of the High Court (see s. 117) also apply to insolvency matters. This result being consistent with s. 90 (1) of the Insolveney Act of 1909. Still, it may be doubted whether the provisions of the C. P. C., so made applicable to the Original Side of the High Court (s. 117) including the insolvency jurisdiction [s. 90 (1)] including the Chapter relating to appeals to His Majesty in Council should be confined to those relating to the procedure to be followed in the High Court. If the C. P. C., s. 109 does not apply, cl. 39 of the Letters Patent certainly applies. The decision in *Rangoon Botatoung Co., Ltd.* v. *Col-*

(1) 83 Ind. Cas. 174; 19 L. W. 316; 34 M. L. T. 99; 46 M. L. J. 580; (1924) M. W. N. 458; (1924) A. I. R. (M.) 662.

lector of Rangoon (2) has nothing to do with this matter. The Judicial Committee held that no appeal lay in land acquisition proceedings for they were in the nature of arbitration proceedings [*vide Secretary of State for India* v. *Chelikani Rama Rao* (3)] and the award passed thereon is not of the nature of a judgment, decree or order within the meaning of cl. 39 of the Letters Patent [see *Special Officer, Salsettle Building Sites* v. *Dasabhai Bezanji Motivalla* (4).]

It may be added that the words "on appeal" in cl. 39 obviously mean the same thing as "in appellate jurisdiction," and it was held by Schwabe, C. J., and myself that the petition (C. M. P. No. 3032 of 1922) [*Official Assignee of Madras* v. *Official Assignee of Rangoon* (1)] properly lay on the Appellate Side and not on the Original Side as its object was to review the appellate order of Wallis, C. J., and Seshagiri Iyer, J. The order on review was in substitution of the original order passed in appeal and takes its place. But this point has no importance. Our order must be either on the Appellate Side or on the Original Side. It cannot be that it is neither. In either case, the application is competent and cl. 39 applies. We hold that an application for leave to appeal is competent if other conditions are satisfied. The Official Assignee of Rangoon is a party to the proceedings and has a right to appeal whether "aggrieved" or not.

It is not denied that the value of the properties involved is several lakhs.

It is not, therefore, necessary for us to certify that the case is a fit one for appeal within the latter part of the proviso to cl. 39—the first part of the proviso being satisfied.

The application is granted and the usual certificate will issue.

C. M. P. No. 1017 OF 1924.

This is connected with C. M. P. No. 1012 of 1924. The petitioner was made a party to the enquiry in C.M.P. No. 3032 of 1922 [*Official Assignee of Madras* v. *Official Assignee of Rangoon* (1)]. He supported the Official Assignee of Rangoon. The final order went against them and the petitioner feels aggrieved like the Official Assignee of Rangoon. The leave applied for is granted and the usual certificate will issue.

C. M. P. NOS. 1012 AND 1017 OF 1924.

The first respondent will pay himself—the taxed costs of the petitions—out of the estate.

V. N. V. *Leave granted.*
S. D.

(2) 16 Ind Cas. 188; 40 C. 21; 16 C. W. N. 961; (1912) M. W. N. 781; 12 M. L. T. 195; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 39 I. A. 197; 5 Bur. L. T. 205; 6 L. B. R. 150 (P. C.).

(3) 35 Ind. Cas 902; 39 M. 617 at p. 624; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1097; 25 C. L. J. 69; 43 I. A. 192 (P. C.).

(4) 20 Ind. Cas. 763; 17 C. W. N. 421 (P. C.).

MADRAS HIGH COURT.

ORIGINAL SIDE APPEALS NOS. 86 AND 87 OF 1924.

March 6, 1925.

Present:—Justice Sir Charles Gordon Spencer, KT., and Mr Justice Ramesam.

GOKULDOSS GOVERDHANADOSS (DEAD)—APPELLANT IN O. S. A. No. 86 OF 1924 AND RESPONDENT IN O. S. A. No. 87 OF 1924

versus

DWARAKADOSS GOVERDHANADOSS (DEAD) AND OTHERS—RESPONDENTS IN O. S. A. No. 86 OF 1924 AND APPELLANTS IN O. S. A. No 87 OF 1924.

Presidency Towns Insolvency Act (III of 1909), s. 11 (d)—"Carrying on business", meaning of—Suit for partition against firm—Appointment of Receiver, whether bars adjudication—Firm, adjudication of, legality of—Madras Insolvency Rules, r. 47.

So long as there are debts of the business being discharged and assets being got in, a business must be regarded as still being "carried on" within the meaning of s. 11 (*d*), Presidency Towns Insolvency Act. [p 129, col. 2.]

Where in a suit for partition against a firm a Receiver is appointed by Court, the business does not cease to be "carried on" for the purposes of s. 11 (*d*), Presidency Towns Insolvency Act. [p. 128, col. 2.]

Dawe v. *Vergara*, (1883) 11 Q. B. D. 241, referred to.

Rule 47 of the Insolvency Rules which says, that an order of adjudication shall be made against partners individually must not be understood to mean that an order of adjudication shall not also be made against the firm. [p. 129, col. 2.]

Appeal from the judgment and order of Mr. Justice Waller, dated the 28th November 1924, and passed in the exercise of the Original Insolvency Jurisdiction of the High Court, in Insolvency Petition No. 351 of 1924.

Messrs. *P. Jagannatha Naidu* and *T. R. Ramachandra Iyer*, for the Appellant.

Messrs. *Nugent Grant* and *Jagannatha Naidu*, for the Respondents.

JUDGMENT.

Spencer, J.—These are appeals against the order of Mr. Justice Waller, adjudicating the firm of Murlidoss Ramdoss & Co., insolvent and finding that the two brothers

Gokuldoss and Dwarakadoss were partners in it, the counter-petitioners Nos. 3 and 4, namely, Govindoss Krishnadoss *alias* Babu who is the son of Krishnadoss Murlidoss, and Ramdoss, son of Dwarakadoss Goverdhanadoss. being minors, were excluded. Original Side Appeal No. 86 is by the first-counter-petitioner Gokuldoss and O. S. A. No. 87 is by the second counter-petitioner Dwarakadoss Goverdhanadoss. As he died after filing the appeal, his son Ramdoss is allowed to continue it. The facts which appear from the affidavits on either side are that the first counter-petitioner, Gokuldoss's deceased father Goverdhandoss and his deceased uncle Murlidoss Ramdoss were carrying on business in buying and selling houses and lands in Madras under the trade name of Ramdoss Murlidoss and Co., and after their deaths the first counter petitioner and Krishnadoss Murlidoss, now deceased, carried it on. Messrs Parry & Co., obtained a decree in O. S. No. 1007 of 1922, on the Original Side of this Court for Rs. 49,117 against this firm. Other creditors of the firm obtained a decree for Rs. 75,206 and attached the properties belonging to the firm on the 9th September 1924. The property remained attached for a period of 21 days and notice was given to Gokuldoss of the intention of Messrs. Parry, & Co., to file a petition, to declare the firm insolvent. Meanwhile Govindoss Krishnadoss *alias* Babu, instituted a suit O. S. No. 622 of 1923 first for partition and later upon amendment for a declaration that the family had become divided from 1890 and that the debts incurred by the firm were not binding upon him after his father's death. In this suit a Receiver was appointed on August 31st 1923.

It was contended before Mr. Justice Waller and again in appeal that, as the business of the firm ceased in April 1923, the Court had no jurisdiction to make an order of adjudication in November 1924. It is also contended that after the appointment of a Receiver any business carried on by the Receiver will not amount to a carrying on of the business by the firm, as the Receiver is not an agent of the parties, but an officer of Court, and that until he is discharged, no adjudication order can validily be made.

Section 11 (*d*) of the Presidency Towns Insolvency Act declares "the Court shall not have jurisdiction to make an order of adjudication in the case of a petition against a firm of debtors unless the firm has carried on business within a year before the date of the presentation of the insolvency petition within those limits". Whether a firm has carried on business or not within a year before the date of the filing of petition is a question of fact in each case. But it is necessary first to determine what is meant by "carrying on business". Is it the same as "being a trader" which is the expression used in s. 87 of the English Bankruptcy Act of 1869? Mr. Ramachandra Iyer quoted the case of *Dawe* v. *Vergara* (1). That was a case where two persons, Ellery and Festing traded together as wine merchants. Festing brought a suit for dissolution and himself took service in another Company as a book-keeper. A Receiver was appointed to carry on the business. It was held that, after the appointment of the Receiver who took possession and carried on the business, Festing was no longer a trader at the time when his goods were taken in execution. Mr. Ramachandra Aiyar also relied on the case of *Ex parte Blan, In re Sawers* (2), where it was held that an act of bankruptcy could not be committed by an agent and, therefore, that two partners of an English firm who were residing permanently in Chelli could not be adjudicated bankrupts in an English Court of Bankruptcy. The explanation to s. 9 of the Presidency Towns Insolvency Act declares that the act of an agent may be an act of the principal for the purpose of committing acts of insolvency, even though the agent may have no specific authority to commit it. It was pointed out by me in *Kalianji Singji Bhai* v. *Bank of Madras* (3), that the law in England was not the same as that in India in this respect.

In *Goswami Shri Girdhariji* v. *Shri Govardhanlalji* (4), the Privy Council had to consider the meaning of the phrase "carry on business" and they observed that the phrase was an elastic one and almost incapable of definition. It was intended in the Letters Patent where the phrase was used, to refer to business in which a man might contract debts and become liable to be sued by persons who had business relations with him. I am of opinion that the expression "carry on business" in the Presidency

(1) (1883) 11 Q. B. D. 241.
(2) (1879) 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334.
(3) 31 Ind. Cas. 583; 29 M. L. J. 788; 3 L. W. 13; (1916) 1 M. W. N. 12; 39 M. 693.
(4) 18 B. 494; 21 I. A. 13; 6 Sar. P. C. J. 396; 9 Ind. Dec. (N. s.) 704 (P. C.).

Towns Insolvency Act cannot be interpreted in the light of the Letters Patent or of the wording of the old English Bankruptcy Law with reference to traders, so that cases like *Dawe* v. *Vergara* (1) and *Ex parte Schomberg* (5) and *Ex parte Salaman, In re Taylor* (6) do not help us to decide the meaning of the phrase "carry on business" in cases of insolvency. Under the old Bankruptcy Act of 1869, a firm could not be adjudicated insolvent in England, but this was made possible by the Bankruptcy Act of 1893 in which the expression "being a trader", was dropped and the expression "carrying on business" was substituted. As a married woman could not be made bankrupt, unless she was carrying on a trade or business after her marriage, the question has come up in connection with the Married Woman's Property Act, as to what is the meaning of "carrying on business" under the Bankruptcy Act. In *In re Dagnall, Ex parte Soan* (7), Vaughan Williams, J., observed that trading was not completed until all the obligations that the fact of trading imposed upon the trader were performed. The learned Judges declined to be bound by the earlier decisions such as *Ex parte Schomberg* (5), as to the meaning of the words in the Bankruptcy Act of 1888, "being a trader". Then in *In re Worsley* (8), Lord Alverstone, C. J., held that a woman who was carrying on business separately from her husband and sold that business must be deemed to be still carrying on the business so long as the debts she had incurred in the business remained unpaid. Reference is made by the learned Chief Justice to the case of *Ex parte Bamford* (9), where the Lord Chancellor laid down that so long as a trader did not pay the debts he had contracted while engaged in the trade, he was to be regarded as still engaged in the trade. In *In re Clark, Ex parte Pope* (10), a similar meaning was given by the three learned Judges of the Court of Appeal to the words "carrying on business" and in this Court in Petition No. 150 of 1916 our learned Chief Justice took the view that the meaning of "carrying on business" as understood by the Court of Appeal in England was the same in this country, and that the language used by the English Court of Appeal was expressed in terms so general as to mean that, so long as there are debts of the business being discharged and assets being got in, a business must be regarded as still being carried on.

As regards the argument that the appointment of a Receiver prevented the order of adjudication being made Mr. Justice Pollock in *Dawe* v. *Vergara* (1) implied that if Festing intended to re-constitute the business or carried it on after the Receiver was discharged, he would be a trader. It seems to me that the Legislature could not have intended that an insolvent firm should be allowed to evade its responsibilities and obligations by the device of one member of the firm bringing a suit against another member and applying to the Court to appoint a Receiver.

It was also argued that Mr. Justice Waller's order declaring the firm insolvent was contrary to r. 47 of the Insolvency Rules which says, that an order of adjudication shall be made against partners individually. I do not understand this rule as meaning that an order of adjudication shall not also be made against the firm. But if it has that meaning, it is at variance with the provisions of s. 99 of the Act which speaks of adjudication orders being made against firms and it may be *ultra vires* as suggested by Mr. Grant. *In re Wenham, Ex parte Battams* (11), Lord Alverstone observed that the rule of the Supreme Court in England under which a creditor was enabled to get a separate Receiver order against each individual partner could not be held to cut down the rights and liabilities created by sections of the Bankruptcy Act. In the present case, there is no question that at the date of the petition the insolvent firm had business debts undischarged.

The objections taken to the order of Mr. Justice Waller thus fail, and the appeals of the two members of the firm must be dismissed with costs.

The respondents will get their costs out of the estate.

This order will have the effect of dissolving our order dated 18th December 1924 as to payment of Rs. 500 per mensum for the

(5) (1875) 10 Ch. 172; 31 L. T. 665; 23 W. R. 201.
(6) (1882) 21 Ch. D. 391; 47 L. T. 495; 31 W. R. 282.
(7) (1896) 2 Q. B. 407; 65 L. J. Q. B. 666; 75 L. T. 142; 45 W. R. 79; 3 Manson 218.
(8) (1901) 1 Q. B. 309; 70 L. J. Q. B. 93; 49 W. R. 182; 84 L. T. 100; 17 T. L. R. 122; 8 Manson 8.
(9) (1809) 15 Ves. Jun. 449; 33 E. R. 824.
(10) (1914) 3 K. B. 1095; 84 L. J. K. B. 89; 59 S. J. 44.
(11) (1900) 2 Q. B. 698; 69 L. J. Q. B 803; 48 W. R. 626; 83 L. T. 94; 7 Manson 309.

maintenance of the insolvents, and they may apply for what is necessary to the Official Assignee or to the Judge sitting in insolvency.

Ramesam, J.—I agree.

V. N. V.
N. H. *Appeals dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 31 OF 1924.
October 8, 1925.
Present:—Mr. Neave, J. C.
Chaudhri UPADHIYA—PLAINTIFF—APPELLANT
versus
LALAY SON OF ALLAH DIN—DEFENDANT—RESPONDENET.

Pre-emption—Decree not complied with, effect of—Appeal, whether can be maintained by plaintiff.

A plaintiff who obtains a decree for pre-emption but fails to pay the decretal amount within the time fixed by the Court loses his right of pre-emption and is not entitled to maintain an appeal against the decree.

Appeal against the decree of the Subordinate Judge, Gonda, dated the 16th February 1924.

Mr. *H. K. Ghose*, for the Appellant.

Mr. *Mohammad Beg*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption. Certain property was sold by one Talib Husain to the respondent Lale. The consideration entered in the sale-deed was Rs. 12,000. The appellant filed a suit for pre-emption alleging that this consideration was fictitious and that the market-value of the property was not more than Rs. 8,000. He claimed to be entitled to pre-empt on the ground that he was a co-sharer.

The lower Court found the plaintiff entitled to pre-empt and also that part of the consideration was not genuine. It granted the plaintiff a decree for pre-emption on condition that he deposited in Court the sum of Rs. 6,716 within two months of the date of the decree, *viz.*, 16th February 1924.

The plaintiff appealed. He did not, however, attempt to deposit the purchase-money until the 16th of April when he appeared in Court and submitted a tender for the money. For one reason or another the money was not actually deposited till a few days later. Even, however, if it be allowed that the deposit was technically made on the 16th of April it is clear that there was no compliance with the order of the Court as that date is not within two months of the 16th February. A preliminary objection has been taken on behalf of the respondent that this failure of the appellant to comply with the terms of the decree is fatal to his appeal. Reference is made to *Imam Din Khan* v. *Abdul Sattar Khan* (1) and to ss. 14 and 15 of the Oudh Laws Act. In the case cited it was held that when a plaintiff had not deposited the amount decreed within the time fixed he lost the right of pre-emption and that his appeal which had been filed after he had lost that right was incompetent and must fail. This decision was that of a Bench of two Judges and is binding on this Court. The learned Counsel for the appellant had urged that this is a hard case, but evidently the appellant has only himself to blame for the hardship. Had he been less dilatory he would have escaped it.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 74 Ind. Cas. 62; 11 O. L. J. 74; (1924) A. I. R. (O.) 102.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 287 AND 288 OF 1921.
December 19, 1924.
Present:—Mr. Justice Phillips and Mr. Justice Odgers.
IN S. A. No. 287 OF 1921.
KRISHNA SASTRI AND OTHERS—DEFENDANTS NOS. 4 TO 8—APPELLANTS
versus
SINGARAVELU MUDALIAR AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 3 AND 1ST DEFENDANT'S LEGAL REPRESENTATIVES—RESPONDENTS.

Inam—Karnam *service* inam, *enfranchisement of, effect of—Title as against strangers—Adverse possession—Prescription against Government, proof of.*

Ayling and *Odgers, JJ.*—The grant of a title-deed at the enfranchisement of a service *inam*, unlike the case of a personal *inam*, constitutes a fresh root of title in the grantee good as against all the world. It extinguishes the claims not only of the members of the family of the grantee but of strangers as well. [p. 131, col. 2; p. 133, cols. 1 & 2.]

Where, however, an outsider claims an enfranchised service *inam* it would be open to him to show either that there was no *inam* at all liable to resumption

or that he had by prescription acquired a title to the property, good, not only as against the service holder, but also against Government, so that Government's power of disposition was lost, and that the enfranchisement was *ultra vires*. In the latter case he would be bound to prove adverse possession for 60 years. [p. 133, col. 1.]

Venkata Jagannadha v. *Veerabhadrayya*, 61 Ind. Cas. 667; 44 M. 643; 41 M. L. J. 1; 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M. L. T. 14; 26 C. W. N. 302; (1922) A. I. R. (P. C.) 96; 48 I. A. 244 (P. C.), followed and explained.

Narayana v. *Chengalamma*, 10 M. 1; 3 Ind. Dec. (N. S.) 751, *Venkata* v. *Rama*, 8 M. 249; 9 Ind. Jur. 185; 3 Ind. Dec. (N. S.) 172, *Venkatarayadu* v. *Venkataramayya*, 15 M. 284; 5 Ind. Dec. (N. S.) 549, relied on.

Gunnaiyan v. *Kamakchi Ayyar*, 26 M. 339, *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya*, 30 M. 434; 17 M. L. J. 101; 2 M. L. T. 101, held overruled.

Lakshminarasimham v. *Venkataratnayamma* 70 Ind. Cas. 642; 30 M. L. T. 334, dissented from.

Phillips and *Odgers*, *JJ.*—To prove adverse possession for 60 years as against Government, it is not sufficient to prove possession for a long period, but possession for the whole period of 60 years must be affirmatively proved. [p. 137, col. 1.]

Secretary of State for India v. *Chelikani Rama Rao*, 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.), followed.

Second appeals against the decrees of the Court of the Subordinate Judge, Chingleput, in Appeal Suits Nos. 105 and 106 of 1919, respectively, preferred against those of the Court of the District Munsif, Tiruvallur, in Original Suits Nos. 267 and 282 of 1918, respectively.

Mr. *L. A. Govinda Raghava*, for the Appellants.

Mr. *K. Rajah Iyer*, for the Respondents.

These second appeals coming on for hearing on the 16th March 1923, and having stood over for consideration till the 21st March 1923, and being set down to be spoken to on the said 21st day the Court (Ayling and Odgers, JJ.) delivered the following

JUDGMENT.

Ayling, J.—The subject-matter of these appeals is a certain *karnam's inam* (plaint item E) which was enfranchised in 1911 in the name of Krishna Sastri (1st appellant in each of the appeals before us). The registered *karnam* at that time was one Munia Pillai, who had six years earlier sold the *inam* land to Raghava Sastri, son of Krishna Sastri, by Ex. IV. The enfranchisement in the name of Krishna Sastri was apparently made to save trouble, and to give effect to a clause in Ex. IV providing for *patta* being granted in the vendee's name. Apparently Raghava Sastri was really a *benamidar* for his father (who was Village Munsif). This explains why Krishna Sastri's name appears in the title-deed.

The suits were brought by the legal representatives of one Doraiswumi Mudaliar for recovery and partition between them of the said land. It was not denied that the land was originally *karnam* service *inam*; but it was alleged that Doraiswami Mudali and his family had acquired title by prescription (no other title seems to be set up) and were entitled to recover.

The lower Courts have found in favour of these contentions and given decrees in plaintiffs-respondents' favour.

The point argued before us by Mr. Govindaraghava Ayyar on behalf of Krishna Sastri and his sons (appellants) is that, in view of the ruling of the Privy Council in *Venkata Jagannadha* v. *Veerabhadrayya* (1) the grant of the title-deed to Krishna Sastri on enfranchisement must be held to constitute a fresh root of title in the latter, good against all the world, and that the suits should, therefore, be dismissed.

The lower Appellate Court has found that Krishna Sastri has been in possession since the date of enfranchisement only; and that prior to 1911 possession was with Doraisawmi's family for a long time. How long is not stated, but it must be taken to be more than 12 years, so as to confer title as against private persons.

Our decision must practically turn on the effect to be given to the judgment of the Privy Council in *Venkata Jagannadha* v. *Veerabhadrayya* (1) and we have had a long argument at the Bar as to the meaning which their Lordships intended to convey. I have already referred to the view put forward on appellants' behalf. Mr. Rajah Ayyar, who appears for respondents, has argued that the judgment merely deals with the right of the members of the family of the person in whose name the title-deed is issued to claim an interest in the enfranchised property, that it has no application to claim put forward by outsiders, and that it does not affect the validity of earlier decisions in so far as these relate to claims by outsiders.

I have given the most careful study I can to the terms of the Privy Council judgment

(1) 61 Ind. Cas. 667; 44 M. 643; 41 M. L. J. 1; 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M. L. T. 14; 26 C. W. N. 302; (1922) A. I. R. (P. C.) 96; 48 I. A. 244 (P. C.).

and have come to the conclusion that the interpretation sought to be placed on it by appellants' Vakil is substantially correct, and not that argued for on behalf of respondents.

Their Lordships make it quite clear that as regards the effect of enfranchisement on title to the property enfranchised, personal *inams* and service *inams* stand on a totally different footing. They refer, without disapproval, and as it seems to me with approval, to the decision in *Narayana* v. *Chengalamma* (2) to the effect that in the case of a Palayam (personal *inam*) the title-deed granted at enfranchisement did not confer any new title and that enfranchisement had no larger operation than as a release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service. They then proceed to dissent in the most emphatic terms to the extension of this doctrine to a *karnam's* service *inam*; and to the view expressed by Bhashyam Ayyangar, J., in *Gunnaiyan* v. *Kamakchi Ayyar* (3) that the law laid down as to Palayams "is law bearing on the enfranchisement of *inams*, whether they be personal *inams* or service *inams*." Now the veiw of Bhashyam Ayyangar, J., in that case is summarized in these words at page 344* : "In my opinion the enfranchisement of a service *inam* does not operate as a resumption, and fresh grant by Government subject to the payment of a quit-rent, any more than it is so in the case of...a personal *inam*."

This view of Bhashyam Ayyangar, J. is expressly adopted by the Full Bench in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4), regarding which their Lordships of the Privy Council state in the most explicit terms:

"Their Lordships are of opinion that the Full Bench was in error."

On the other hand the decisions of an earlier Full Bench in *Venkata* v. *Rama* (5), and of a Divisional Bench in *Venkatarayadu* v. *Venkataramayya* (6) are quoted with approval [both being dissented from in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4).]

The former I shall deal with presently; the latter stated in terms: "The effect of enfranchisement was to free the lands from their inalienable character and *to empower the Government to deal with them as they pleased.*"

This passage is quoted in the Privy Council judgment.

The case in *Venkata* v. *Rama* (5) also related to a *karnam* service *inam*. The post of *karnam* was held by the defendant at the time of enfranchisement and the title-deed was issued in his name. The suit was brought by a person who was not in office at the time of enfranchisement, but who was a member of a family hereditarily entitled to preference in appointment, and who, if personally qualified, could have secured the post and the emoluments (prior to enfranchisement) by a suit before the Collector (*vide* Hutchins, J., in his referring judgment at page 251*). The defendant, on the other hand, lost the post of *karnam* after enfranchisement, another man being preferred to him. Nevertheless the Full Bench held that having been in office at the time of enfranchisement, and having had the title-deed issued in his name, his title could not be questioned by plaintiff. Unless the decision was based on the footing of a new title conferred at enfranchisement, it is difficult to see how it could be supported and that, I think, was the effect of the judgment of the majority Judges.

Mr. Rajah Ayyar points to the stress which the learned Judges laid on the fact that the appellant was not in office at the time of enfranchisement, and in particular to the concluding paragraph of the judgment of Turner, C. J.:

"On the ground that the respondent was not the holder of the office when the lands were enfranchised, I must hold that he has failed to show a title to the lands and that his claim is unfounded. If he had established a title, if he had shown that at the time of the enfranchisement of the *inam* he had been appointed to the office, the Court would have had jurisdiction to determine whether the enfranchisement in favour of the appellant could be supported. I would reverse the decrees of the Courts below and dismiss the suit with costs."

It is argued that this is incompatible with the view that the issue of the title-deed conferred a new title. I do not think it is. I think what the learned Judges

(2) 10 M. 1; 3 Ind. Dec. (N. S.) 751.
(3) 26 M. 339.
(4) 30 M. 434; 17 M. L. J. 101; 2 M. L. T. 101.
(5) 8 M. 249; 9 Ind. Jur. 185; 3 Ind. Dec. (N. S.) 172.
(6) 15 M. 284; 5 Ind. Dec. (N. S.) 549.

*Page of 26 M.—[*Ed.*]

*Page of 8 M.—[*Ed.*]

meant was that if plaintiff had been in office at the time of enfranchisement, it would have been open to the Court to consider whether the enfranchisement in favour of defendant was legal or *ultra vires*. This may be so. It is a point not alluded to in the judgment of the Privy Council, but it is unnecessary to say that the claim before us is not such a contention.

I think the judgment of the Privy Council amounts to stating that the grant of a title-deed at enfranchisement of a service *inam* (unlike the case of a personal *inam*) does confer a new title, and that, for this reason, it cannot be questioned by other members of his family. They say in the penultimate paragraph of the judgment "when accordingly, on the 21st March 1906, the title-deed already quoted was granted by way of an *inam* to the appellant's father and was in express words confirmed 'to him, his representatives and assigns, to hold or dispose of as he or they think proper,' the Board is of opinion that that enfranchisement must be given full effect to, and that it is not subject to be eviscerated or altered by the claim for partition or division put forward in the present suit."

I think this carries with it the implication, that it can no more be questioned by persons unconnected either with the office or with the family of the grantee—as are the plaintiffs in these suits (this is subject to one reservation to which I shall presently allude). The grant of a new title which could be questioned by any outsider who had trespassed on the property would be meaningless.

This is as far as one need go for the purpose of the present case. The reservation to which I have referred is this. It would, I conceive, be open to an outsider claiming an enfranchised service *inam* to show that either that it was not an *inam* at all liable to resumption or that he had by prescription acquired a title to the property, good, not only as against the service holder, but also against Government, so that Government's power of disposition was lost. This would, of course, involve adverse possession for 60 years.

I may add that I have not deemed it necessary to discuss earlier rulings of this Court or the effect of the various Madras Acts [discussed by Bhashyam Ayyangar, J., in *Gunnaiyan* v. *Kamakshi Ayyar* (3)]—all of which must be deemed to have been within the consideration of their Lordships of the Privy Council. As I understand it our duty is to understand, as well as we can, and give effect to the authoritative exposition of the law contained in their judgment in *Venkata Jagannadha* v. *Veerabhadrayya* (1).

Our attention was drawn to a recent decision of a Bench of this Court not reported in the I. L. R. Series, but to be found in *Lakshminarasimham* v. *Venkataratnayamma* (7). From this in so far as it deals with bearing of the Privy Council decision on the effect of a title I must respectfully dissent. I may incidentally remark that the scope and intent of Madras Act VIII of 1869, referred to therein, may be gathered from the premable. It would appear to be directed to protect the interests of *kudivaramdars* where the *inam* consisted only of the *melvaram*.

The learned Vakil for respondents claims the opportunity of showing that he has acquired a complete title by 60 years adverse possession. I would, therefore, call for a finding from the lower Appellate Court on the following issue :—

Have plaintiffs acquired a title to the suit property by adverse possession as against Government?

Fresh evidence may be adduced. Finding will be submitted within four months, and seven days will be allowed for filing objections.

Odgers, J.—The facts are fully set out in the judgment of my learned brother. I deal with the sole question of law raised in this case as to whether the decision of the Privy Council in *Venkata Jagannadha* v. *Veerabhadrayya* (1) is to the effect that enfranchisement of a *karnam* service *inam* founds a new root of title in favour of the person in whose name the *inam* is enfranchised; or whether it has a restricted application, *i. e.*, it only extends to extinguish the claims of the family of such person and does not apply to the case of a stranger (as in the appeals before us).

There can be no doubt whatever that the decision in *Venkata Jagannadha* v. *Veerabhadrayya* (1) has affected a change in the law. Referring to the judgment of the Full Bench in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4) reversing the law as laid down in *Venkata* v. *Rama* (5) their Lordships say "this procedure has been, of course, full of perplexity and that perplex-

(7) 70 Ind. Cas. 642; 30 M. L. T. 334.

ity must now, if possible, be brought to an end." Again their Lordships are of opinion that the Full Bench ruling in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4) approving and adopting the decision in *Gunnaiyan* v. *Kamakshi Ayyar* (3) was erroneous, that the case of a *karnam inam* stands on its own footing and that the principles applicable thereto were properly decided in *Venkata* v. *Rama* (5) by the Full Court.

The law as stated in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4) was that the effect of enfranchisement was not to confer on the persons named in the title-deed any right in derogation of those possessed by other persons in the *inam* at the time of the enfranchisement. This was a case of a Hindu widow who (as the Full Bench says) could not have been in any view constituted absolute owner by the grant. That decision in *Venkata* v. *Rama* (5) is capable of the construction sought to be attached to it by the appellants here is obvious from the remarks of the Full Bench in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4): "There are undoubtedly observations in the judgments of the learned Chief Justice and of Brandt, J., which go strongly to support the view that enfranchisement involved a resumption of the *inam* by Government and a fresh grant in favour of the persons named in the title-deed." The decision, however, finally adopted as correctly stating the law is *Gannaiyan* v. *Kamakshi Ayyar* (3). In that case it was held that the enfranchisement of a service *inam* does not operate as a resumption and fresh grant by Goverement subject to the payment of a quit-rent, any more than in the case of a personal *inam*. The enfranchisement of a village service *inam* stands on the same footing (*i. e.*, as a personal *inam*) as far as the family in which the village office is hereditary is concerned.

The Privy Council differs from this view and state that the law as to service and private *inams* is different and that the error in the law here has crept in owing to these distinctions having been confused as it appeared from *Narayana* v. *Chengalamma* (2). Their Lordships say (page 654*): "It is accordingly not to be wondered at that when a case of this nature was brought before the Courts, as in *Narayana* v. *Chengalamma* (2) already referred to, it should have been held that the *inam* title-deed which had been granted to the Palayagar in that case did not confer any new title and that the enfranchisement had no 'larger operation than as a release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service.' The decision forms no authority for the same principle being extended to the case of a *karnam*." This seems clearly to imply that in the case of a *karnam* enfranchisement the title-deed would have conferred a new title.

While thus disapproving the decision in *Pingala Lakhshmipathi* v. *Bommireddipalli Chalamayya* (4) and *Gunnaiyyan* v. *Kamakshi Ayyar* (3) the Privy Council approve that in *Venkata* v. *Rama* (5). "In the opinion of the Board the law of Madras was thus soundly stated (by Collins, C. J., and Muttuswami Ayyar, J.) and that judgment should not have been disturbed." The facts of *Venkata* v. *Rama* (5) are set out in the referring judgment of Hutchins, J. Plaintiff's adoptive father held the *karnam* office, and died in 1870 when plaintiff was a minor. The defendant-appellant was appointed *karnam* in 1877 and a year or two later the lands were enfranchised in his name as the person at the time in possession. He had no hereditary claim and was, therefore, a stranger to the family in which the office ordinarily ran. The plaintiff brought a suit to recover the lands which plaintiff alleged belonged to his ancestors as *karnam's inam*. The plaintiff's claim was decreed by the Munsif and confirmed by the District Judge. On the appeal to this Court by the defendant the decrees below were reversed.

Turner, C. J. after discussing the regulations as to the mode of selection, disqualification, etc., of holders of such offices says "It may be that in some instances the land is not the emolument of the office, but a reduction of the assessment. In such a case the Government could not resume the land, but only deal with the assessment. But in the case before us the orders of the Revenue Authorities show that the lands are and were attached to the office, and though the respondent's father may have improperly obtained possession of them, the Government was at liberty to resume them and to confer them on the office-holder, and it did so confer them on the appellant through the Collector in 1877." The learned Chief Justice holds that re-

*Page of 44 M.—[*Ed.*]

spondent had failed to show title as he was not the holder of the office when the lands were enfranchised. If he could have shown that at the time of enfranchisement he had been appointed to the office, the Court could have determined whether the enfranchisement in favour of the appellant could be supported. These observations are not referred to by the Privy Council and in my opinion afford no ground for the suggestion that the only effect of enfranchisement is to bar the claims of the family.

From Muttuswami Ayyar, J.'s judgment it is clear that the contention for the appellant was (page 265*) that the title-deed gave him a valid title to the land. The following passage of Muttuswami Ayyar, J.'s judgment was quoted with approval by the Privy Council (page 267*): "According to the law, therefore, as it stood prior to the enfranchisement of the *inam*, a right to the land could only be legally acquired through the right to the possession of the office, and neither the respondent's father nor the respondent had then any vested interest in the office to sustain an action in the nature of an ejectment."

Also in the judgment of Brandt, J., the following passage may be quoted: " I think it may be taken that such lands were enfranchised in favour, not of the family generally, but of the office-holder for the time being, in which case they would presumably descend, not to all the members of the family, but to the branch or heirs of the person in whose favour it was enfranchised."

The decision in *Venkatarayadu* v. *Venkataramayya* (6) was quoted and approved by the Privy Council.

"The effect" said Collins, C. J., in that case "of enfranchisement was to free the lands from their inalienable character and empower the Government to deal with them as they pleased."

In *Dharanipragada Durgamma* v. *Kadambari Virrazu* (8) the Court said of the Full Bench in *Venkata* v. *Rama* (5) "that decision proceeded on the broad ground that the plaintiff did not hold the office of *karnam* at the time of the enfranchisement and, therefore, had no title to sue for the ands and that the land when enfranchised was at the disposal of Government and alienable to whomsoever the Government pleased. It regarded the *inam* title-deed as evidence of a grant of the land personally to the grantee, and that was the view followed in the case on which the Subordinate Judge relies *Venktarayadu* v. *Venkataramayya* (6)."

So also *Subbaraya Mudali* v. *Kamu Cheti* (9); the right of a widow of a deceased *manyam* service-holder was held after enfranchisement (after his death) to confer a right not limited to that of a widow's estate.

This decision is also quoted with approval by the Privy Council, their Lordships saying that it was expressly decided as following the Full Bench decision in *Venkata* v. *Rama* (5).

As against this line of decisions, Mr. Rajah Ayyar contends that on the Madras Acts, IV of 1862, IV of 1866 and VIII of 1869 the only effect of enfranchisement is to remove the service obligation. Act IV of 1866, preamble, states that certain *inams* have been enfranchised from the condition of service and placed in same position as other description of landed property in regard to their future succession and transmission and by s. 2 the title-deed is to be sufficient proof of enfranchisement.

Act IV of 1862 is to the same effect.

Act VIII of 1869 lays down that nothing in the *inam* deed is to destroy the rights of any description of holders or occupiers of land from which any *inam* is derived or drawn or affect the interests of any person other than the *inam* holder. By the preamble the doubt removed is limited to cases where the *inam* holders do not possess the proprietary right in the soil but only the right of receiving the rent or tax payable to Government, etc. This seems to me to point to the well-known distinction vested on the owners of the *melvaram* and *kudivaram*. None of the Acts appear to me to help the respondent in his contention.

There is, however, a case of this Court reported in *Lakshminarasimham* v. *Venkataratnayamma* (7) wherein it was held by Spencer, J., on the authority of Act VIII of 1869 that no independent title is created by a grant of title-deeds and that no title arises from the title-deed that was not already inherent in plaintiff or her husband. Ramesam, J., held that *Venkata Jagannadha* v. *Veerabhadrayya* (1) did not apply to a case of conflict between the title of an office-holder and that of a person

(8) 21 M. 47; 7 M. L. J. 233; 7 Ind. Dec. (N. S.) 389.

(9) 23 M. 47; 9 M. L. J. 160; 8 Ind. Dec. (N. S.) 427.

*Pages of 8 M.—[*Ed.*]

other than an office-holder claiming on ground that he was named in the title-deed, as the title-deed in that case was issued to the office-holder.

It appears to me from the result of my examination of *Venkata Jagannadha* v. *Veerabhadrayya* (1) and of *Venkata* v. *Rama* (5) that the Privy Council judgment went further than that. There are the clear words of Collins, C. J., in *Venkatarayadu* v. *Venkataramayya* (6) as approved by the Privy Council and also in my opinion the inferences to be drawn from the Privy Council judgment itself indicated above to the effect that enfranchisement does confer a title like any other deed of conveyance on the person to whom it is granted, and it is not necessarily confined to grants to persons either holding the office at the time of enfranchisement or those claiming the right to do so; though ordinarily no doubt as the land follows the office, the title would be conferred on the office-holder at the time of enfranchisement; with respect, therefore, I am unable to concur in the narrow construction placed on the Privy Council judgment in *Lakshminarasimham* v. *Venkataratnayamma* (7). I think their Lordships of the Privy Council meant to lay down a broad general principle and as will be seen from the extracts quoted, their language was by no means limited to the facts of the actual case before them.

I may also add that in my view the decision in *Lakshminarasimham* v. *Venkataratnayamma* (7) as to the effect of Madras Act VIII of 1869, is for the reasons stated by me erroneous.

I, therefore, think that the point contended by Mr. Govindaraghava Ayyar for appellants must succeed.

I agree with the order proposed by my learned brother.

In compliance with the order contained in the above judgment the Subordinate Judge of Chingleput submitted the following

FINDING.—These cases have been remanded by their Lordships of the High Court for a finding on the following issue:—

Have plaintiffs acquired a title to the suit properties by adverse possession as against the Government?

2. The lands in question which are of aggregate extent of 1 *cawnie*, originally formed part of the *karnam* service *inam* of the village Kolundalur. The lands being enfranchised in 1911, the *inam patta* therefor was issued in favour of the 3rd defendant (in O. S. No. 282 of 1918), in whose name his father, the 1st defendant, had purchased them from the last holder of the *karnam* office one Munia Pillai as per the sale-deed, Ex. IV (copy) of 28th April 1905. It would appear from the evidence of the plaintiff's witnesses Nos. 1 to 4 that ever since the enfranchisement of the *inam* in 1911, the lands have been in the possession and enjoyment of 1st defendant's family and the plaintiffs' case is that prior to the enfranchisement the lands had been in the possession and enjoyment of their family for over three generations. The contesting defendants Nos. 1 to 4, on the other hand, assert that prior to the enfranchisement also the lands have been in the enjoyment of 1st defendant since 1904, and that they had previously been in the enjoyment of the *karnam* Munia Pillai and his ancestors. Thus the issue remitted resolves itself into as to whether the plaintiffs acquired a title to the lands in question by adverse possession for upwards of 60 years prior to 1911.

* * * * * * *

8. Thus on a consideration of the material evidence and the general probabilities, I am of opinion that the plaintiffs and their ancestors had been in possession and enjoyment of the lands for over 60 years prior to 1911, and that such possession not being shown to be permissive was adverse to the Government and the office-holder. I accordingly find on the issue remitted that plaintiffs acquired a title to the plaint properties by adverse possession as against the Government.

These second appeals coming on for final hearing on the 29th October 1924, after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial the Court delivered the following

JUDGMENT.—The Subordinate Judge has found that plaintiffs were in possession of the suit lands for more than 60 years before 1911, but objection is taken by appellants that there is no evidence to support this finding. The Subordinate Judge relies on oral statements of witnesses that plaintiffs' family were in possession for a very long period, but except for the

statement of plaintiffs' witness No. 1 that his family was in possession for 150 years, a fact which is certainly not within his personal knowledge, there is no evidence which fixes the date of possession as early as 1851 and this is essential in order to prove adverse possession for 60 years. It is not sufficient to prove possession for a long period but as pointed out by the Privy Council in *Secretary of State for India* v. *Chelikani Rama Rao* (10) possession for the whole period of 60 years must be affirmatively proved. In the present case there is no such evidence but only evidence of long possession which the Subordinate Judge has held to be for over 60 years on the general probabilities. This he is not justified in doing and we cannot therefore, accept his finding. The burden of proof was on plaintiffs and they have failed to discharge it.

The appeals must, therefore, be allowed and the suits dismissed with costs throughout including the costs of the guardian of the 6th respondent in both second appeals.

These second appeals came on for orders this 19th day of December on account of the 5th respondent not being served with notice the Court delivered the following

JUDGMENT.—The 5th respondent is given up. The second appeals are dismissed as against her.

Order accordingly.

V. N. V.

Z. K.

(10) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1111; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.).

MADRAS HIGH COURT.

REFERRED CASE No. 16 OF 1924.

January 23, 1925.

Present:—Sir Victor Murray Coutts-Trotter, KT., Chief Justice, and Mr. Justice Krishnan.

COMMISSIONER OF INCOME TAX, MADRAS—REFERRING OFFICER

versus

CHENGALVARAYA CHETTY AND ANOTHER—ASSESSEES.

Income-tax—Stock, fall in price of—Loss, calculation of, on fallen price—Opening price for next year, fixing of—Profit and loss—Income Tax Act (XI of 1922), s. 66—Reference on mandamus application, form of.

An income-tax assessee had a large stock of piece-goods at the beginning of 1921 which he had bought at Rs. 13-8 per piece. At the end of the year the value of these goods fell in the market to Rs. 6 per piece. In submitting his statement to the Income-tax Authorities for the year April 1921 to March 1922, he took into account the fall in price in the market for the whole stock in calculating his loss for the year though he had not sold the whole of it. He treated the remaining stock in his hand at the end of the year as being worth only Rs. 6 a piece and on that footing estimated his loss. In the next year instead of taking that stock as being worth Rs. 6 at which he valued it the day previous to the beginning of the year, he valued it at Rs. 13-8 again and on that footing he estimated his loss. On a question arising whether he was entitled to do so :

Held, that the assessee, having elected in the previous year to value his stock at the market price of Rs. 6 a piece for the purpose of showing his trade loss during that year, was not entitled in the succeeding year to revert to the purchase price figure as representing the value of the goods, but was bound by the market price which he had fixed and been assessed on in the previous year, unless he could show that he made a mistake as to the market-value, and that he was, therefore, bound to put only Rs. 6 as the opening value of the stock for the second year. [p. 139, cols. 1 & 2.]

Per *Krishnan, J.*—On an application for *mandamus* to the High Court to direct the Commissioner for income-tax to state a case for the opinion of the High Court, the question should be so framed as to leave to the Court which afterwards hears the reference to decide the matter on the facts stated by the Commissioner of income-tax. It must not be put in such a form that taking the hypothesis involved in it, it would be impossible to give any answer to it except in one way. [p. 139, col. 2.]

Case stated under s. 66 (3) of the Indian Income Tax Act by the Commissioner of Income Tax, Madras, in his letter No. 1414 of 1924, and dated the 15th October 1924, in pursuance of an order of the High Court, dated the 15th August 1924, on the *mandamus* application of S. Changalvaroya Chetty and S. Munisami Chetty.

Mr. *M. Patanjali Sastri*, for the Referring Officer.

Mr. *Suryanarayanayya*, for the Assessees.

JUDGMENT.

Coutts-Trotter, C. J.—This is a case in which my learned brother Kumarswami Sastri directed the Commissioner of Income Tax to state a case for the opinion of the High Court, under s. 66 of the Income Tax Act.

The learned Judge did something further which the section does not provide for ; he framed the question which he supposed to arise from the facts as set out in the Commissioner's report. With great respect to the learned Judge, I do not think that the question he framed was the real question raised in the case, and I think that the question as he has framed it is so beset

with assumptions and begged questions that it would be impossible to decide fairly what the real point in this case is by any answer that could be given to the highly involved question he formulated.

The facts here are very simple. The assessees are a firm of piece-goods merchants in this city and they keep their books and render their accounts to the income-tax authorities in what is known generally as the mercantile system of accounts. It is obviously very rough and ready method; but, it is the one that they have adopted and the one that the income-tax authorities are prepared to accept (provided they are satisfied with the honesty of the items set out) as giving sufficiently, for practical purposes, an accurate figure on which they can assess income-tax. The method is this; you set out on the debit side your opening stock and add to that the purchase of stock made during the year, you then set out on the *contra* side of the account the sales during the year and then you add to that the value of the stock on hand at the close of the year. Then, of course, you add to the debit side the establishment charges and the interest, if any, paid to creditors and so forth during the year. I should add that the accepted rule is that the assessee in crediting the closing stock figure is to take either the cost price or the market value whichever be the less a—provision obviously intended to be in favour of the trader and which enables him more evenly to distribute his loss.

Now for the year April 1921-22 an account was rendered on that footing and it showed a trading loss during the year of one *lakh* and accordingly these people were not assessed to income-tax at all. The loss arose in this way. They started their year with 12,570 pieces which were valued at what no doubt was taken to be the cost price, *viz.*, Rs. 13-8 a piece, and at the end of the year there was left on their hands a balance of 7,573 pieces, and, in accordance with the then market rate, those pieces were valued down to Rs. 6 a piece. The result was a trading loss of just over a *lakh* and I ought to remark, because it has a bearing on what I am going to say later, that if those goods had been put down at Rs. 13-8 a piece, their cost price, there still would have been a trading loss of some Rs. 45,000, so that the assessees really stood to gain nothing if the figure of Rs 6 was an under-valuation. Now comes the next year. In that year they start off their debit side to stock on the 13th of April 1922, 7,573 pieces at Rs. 13-8 a piece by which means they work out a loss of Rs. 15,000 and odd. The contention of the income-tax authorities is that the stock on the opening of the account must be put at the same value as it was put as stock left on hand on the other side of the previous year's account. That seems so obvious that one must scrutinize carefully what is said against it.

The question framed by the learned Judge ends up with the statement "whether he should be deemed to have made a large profit, while, as a matter of fact, he has incurred a large loss". That begs so many questions that I really hardly know how to deal with it. The question is not whether a man has made a loss from the beginning to the end of his dealings with certain goods but whether he has made a loss or a profit during the current year's trading, having regard to how he started and how he ended up. Of course, if you had to take it, that he could go on year in and year out writing off all this loss against the cost price, no matter how old the pieces left on hand, you might reach almost any result. What he does is this. He writes down at the end of the year his goods at the value at which they stand in the market, as he had to adopt the system of account in vogue. That gives him in certain cases a benefit; there is also always a provision which is intended for his benefit, that his losses in other branches can be set off. The principle, if it can be called a principle, contended for by the assessee would enable him, having cut his loss in one year to go on claiming to deduct the same loss year in and year out and I cannot illustrate the absurdity of that better than by the hypothetical case that I put in the course of the argument. Supposing in the year 1921-22, the assessee had underwritten his loss with a firm of under-writers—I believe there are under-writers who will guarantee trading losses—and at the end of the year he goes to his under-writers and says:—"I bought at Rs 13 8 a piece at the beginning of the year. It is now worth Rs. 6; Rs. 7-8 is my loss; please pay me Rs. 7-8." I do not know what defence the under-writers would have to that claim. Suppose that he goes again next year to the under-writers with the same purpose of having his trading loss underwritten, what are the under-writers going to say if he says

that the value of the same stock is Rs. 13-8 a piece? The under-writers would say: "We paid you yesterday a partial loss on the footing that these goods had deteriorated to Rs. 6 a piece; now you again value them at Rs. 13-8." Of course, the first observation is that no under-writer would accept such a valuation. If through accident or misapprehension as to the identity of the goods he got a second policy, and sued upon it the defence of the under-writers would be "gross over-valuation" and to that defence it seems to me that the assured has no answer. He would be getting more than an indemnity. I cannot see that the principle is in the least different because you are dealing between the trader and the Government instead of between the traders and his under-writers. The question is, what in the proper mercantile sense is his loss or profit in the year? Appeals *ad miscribordiam* are beside the point. The question is not so much of law but of business common sense. But there is a principle involved which determines the legal position, and I think the answer is clear that, as the value of the stock on the 13th of April 1922 was in fact and in truth Rs. 6 a piece, the assessee is not entitled to reduce what are truthfully called his profits by putting the fictitious value of Rs. 13-8 a piece on the stock-in-trade merely because that was the sum he happened to pay for it before the year of assessment. In my opinion to allow this to be done would be to let the assessee ascertain not his profit or loss, but to debit himself with the same loss on the same goods *in toto* for perhaps a course of years. That cannot be permitted. If these goods had been valued at Rs. 6 and the market had gone down to say Rs. 4 he would, of course, be entitled in this trading year to treat the difference between Rs. 6 and Rs. 4 *i.e.* Rs. 2 as another loss justly debited to this year. But in the event of the price going up above the market rate at the beginning of the year which we must take as an accurate valuation, the difference is his profit.

In our opinion the answer that we should return to the question is that the assessee, having elected in the previous year to value his stock at the market price of Rs. 6 a piece for the purpose of showing his trade loss during that year, is not entitled in the succeeding account to revert to the purchase price figure as representing the value of the goods, but is bound by the market price which he has fixed and been assessed on in the previous year unless he can show that he made a mistake as to the market value. Perhaps the simplest way of putting it is to say that the trader made a profit in this year, but it was not a profit sufficient to compensate him for his loss in other years.

Each party will bear his own costs in this Court. Costs in the lower Court will be paid by the assessee to the Government as directed by the learned Judge. Vakil's fee Rs. 50 (Rupees fifty).

Krishnan, J.—I agree with what has fallen from my Lord the learned Chief Justice in this case except that I would add that the learned Judge who made the reference was not wrong in stating what in his opinion was the question of law that should be considered in this case, for a reference can be directed on a point of law. It is difficult, however, to understand what exactly the learned Judge thought should be decided in this case. The question stated by him is put in such a form that, taking the hypothesis involved in it, it is impossible to give any answer except in the negative. That is not a fair way of framing a question. It should be so framed as to leave to the Court which afterwards hears the reference to decide the matter on the facts stated by the Commissioner of Income Tax who makes the reference.

The particular case before us is a very simple one. The assessee had a large stock of piece goods 12,570 pieces at the beginning of 1921, which he says he bought at Rs. 13-8 per piece. At the end of the year the value of these goods fell in the market to Rs. 6 per piece according to his own statement. In submitting his statement to income-tax authorities for the year April 1921 to March 1922 (Ex. A), he has taken into account the falling price in the market for the whole stock in calculating his loss for the year though he had not sold the stock. He has treated the remaining stock in his hand at the end of the year 7,573 pieces as being worth only Rs. 6 a piece and on that footing he has estimated his loss. In the next year instead of taking that stock as being worth Rs. 6 at which he valued it the day previous to the beginning of the year he valued it at Rs. 13-8

gain and on that footing he has estiated his loss. He contends before us at, in fact, he made no profit over the ansaction taken as a whole, that is out of e 12,570 pieces he purchased if the total lling value which he realized is taken to consideration he has really lost oney. That may be so. The question is hether we ought to take that into consideration and hold that though he had in is statement of account for the previous ar elected to treat his loss on the whole the 12,000 and odd pieces by the fall in e market price as a loss that occurred that ar he should be allowed again to say the xt year that the real loss occurred on the lance stock when that stock was sold at year. I do not think he can be allowed to do so. The learned Vakil argues at if the loss which his clients had incurred on the sale of the goods be split up and only the loss incurred on the stock hich he sold in the year 1921 had been ken for the purposes of the statement r that year, he would still have made a ss for that year and the income-tax thorities would not have been able to levy any tax on him. That may be so but we cannot take it into consideration at all. Having elected to treat his loss as having occurred in the year 1921-22, he cannot be allowed to treat it again as a loss in the next year also. It will not do to allow him to re-open the previous return and newly distribute the loss between the two years. It may be an advantage to do so in this case but it would more often be a disadvantage to the assessee to do so. Having been allowed to treat his loss as one on the stock in hand the previous year, he cannot be allowed again to treat it as a loss on the sales in respect of the same stock the next year. That is the only point that really arises in this case. I entirely agree with the learned Chief Justice in the answer that he has proposed to give to the income-tax authorities that we consider that they were right in treating the second year's statement as erroneous in putting Rs. 13-8 as the initial value of the stock he had on hand and that he was only entitled to put Rs. 6 as the value of that stock. This is not a case really of the assessee having made no profit for the second year, for that entirely depends upon how the calculation is made. If he starts the second year with stock worth Rs. 6 the value he has put on it at the end of the previous years and if he sells it at Rs. 8-8 as he seems to have done there is manifestly a profit.

V. N. V. *Reference answered.*

N. H.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 63 OF 1924.

September 3, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

SHEO RATAN SINGH—DEFENDANT—APPELLANT

versus

Thakur RAJENDRA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Patent, infringement of—Damages, award of—Injunction to hand over infringing articles—Order, whether justified

Where in a suit relating to the infringement of a patent, the Court awards damages for loss caused to plaintiff, an order calling upon the defendant to hand over the infringing articles to the plaintiff is unjustified. The proper order would be to order the defendant to destroy those articles. [p. 142, col. 1.]

Appeal against the judgment and decree of the First Additional District Judge, Bara Banki, dated the 15th October 1924.

Messrs. *G. N. Misra* and *Ali Zaheer*, for the Appellant.

Messrs. *L. S. Misra* and *Bisheshar Nath*, for the Respondents.

JUDGMENT.—This is the defendant's appeal. The cause of action for the suit, out of which this appeal arises, was founded on an alleged infringement of a patent granted by the Government of India to one George Perfect of Bara Banki for an invention in the working of a certain type of a sugar-cane machine then in existence. The patent is described as No. 1143 of the 28th August 1913. The letters patent granting the monopoly of the invention to George Perfect is exhibited in its original in this case and is marked as Ex. 8. The title to the benefit of the letters patent has devolved upon the plaintiffs by assignment from George Perfect under a deed dated the 16th September 1922 (Ex. 11). It was alleged that in the months of October and November 1922, the defendant-appellant, Sheoratan Singh, who also carries on the business of manufacturing and hiring out sugar-cane crushing machines, infringed the plaintiffs' patent in the manufacturing and hiring out of such machines. The material defence to

this suit, with which I am now concerned in appeal, was the denial of the infringement. The Trial Court found in favour of the plaintiffs and against the defendant and in result granted the following reliefs to the plaintiffs :—

(1) Damages to the extent of Rs. 500.

(2) A perpetual injunction prohibiting the defendant from infringing the plaintiffs' patent by manufacturing three roller mills as described in specification No. 1143 of the 28th August 1913 read with the amendment made on the 17th April 1916.

(3) A further mandatory injunction that the defendant should hand over to the plaintiffs all machines in his possession or which have been let out by him which infringe the plaintiffs' patent.

(4) Costs of the suit.

The specification of the invention as described in the letters patent and as subsequently amended is in the following words :—

" In a three roller sugar-cane mill of the type in which the pinions are above the top beam of the frame and in which the driving roller has a flange, which extends over the other two rollers, a bruising roller touching the driving roller and nearly touching the companion roller so that no cane guide plate between these rollers B and C is used or required substantially as described."

Within the letters patent is included a plan explaining the specification. On a careful consideration of the language used in the letters patent and also of the decision of the Controller of Patents dated the 21st April 1914, (Ex. D-1) the construction which I place on the specification of the invention as given in the letters patent is that the essence of the invention in favour of which the patent was granted lay in the relative position of the two rollers described in the plan C and B and stated in the specification as " bruising roller.....nearly touching the "companion roller." The closest proximity of the two rollers without actually touching each other had the advantage of dispensing with what was called the cane gide plate. The intended result of attaching the cane guide plate was to prevent the cane from slipping out of the line of pressure created by simultaneous revolutions of both the rollers. That result was obtained but not in full measure. The bringing of the two rollers so near each other as is shown in the plan referred to above was a new invention of attaining t old result. The Trial Court has found th the machines manufactured by the defen ant have the two rollers in close conn tion as well as the cane guide plate and th the latter is a mere useless appendage i tended to serve as a screen to the infring ment.

The arguments in support of the appe proceeded on three separate lines :

(1) That the particulars of the infring ment were not stated in the plaint.

(2)That there was no infringement.

(3) That the relief No. 2 granted by th lower Court was vague and indefinite an that the relief No. 3 was unjustified.

As to the first line of attack, I am of opi ion that the plaintiffs have stated enough i their plaint to disclose a cause of actio for the claim. It was not necessary f them to give more particulars of the breac of the patent than what they have given i their plaint. The particulars of time, pla and the manner in which the infringeme had been made by the defendant we stated in the plaint. The first witness i the case was one of the plaintiffs. He mad it perfectly clear in his statement as t what constituted the infringement. Th defendant fully understood all along th trial as to what the plaintiffs' cause o action was and there is no trace on th record of this case that he was at any stag of the litigation taken by surprise in th matter of the plaintiffs' case. This arg ment, therefore, fails.

In support of the second line of argumen it was contended that the expression "nea ly touching" in the specification was n definite unless it was coupled with a d scription of the proximity of the two roller by a mathematical fraction, that is $\frac{1}{8}$th of a inch. It was then argued that if the inve tion protected by the letters patent lay i the distance between the two rollers bein $\frac{1}{8}$th of an inch only and neither more no less it was not proved that the defendant' machines made any encroachment on tha invention. The fraction $\frac{1}{8}$th of an inch ha been borrowed from the Controller o Patent's decision to which reference ha already been made (Ex. D-1). But the Co troller used the fraction by way of an expla nation of the invention and admittedly i was not made a part of the specificatio as given in the letters patent. I do no agree with the learned Advocate for th appellant that the essence of the invention

lay in the distance of one roller from the other being $\frac{1}{8}$th of an inch only. Further the lower Court finds that the mill represents the type of mills which the defendant has been manufacturing and the distance between the two rollers in that mill is only $\frac{1}{8}$th of an inch. I am not prepared to take a different view from what the learned Judge in the Trial Court has taken in this matter. The argument, therefore, must be rejected. Under this head it was further urged that the defendant's mills have still attached to them the sugar-cane plate. To my mind this makes no difference. On the evidence it is perfectly clear that the retention of the sugar-cane plate on the defendant's mills is a mere device to hide the infringement, the plate serving no purpose whatsoever.

As to the third line of argument, I am of opinion that the perpetual injunction granted by the lower Court is in proper terms and is not open to any objection. In the circumstances of the case, however, the mandatory injunction calling upon the defendant to hand over to the plaintiffs all machines in his possession or which have been let out by him and which infringe the plaintiffs' patent is unjustifiable. The plaintiffs have been granted a decree for damages for the loss they have suffered by the infringement. I find no ground for ordering the delivery of the defendant's machines to the plaintiffs. These machines must have caused money to the defendant and there is no reason why the defendant should be made to suffer further loss which would, of course, ensue if he were to deliver these machines. This relief should, therefore, not be granted and in lieu thereof I order that defendant shall destroy all machines in his possession or which have been let out by him and which infringe the plaintiffs' patent. This small alteration in the decree of the lower Court should not obviously affect the plaintiffs' right to obtain their costs of the appeal. Therefore, except in so far as above indicated, the appeal fails and is dismissed with costs.

N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

March 19, 1925.

Present:—Mr. Justice C. C. Ghose.

In the matter of AN ATTORNEY.

Letters Patent (Cal.), cl. 10—Solicitor—Professional misconduct—Detaching client from other Solicitor—Disciplinary jurisdiction.

A Solicitor ought not to detach a client from another Solicitor during the period of his retainer. [p. 143, col. 2.]

In re A Solicitor, (1915) 1 Ir. R. 152 at p. 163, relied on.

It is not every reprehensible conduct on the part of a Solicitor that amounts to that professional misconduct, which entails the serious result of being struck off the roll of Solicitors, suspended, or otherwise dealt with by the High Court, and in respect of applications under s. 10 of the Letters Patent the Court cannot be too careful in scrutinizing the materials upon which the jurisdiction of the Court is invoked. At all times it is a serious matter and the machinery of the Court ought not to be set in motion, except upon the clearest evidence of professional misconduct. [*ibid.*]

Mr. *L. P. E. Pugh* (with him Mr. *R. C. Ghose*), for the Petitioner.

Mr. *S. C. Bose*, for the Respondent.

JUDGMENT.—In this case the applicant, who is a Solicitor of this Court, applies under s. 10 of the Letters Patent for an order that the respondent who is also an attorney of this Court, may be called upon to answer the matters set forth in the application.

The short facts are as follows:—It appears that the applicant attorney has been acting for a Muhammadan lady, Shahebzadi Mahmudi Begum, in the matter of negotiating for and completing mortgages of properties belonging to a certain *wakf* estate, of which Shahebzadi Mahmudi Begum is the *mutwali*, and in carrying out preliminary investigations and other incidental matters connected therewith, including the obtaining of necessary orders from Court sanctioning the raising of moneys upon such mortgages. It appears that in August, 1923, the *mutwalli* instructed the applicant attorney to negotiate for and complete a mortgage of the *wakf* estate for a sum of Rs. 1,70,000. It is alleged that the said *mutwalli* instructed the applicant attorney to advance such moneys as may be necessary or incidental in connection with the negotiations for and completion of such mortgage and that she agreed that the proceeds of the mortgage to be effected were to be held as security for the in-pocket and out of pocket costs in connection with the said mortgage. It is also alleged that the applicant attorney,

acting for the said *mutwalli*, obtained an order from the Court on the 30th August 1923, for leave to raise a loan of Rs. 1,70,000. The order of the Court had to be modified to a certain extent and subsequently on an application made to this Court on the 14th of March 1924, a modified order in manner indicated in this petition was obtained. It is said that while the negotiations for a mortgage were pending, the applicant attorney came to discover that the said *mutwalli* had gone over to the respondent attorney and had through the latter obtained an order from Court on the 8th August, 1924, which order, it is alleged, was in substance a variation of the order obtained through the applicant attorney on the 14th March 1924. The applicant attorney's costs had not been paid by the *mutwalli*, although efforts were made to obtain payment and the applicant attorney now alleges that the respondent attorney ought to have referred to him before taking up any retainer on behalf of the *mutwalli* and that his default in doing so calls for the interference of this Court under s. 10 of the Letters Patent.

The respondent attorney has filed an affidavit, in which he states that the warrant in favour of the applicant attorney was executed for a particular purpose, namely, to enable the applicant attorney to act in the matter of an application of the said *mutwalli* for sanction to raise a loan and that the applicant attorney's retainer came to an end when the proceedings in that application terminated. He further states that in the circumstances set out in his affidavit, he was entitled to accept a retainer from the *mutwalli*, for the purpose of making an application on her behalf to this Court for sanction to raise a fresh loan on first mortgage of the *wakf* property. He denies that the order obtained through him was in substance a variation of the order made on the 14th March 1924, and he states that the application made through him resulted in an order giving permission to raise a fresh loan on the first mortgage of the *wakf* properties. In these circumstances the respondent attorney denies that he has been guilty of any improper conduct and submits that the grievance of the applicant attorney has no foundation whatsoever.

Mr. Pugh, who appeared on behalf of the applicant attorney, has argued that there has been an attempt on the part of the respondent attorney to detach a client from the applicant attorney during the period of his retainer and that the respondent attorney in dealing with the *mutwalli*, who had already retained the applicant attorney, has not acted with that caution which as between members of the Solicitor's branch of the profession would be considered proper.

As an abstract proposition it cannot be questioned that a Solicitor ought not to detach a client from another Solicitor during the period of his retainer; it is only necessary for me to state my respectful concurrence with the view expressed by the Lord Chancellor of Ireland in the case of *In re A Solicitor* (1). But in this case I have got to determine whether on the facts set out before me there has been such professional misconduct as to attract to itself the disciplinary jurisdiction of this Court under s. 10 of the Letters Patent. It is to be remembered that it is not every reprehensible conduct (I desire to guard myself from being understood to say that there has been any reprehensible conduct on the part of the respondent attorney) that necessarily amounts to that professional misconduct which entails the serious result of being struck off the roll of Solicitors, suspended, or otherwise dealt with by the Court, and I desire to state that in respect of applications under s. 10 of the Letters Patent the Court cannot be too careful in scrutinizing the materials upon which the jurisdiction of the Court is invoked. At all times it is a serious matter and the machinery of the Court ought not to be set in motion, except upon the clearest evidence of professional misconduct. I desire to say that having scrutinized the materials before me, I find that there is a singular and striking lack of all materials which would justify a reasonable man in making an application of this nature. While one may sympathize with the applicant attorney in his annoyance or irritation, it is a very different proposition to say that the respondent attorney has been guilty of misconduct. In the circumstances of this case I find no trace of misconduct on the part of the respondent attorney and I must, therefore, dismiss the present application with costs.

N. H. *Application dismissed.*

(1) (1915) 1 Ir. R. 152 at p. 163.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1027 OF 1923.

April 22, 1925.

Present :—Mr. Justice Ramesam.

KALLUKUTTY PARAMBATH PERACHAN—INSOLVENT-DEBTOR—PETITIONER

versus

PUTHEN PEETIKAKKAL KUTTIALI—CREDITOR—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 4, 27—Debtor's petition for adjudication under old Act—New Act in force on date of disposal of petition—Procedure applicable—Time for applying for discharge—Failure to apply within time—Notice to creditors on annulment.

In the case of a debtor filing a petition for being adjudicated an insolvent under the Provincial Insolvency Act (III of 1907), and the petition coming on for disposal after the new Act (V of 1920) coming into force, the procedure applicable is that under the new Act and not the old one. It is, therefore, competent to the Court on making an order of adjudication to fix a period within which the insolvent should apply for a discharge. Where he does not so apply within the prescribed time, it is competent to the Court to annul the order of adjudication. [p. 144, col. 2; p. 145, col. 1.]

It is not open to the insolvent to contend that an order of annulment of adjudication is invalid merely because of want of notice to the creditors. [p. 145, col. 1.]

Petition, under s. 75 of the Provincial Insolvency Act V of 1920, praying the High Court to revise an order of the District Court, South Malabar, dated the 25th October 1923, in C. M. A. No. 62 of 1923, preferred against that of the Court of the Principal District Munsif, Calicut, dated the 31th July 1923, in Insolvency Petition No. 1 of 1920 (Miscellaneous Petition No. 582 of 1923).

Mr. *N. A. Krishna Iyer*, for the Petitioner.

Mr. *T. S. Visvanatha Iyer*, for the Respondent.

JUDGMENT.—In this case the insolvency petition was put in on the 8th of January 1920 and the petitioner was adjudicated an insolvent on the 4th of June 1920. Meanwhile, Act V of 1920 had come into force on the 25th of February 1920. At the time of adjudication, the Court fixed one year as the period within which he should apply for discharge. This order was based obviously under s. 27 of Act V of 1920 as the old Act III of 1907 contained no such provision. He not having applied within one year, the District Munsif of Calicut annulled the order of adjudication and the District Judge of South Malabar affirmed the order of appeal. The present revision petition before me is against the order of the District Judge.

It has been contended before me that, as the petition was filed under the old Act, the petitioner obtained a vested right to an unconditional order of discharge and the District Munsif's Court had no jurisdiction to impose a condition that discharge must be applied for within one year under s. 27 of the new Act. It is true that in *Chhatrapat Singh Dugar* v. *Kharag Singh Lachmiram* (1), the Privy Council held that where an application under the Insolvency Act complies with all the conditions specified by the Act the petitioner is entitled to an order of adjudication and the dismissal of his petition amounted to an abuse of the process of Court. But I do not see how this decision helps the petitioner. For some reason or other the petition did not come on for final disposal before the 25th of February and by the time it did so come on the new Act had come into force. What order should be passed on the insolvency petition seems to me to be a matter of procedure and it cannot be said that by the mere filing of a petition under the old Act the petitioner acquired a vested right to a particular kind of order which cannot be affected by the new Act. The order actually passed was a perfectly proper order under the new Act. It may be that, if a condition was improperly annexed it may be ignored as a nullity [*vide*, *Ram Chandra Neogi* v. *Shama Charan Bose* (2)] but I do not see any way to hold in this case that the condition was improperly annexed or was passed without jurisdiction. I do not see how the remarks of Macleod, C.J. in *Laxmi Bank Limited* v. *Ramchandra Narayan* (3) help the petitioner. All that was said in that case was there was no material difference between Act III of 1907 and the Act of 1920 in the matter of what was required to be proved before it is decided that the petitioner had a right to present his petition. Nor does the decision in *Aiyapuraju* v. *Veeva Venkatakrishnayya* (4) help the petitioner. It is not decided

(1) 39 Ind. Cas. 788; 44 C. 535; 21 M. L. T. 36; 15 A. L. J. 87; (1917) M. W. N. 100; 32 M. L. J. 1; 19 Bom. L. R. 174; 25 C. L. J. 215; 21 C. W. N. 497; 10 Bur. L. T. 25; 44 I. A. 11 (P. C.).

(2) 21 Ind. Cas. 950; 19 C. L. J. 83; 18 C. W.N. 1052.

(3) 67 Ind. Cas. 233; 46 B. 757 at p. 760; 24 Bom. L. R. 292; (1922) A. I. R. (B.) 80.

(4) 72 Ind. Cas. 483; 44 M. L. J. 303; (1923) M. W. N 195; 18 L. W. 35; (1923) A. I. R. (M.) 462.

in that case that, when a petition was filed under the old Act and when the new Act had come into force by the time the petition comes on for disposal, the old Act is applicable and not the new Act. What was held there was that a creditor's right to apply for adjudicating his debtor an insolvent based on an alleged fraudulent transfer by the debtor had become barred under the old Act and, therefore, that the new Act could not revive the barred right and the District Court had no power under s. 78 of Act V of 1920 to excuse the delay so as to revive the barred right. This proceeds on a well-known and perfectly intelligible principle that a new Act cannot revive a right barred under an old Act. This decision does not, therefore, help the petitioner [see also *Pulpati Hanumaya* v. *Ravuri Ramayya* (5)]. My conclusion is in accordance with the decision in *Rangiah Chettiar* v. *Annaswamy Alwar Ayyangar* (6), where it is observed that any orders passed under the old Act or rights obtained thereunder will be unaffected by the new Act. In the present case we have neither.

A second point raised by the petitioner is that the adjudication should not be annulled without notice to all the creditors and he relied on a decision in *In the matter of Rajnarayan Pal* (7). In that case the petition for annulment was filed on the ground that the insolvent had come to a settlement with all his creditors and objection was properly taken for the Official Assignee that notice should be given to all the creditors having regard to the nature of the ground but I do not see how that decision applies here. Even if it does, it is for the creditors to complain. They have not chosen to appear and oppose the annulment in all the three Courts. I take it they are apparently satisfied with the annulment. Anyhow I do not see how this objection can be taken by the petitioner. I may add that a preliminary objection was taken that the revision petition does not lie as an appeal lies under s. 75 (1) proviso. As I have come to a conclusion against the petitioner on the merits, it may not be necessary to deal with this objection, but I think the objection is well-founded. The words "of any nature whatsoever" in s. 4 of the new Act show that all questions which arise in the course of insolvency may be dealt with by the Court for the purpose of doing complete justice and in such a case a second appeal lies to the High Court on a question of law. It, therefore, seems to me that the revision petition is not competent.

The result is the petition is dismissed with costs.

V. N. V.
N. H. *Petition dismissed.*

(5) 64 Ind. Cas. 270; 41 M. L. J. 126; (1921) M. W. N. 381.
(6) 79 Ind. Cas. 408; 18 L. W. 836; (1923) M. W. N. 840; (1924) A. I. R. (M.) 368.
(7) 13 B. L. R. App. 25.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 1033 OF 1924.
June 15, 1925.

Present :—Mr. Rupchand Bilaram, A. J. C.

THE JAPAN TRADING CO., LTD.—PLAINTIFFS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANTS.

Railways Act (IX of 1890), s. 72 (2) (b)—Risk Note Form "B"—Liability of Railway Company—"Wilful neglect" and "unforeseen event or accident", meaning of.

Negligence means the absence of such care or skill as it was the duty of the defendant to use towards the plaintiff. [p. 147, col. 1.]

"Wilful neglect" means that the neglect was on the part of a person who was not only a free agent but who was conscious of the consequences which were likely to ensue from his act or omission, or was recklessly indifferent as to such consequences and that if he had not been so indifferent, he would have known what the consequences would be. [p. 149, col. 1.]

What is negligence or the requisite absence of care in any particular case must depend on the circumstances of that case. [*ibid.*]

A Railway accident which is caused by the neglect or misconduct of the servants of the Railway Administration does not fall within the meaning of "an unforeseen event or accident" within the meaning of these words as used in Risk Note Form "B." [p. 150, col. 1.]

Mr. *Kimatrai Bhojraj*, for the Plaintiffs.

Captain *C. C. Lewis*, for the Defendants

JUDGMENT.—The plaintiffs consigned 291 bales of cotton from Montgomery on the North Western Railway to Karachi on the terms contained in the Railway Risk Note Form B. They received delivery of one hundred bales and were informed that the remaining 191 bales were smashed and lost in a Railway accident, and that the Railway Administration were, therefore, not liable to make good the loss. They have instituted this suit for recovery of Rs. 65,560-3 0 as the value of the 191 bales

not delivered. The Risk Note has been duly approved by the Governor-General in Council under the provisions of s. 72, cl. (2) (*b*) of the Indian Railways Act IX of 1890. It provides for carriage of goods at reduced rates in consideration of the consignor agreeing to hold *inter alia* the Railway Administration free from responsibility for any loss, or damage or deterioration to such goods from any cause whatever, whether such loss, damage, etc., be caused before, during or after transit, subject however, to the exception that the Railway Administration shall continue to be liable for only the loss of a complete consignment due to any one of the following causes:—

(*a*) wilful neglect of the Railway Administration;

(*b*) wilful neglect of their servants;

(*c*) theft by their servants.

This exception is again subject to a proviso that "wilful neglect" shall not include (*a*) loss by fire, (*b*) robbery from a running train, and (*c*) any other unforeseen event or accident.

There is no dispute as to the cause of the Railway accident referred to in the defence. On February 23, 1924 when the "100 Down" goods train carrying the bales in suit was passing over a bridge between Mahesar and Pano Akil Railway Stations the boiler of the locomotive engine attached to the train was blown off the frame work and the frame work of the engine and several wagons were thrown off the rails into the *nullah* down below the bridge and telescoped. There was serious loss of life and property. The engine driver and firemen were burnt to death and a number of coolies working on the bridge were either killed or seriously injured. The inquiries instituted by the Railway Authorities disclosed that the locomotive was in a dangerous condition and unsafe for work when it was sent out for work from its shed at Rohri and that one Woodward the European boiler-maker whose duty it was to make a quarterly inspection of the boilers of all the locomotives stationed in that shed, and particularly to examin the stays of boilers of all locomotives which were liable to corrosion owing to the action of steam, and water, to make periodical reports of the condition of the boilers and to stop locomotives from work found by him to be unsafe, had neglected to do his duty for over twenty-two months, that the cause of the accident was the giving way of the corroded crown stays which held the crown plate of the boiler in position, thereby causing an explosion, and the bursting of the boiler. He was put on his trial and convicted by the Sessions Court, Sukkur, under ss. 304-A, 337, 338, Indian Penal Code, for criminal neglect of duty resulting in loss of life and injury to persons, and also under ss. 465 and 471, Indian Penal Code, for fabricating documents after the accident with the object of saving himself from the consequences of his criminal neglect of duty. On appeal to this Court in the exercise of its High Court Jurisdiction his conviction was upheld. The judgment of the Bench of this Court was delivered by me.

With the object of avoiding the same evidence being re-called, the plaintiffs have, on the one hand, admitted that the 191 bales were lost as the result of this accident and the Railway Adminstration have, on the other hand, admitted that the accident was due to the negligence of Woodward "in omitting to examine the boiler of the locomotive thoroughly.....in omitting to make a quarterly report and (in omitting) to stop the boiler in question from going to work:" (*vide* the written admissions of the Solicitor for the Railway dated April 27th, 1925). By consent my judgment in Woodward's case has been put in as Ex. 5, and the facts as found in the judgment have not been challenged. Both parties have relied on it in support of their case.

Two questions have been argued, firstly, what is the meaning to be attached to "Wilful neglect," and secondly, do the facts as found in Woodward's case amount to such wilful neglect.

On the one hand it has been contended that "wilful neglect" means nothing more than negligence in law or that want of care which a man under similar circumstances would take of his own goods as laid down in s. 151 of the Indian Contract Act. It is urged that the epithet "Wilful" merely indicates that the person guilty of such neglect was a free agent at that time. On the other hand it is said that "Wilful" connotes something more than want of care under similar circumstances. It signifies that the person guilty of neglect was not only a free agent but that he was conscious of the consequences of his act or omission or was recklessly indifferent about such consequences. As will presently appear, the facts of this case are so patently clear that there

can be no doubt that whatever meaning be attached to the expression "wilful neglect", Woodward was guilty of such neglect. The discussion at the bar on this point has, therefore, been purely academic. As the question is constantly coming up, it would be as well for me to express my opinion on the point. It is well-settled that both under the English and the Indian Law of Torts negligence means the absence of such care or skill as it was the duty of the defendant to use towards the plaintiffs: *Vaughan* v. *Taff Vale Ry. Co.* (1), *Winterbottom* v. *Wright* (2), *Le Lievre* v. *Gould* (3), *Cavalier* v. *Pope* (4) and *Malone* v. *Laskey* (5). In the celebrated case of *Coggs* v. *Bernard* (6) which contains the first well-ordered expositions of the English Law of Bailments, Lord Holt distinguished between different degrees of negligence corresponding to the degrees of care incumbent on the different kinds of bailees. In actions based on the contract, the ascertainment of liability of depending on the different degrees of negligence has since elicited much discussion and a great variety of opinion. The Indian Statutory Law has, however, abolished this distinction. So far as we are concerned, whether an action is based in tort or on contract, to use the words of Willies, J., in *Vaughan* v. *Taff Ry. Co.* (1), "negligence is the absence of care according to the circumstances". It is urged, and not without reason, that the expression "wilful neglect" should not be interpreted so as to introduce afresh the distinction between the different degrees of negligence in another form or be made a substitute for gross or culpable or any other kind or form of negligence. Gross negligence, according to the *dictum* of Lord Cranworth in *Wilson* v *Brett* (7) approved of by Willies, J., in *Grill* v. *General Iron Screw Colliery Co.* (8) is ordinary negligence with a vituperative epithet. In *Sheppard* v. *Midland Railway* (9) Lush, J., had made similar observations with regard to "wilful negligence" He says: "Wilful neglience is only negligence—as has been said of 'gross negligence,'—with a vituperative adjective before it. It is negligence after all, whether you call it 'Wilful' 'gross,' 'ordinary', or use any other adjective". Reliance has also been placed on the following *dictum* of Bowen, L. J., in *Young and Harston's Contract* (10), while dealing with the meaning to be attached to "wilful default" on the part of the vendor of property in the conditions of sale :—

"The term 'wilful default'—though one in common use in such contracts—is not a term of art, and to pursue authorities with a view to defining for all time what is its meaning in a contract like this appears to me to press citation far beyond the point at which it ceases to be useful. Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. The other word which it is sought to define is 'wilful.' That is a word of familiar use in every branch of law, and although in some branches of the law, it may have a special meaning, it generally, as used in Courts of Law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent."

The argument that the object of having a special contract is to further limit the liability of a Railway Company to some thing less than that of an ordinary bailee, and that the effect of interpreting "wilful neglect" as "want of care under the circumstances" simpliciter would be to render the Railway Company liable to the same extent as an ordinary bailee, has been met by the plea that this form in the first place limits the liability of a Railway Company to the loss of whole packages, and in the second place shifts the onus on the con-

(1) (1860) 5 H. & N. 679 at p. 688; 29 L. J. Ex. 247; 6 Jur. (N. S.) 899; 2 L. T. 394; 8 W. R. 549; 157 E R. 1351; 120 R. R. 779.

(2) (1842) 10 M. & W. 109; 11 L. J. Ex. 415; 152 E. R. 402; 62 R. R. 534.

(3) (1893) 1 Q B. 491; 62 L. J. Q B. 353; 4 R. 274; 68 L. T. 626; 41 W. R. 468; 57 J. P. 484.

(4) (1906) A. C. 428; 75 L. J. K. B. 609; 95 L. T. 65; 22 T. L. R. 648.

(5) (1907) 2 K. B. 141; 76 L. J. K. B. 1134; 97 L. T. 324; 23 T L. R. 399.

(6) (1790) 2 Ld. Raym. 909; 1 Sm. L. C. (11th Ed.) 173 at p. 191; 92 E. R. 107.

(7) (1843) 11 M. & W. 113; 12 L Ex 264; 152 E. R. 737; 63 R R. 528.

(8) (1866) 35 L. J. C. P. 321 at p. 330; 1 C. P. 600; 12 Jur. (N. S.) 727; 14 W. R. 893.

(9) (1916) 114 L. T. 515 at p. 517; 85 L. J. K. B. 283.

(10) (1886) 31 Ch. D. 168 at p. 174; 54 L. J. Ch. 1144; 53 L. T. 137; 34 W. R. 84; 50 J. P. 245.

signor to prove such want of care notwithstanding the provisions of s. 76 of the Indian Railways Act to the contrary and that these limitations are a sufficient consideration for payment of reduced fares. My attention has also been drawn to some of the decided cases where suits have been decreed against Railway Companies on proof of want of care simpliciter without reference to the fact whether the delinquents whose acts or omissions were complained of were conscious of the consequences of their acts or omissions or acted with reckless indifference to such consequences. With all due respect to the learned Judges who hold a contrary view, I am of the opinion that "wilful" does not merely denote that the delinquent was a free agent. The very expression "neglect" or "negligence" indicates that the delinquent was a free agent. "Neglect" has been defined by Pattison, J., in *King* v. *Burrell* (11), "the omission to do some duty which the party is able to do." Inability to perform an act or being prevented from the performance of an act by superior force is not neglect. The adjective "wilful" as indicating that the delinquent was a free agent, would render its use superfluous. It has, in my opinion, a pertinent significance and a special meaning attached to it. In a somewhat similar form of special contract to carry goods on payment of reduced rates at "owner's risk" used by the Railway Companies in the United Kingdom, there is a provision rendering the Railway Companies liable for "wilful misconduct. This expression has been the subject of judicial interpretation. In *Lewis* v. *G. W. Ry. Co.* (12), the argument that "wilful" was used simply and solely to indicate that the act or omission complained of was not accidental, did not find favour with the Court, and at page 211*, Brett, L. J., observed that "those two terms '(wilful and conduct)' together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission," and the learned Lord further pointed out, that such knowledge on the part of the person misconducting may be gathered from the nature of the act or omission and that if his act or omission is such that every body must know that it is likely to endanger or damage the goods, then he may be presumed to have known the consequences of his act. In *Graham* v. *Belfast and Northern Counties Railway Co.* (13) Johnson, J., defined "wilful misconduct" in such special contracts as "misconduct to which the will is party as contra-distinguished from accident," and is "far beyond any negligence, even gross or culpable negligence" and further stated that it "involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part...to do, or to fail, or omit to do (as the case may be) a particular thing, and yet intentionally does, or fails or omits to do, it, or persists in the act, failure or omission regardless of consequences." In *Forder* v. *G. W. Ry. Co.* (14), Lord Alverston observed that he was prepared to adopt the definition of Johnson, J., with a slight addition, and the addition suggested by him is "or acts with reckless carelessness not caring what the result of his carelessness may be" and said that the *dictum* of Brett, L. J., in *Lewis* v. *G. W. Ry. Co.* (12) led to the same conclusion. The addition suggested by Lord Alverston has been interpreted by Lush, J., in two subsequent rulings, *Norris* v. *Great Central Railway Co.* (15) and *Sheppard* v. *Midland Railway* (9) as meaning "reckless indifferences to what the result may be." The definition of "wilful misconduct" given by Lord Alverston and as interpreted by Lush, J., may be accepted as the proper *indicia* of rendering an English Company liable.

The present Risk Note B was amended in 1907. The old Risk Note was in more drastic terms. It relieved the Railway Companies from all responsibility irrespective of any neglect, default or misconduct on their part or the part of their servants, *Moheswar Das* v. *Carter* (16), *Tippanna* v. *Southern Maratha Ry Co.* (17), *Balaram Harichand* v. *Southern Mahrata Ry. Co.* (18), *East India Ry. Co.* v. *Bunyad Ali* (19), *Toonya Ram* v. *East India Ry. Co* (20), *Mulji Dhanji Sett* v. *Southern Mahratta Ry.*

(11) (1840) 12 Ad. & El. 460 at p. 468; 4 P. & D. 207; 9 L. J. Q. B. 337; 4 Jur. 1109; 113 E. R. 886.

(12) (1878) 3 Q. B. D. 195; 47 L. J. Q. B. 131; 37 L. T. 774; 26 W. R. 255.

*Page of (1878) 3 Q. B. D.—[*Ed.*]

(13) (1901) 2 Ir. R. 13; 6 Ir. L. R. 6.

(14) (1906) 2 K. B. 532; 74 L. J. K. B. 871; 53 W. R. 574; 93 L. T. 344; 21 T. L. R. 625.

(15) (1916) 114 L. T. 183; 85 L. J. K. B. 285n; 32 T L. R. 120.

(16) 10 C. 210; 12 C. L. R. 122; 5 Ind. Dec. (N. S.) 141.

(17) 17 B. 417; 9 Ind. Dec (N. S) 272.

(18) 19 B. 159; Chitty's S. C. C. R. 422; 10 Ind. Dec. (N. S.) 107.

(19) 18 A. 42; A. W. N. (1895) 150; 8 Ind. Dec. (N. S.) 732.

(20) 30 C. 257; 7 C. W. N. 370

Co. (21) and *Ganesh Flour Mills Co.* v. *G. I. P. Ry. Co.* (22). This old form afforded a much greater protection to the Railway Companies than was warranted under the circumstances and the object of amending it was evidently to render the Railway Companies liable for certain grave derelictions of duty on their part and on the part of their servants, and very probably to bring this form of contract in conformity with the similar form used by the English Companies.

Why the expression "wilful neglect" was substituted for "wilful misconduct" may be surmised, and was probably due to the fact that unlike the English Companies the liability of the Indian Companies is that of ordinary bailees and not that of common carriers, and that "neglect" was the more appropriate expression. I can see no reason why the same meaning should not be assigned to the epithet "wilful" when applied to "neglect" and as indicating that the neglect was on the part of a person who was not only a free agent but who was conscious of the consequences which are likely to ensue from his act or omission or was recklessly indifferent as to such consequences, and that if he had not been so indifferent he would have known what the consequences would be. This is not introducing afresh the distinction between different degrees of negligence or want of care. What is negligence or the requisite absence of care in any particular case must depend on the circumstances of that case. Every such absence of care does not render the Railway Company liable. But only when the delinquent knew what the consequences would be, or could, if he had not been recklessly indifferent, have known them, the Railway Company are liable. The line of demarcation may not in certain cases be distinct but it is appreciable.

In *Madras and Southern Maharatta Ry.Co.* v. *Mattai Subba Rao* (23), where a coolie had placed a leaking package of acid which had leaked on his shoulder and burnt his coat, on a bale of piece goods and had thereby damaged its contents, Sheshagiri Ayar, J., said that the "act of the coolie was 'wilful' in the sense that he must have known that the corrosive substance would cause injury to the article over which it was thrown". Whether under the particular circumstances of that case this inference as to his knowledge should have been drawn or not, is another matter.

On the facts as found by me in Woodward's case there can be no doubt that Woodward knew what the consequence of his neglect of duty would be, or at any rate he acted with reckless indifference to such consequences. The fire box is the heart of an engine. If it is not properly attended to, it can only result in serious consequences. The flat top of the fire box of this particular locomotive was of copper and was stayed to the crown plate of the boiler by 192 stays. These stays when new were about $1\frac{1}{4}$ inches in thickness. They were liable to corrosion and required watching. Stays commonly become corroded and require to be cleaned with a chisel to remove the encrustation to find out how deep the corrosion has progressed. This work is entrusted to an experienced boiler maker who is placed in charge of each shed where the locomotives return for rest, and for cleaning up after work. The inspection of the stays is so important that there are specific rules requiring a boiler-maker to examine the stays of all running engines once at least in every quarter and to report their condition. A neglect to inspect the stays of another locomotive had to the knowledge of Woodward resulted in its boiler being blown off. A special circular had been issued by the Railway Authorities in December 1923, only a couple of months before the blowing of the boiler of the locomotive in question, warning the boilder-makers of the serious consequences of such neglect of duty, and this circular was duly brought to the notice of Woodward, but he appears to have done nothing. He was transferred to this shed about twenty-two months before the accident, and during all this period he had neglected his duty. Seven quarterly reports of this and all other boilers of the different engines housed in this shed were overdue. The minimum average thickness of the stays for purposes of safety according to expert evidence is 7/16th of an inch. The condition of the boiler after the explosion showed that ten stays were completely gone and others were very badly corroded, their average thickness having been reduced to less then 5/16th of an inch. The cause of the explosion was the stays giving way. The state in which the stays were found spoke

(21) 14 M. L. J. 396.
(22) 4 Ind. Cas 907; 15 P. L. R. 1909; 113 P. R 1908.
(23) 55 Ind. Cas. 754; 43-M. 617; (1920) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 360; 28 M. L. T. 49.

for themselves. It is inconceivable that Woodward was not fully conscious of the serious consequences which were likely to result from his neglect of duty in not examining the stays for a period of over twenty-two months.

The plaintiffs have, therefore, discharged the onus placed on them of proving that the loss of the goods in question was due to the wilful neglect of a servant of the Railway Administration.

The learned Solicitor for the defendant has relied on the proviso to the exception in the Risk Note. He has in his turn contended that the loss of the goods was due to a Railway accident and the Raiway Administration are, therefore, protected from liability. The proviso, however, does not refer to what is ordinarily known as a "Railway accident", but it refers to "an unforeseen event or accident". The use of the expression "accident" by itself involves the idea of something fortuitous and unexpected, and more so when it is coupled with and preceded by the words "unforeseen event" as in the present case. In law "an accident" is generally intended to mean either "*vis major*," *i. e.*, an inevitable casualty or the act of Providence, or else an unforeseen event, misfortune, act or omission which is not the result of any negligence or misconduct of the party relying on this plea. Story on Equity Jurisprudence, p. 78; Halsbury's Laws of England, Vol. XIII, para. 26.

A Railway accident which is caused by the neglect or misconduct of the servants of the Railway Administration does not, therefore, fall within the meaning of "an unforeseen event or accident". It is no doubt true that the exception purports to protect the Railway Administration from liability for loss by fire or by robbery from a running train though such loss or robbery has been caused or made possible by wilful neglect of the servants of Railway Administration, and the persons who were responsible for the draft of the Risk Note may possibly have intended to exempt the Railway Administration from liability for loss resulting under unusual circumstances such as a Railway accident though caused by wilful neglect and to provide for liability only for loss which ordinarily results from the neglect of servants who actually deal with the goods bailed. I am, however, not prepared to read into the proviso the words which do not appear there or to attach any meaning to the expression "unforeseen event or accident" which it does not ordinarily bear.

If the Railway Administration wish to protect themselves against loss arising out of such extraordinary or unusual circumstances, it is for them and their legal advisers to revise the proviso and give expression to their intentions in clear and unambiguous terms. I hold that the defendant is liable to make good the loss resulting to the plaintiff by the non-delivery of the 191 bales in suit.

With regard to the value of the 191 bales not delivered, it has been proved that the 103 bales were of superior quality known as the American cotton grown in the Punjab, and that 88 bales more were of the superior *desi* quality grown in the Punjab. The plaintiffs have claimed the value of these bales at the rate of Rs. 700 per candy, for American cotton, and Rs. 560 per candy for *desi* cotton according to the market rates prevailing here on the date of February 23, 1924, the date on which the bales were lost. Mr. Kimatrai has admitted that the proper mode of calculating their value would be according to the market rates prevailing on the date when the goods should in the ordinary course have arrived here. From the evidence of Mr. Panas, the Assistant Manager of Messrs. Ralli Brothers it appears that the market rate of American cotton on February 28, 1924 was Rs. 64 8 0 per maund or Rs. 602 per candy and of the superior *desi* cotten was Rs. 55 per maund or Rs. 513-5-4 per candy. To this is to be added a certain amount for brokerage and weighing charges which the plaintiffs would have had to pay in order to ascertain the cost of the bales to them if they had bought the bales in the open market. It also appears from his evidence that it takes generally twenty-four hours for each one hundred miles to bring down the goods from up-country and that if this accident had not taken place on the 23rd at Pano Akil, the goods would have been available for delivery to the plaintiffs here on or about February 27th. The market rates for cotton on February 27 are not available though there is evidence that the market was on the decline and that the rates prior to the 27th were much higher than the rates prevailing on February 28. The Assistant Manager of the plaintiffs has given evidence as to the actual cost of these bales, and according to him, it appears that the plaintiffs paid Rs. 721 per candy for American cotton and Rs. 501 per

candy for the *desi* cotton. Taking the whole evidence into consideration I think it will not be unfair to both the parties if I fix the market rate of American cotton at Rs. 606 per candy and of *desi* cotton at Rs. 516 per candy The amount in suit has, therefore, to be accordingly reduced. There will, therefore, be a decree for the plaintiffs for Rs. 53,803 (Rupees fifty-three thousand eight hundred and three only) with interest at six per cent. per annum from date of suit till payment and costs on the amount found due.

P. B. A. *Suit decreed.*
Z. K.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No 118 OF 1923.
January 19, 1925.

Present:—Sir Victor Murray Coutts-Trotter, KT., Chief Justice, and Mr. Justice Krishnan.

P. RAMIAH AND CO.—PLAINTIFFS—APPELLANTS

versus

T. R. SADASIVA MUDALIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Shortage in goods delivered—Damages, suit for, by purchaser—Defendant unable to recover compensation from his own seller—Liability of defendant, whether affected—Limitation Act (IX of 1908), Sch. I, Arts. 62, 96—Common mistake, money paid under—Limitation—Starting point.

In a suit for damages for shortage in goods sold by the defendant to the plaintiff, the defendant cannot escape liability on the ground that the seller from whom he himself purchased the goods as being of full quantity had become insolvent, and that as he himself had lost his chance of getting compensation for shortage from his seller, he should not be called upon to pay for shortage to his buyer. [p. 153, col. 1.]

K. M. P. R. Firm v. *Official Assignee of Madras*, 70 Ind Cas. 751; 43 M. L. J. 142; 16 L. W. 75; (1922) M. W. N. 498; (1923) A. I R. (M.) 17, distinguished.

Standish v. *Ross*, (1849) 3 Ex. 527; 19 L. J. Ex. 185; 154 E. R. 954; 77 R. R. 715, relied on.

Where in a contract of sale of goods by bales, both the vendor and the purchaser believe that the bales contain a particular quantity of goods, but it is subsequently found that there is a mistake, the bales containing only a lesser quantity, the excess price paid is clearly money paid by mistake, and Art. 96 of Sch I to the Limitation Act applies. The starting point of limitation in such a case is not the date of delivery but the date when the mistake was discovered. [p. 152, col. 1; p. 153, col. 2.]

Per *Coutts-Trotter, C. J.*—In all cases where something turns upon a mistake, or concealment of fact by the fraud or deceit of the other side, the time from which limitation must be taken to run is always the time when it was brought to the plaintiff's knowledge that there had been a mistake or a fraud. [p. 152, col. 2.]

Appeal from the judgment of Sir Walter George Salis Schwabe, KT., Chief Justice, dated the 25th of October 1923, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in C. S. No. 174 of 1922.

Messrs. *V. Radhakrishnayya* and *Venkataseshayya*, for the Appellant.

Messrs. *T. D. Srinivasachari* and *T. Chakravarty Iyengar*, for the Respondents.

JUDGMENT.

Coutts-Trotter, C. J.—In this case the appellants bought some bales of grey shirtings from one Krishnaji Kesari Mull, a Bombay merchant. They sold them to the plaintiffs and then they went through a long chain of changing hands and, in the end, some 7 or 8 months after the bales had been sold, it turned out that some of them were short by 10 pieces; that is to say, whereas they purported to contain 60 pieces they in fact contained only 50.

The learned Chief Justice, my predecessor, who tried this case found on the evidence before him that, although only 3 bales had been opened, the reasonable conclusion of fact was that the shortage extended to the other 5 bales which were exactly of the same size, appearance and description and, with that finding, which the learned Judge was entitled to come to, we do not desire to interfere. There was evidence to support it and one knows that to rip up a bale for the purpose of counting the contents has a most damaging effect upon its value in the market.

There are only two points really argued, and they are both points of law. It appears that the defendants were unable, when the mistake was found out, to have recourse to their sellers because the sellers had gone bankrupt. They may not be able to get a dividend. That being so, reliance was placed on a judgment of this Court to which I was a party [*K. M. P. R. Firm* v. *Official Assignee of Madras* (1)] in which the facts were the converse. There had been an over-delivery of 14 pieces, a delivery which was thought to be one of 7,000 pieces but really turned out to be of 7,014 pieces. We there held that one of the persons in the chain was not accountable to his immediate seller because he, in good faith, had passed all the 7,014 pieces to his immediate buyer, all parties being of the belief that they really were only 7,000. Rightly or wrongly we

(1) 70 Ind. Cas. 751; 43 M. L. J. 142; 16 L. W. 75; (1922) M. W. N. 498; (1923) A. I. R. (M.) 17.

held there and it may be, we expressed the proposition in too general terms that in such cases redress could be had by the plaintiff only if he was able to show that his goods which were not covered by the contract, namely, 14 extra pieces, were in the possession of the defendant or that the defendant had had the benefit of them. But in *Standish* v. *Ross* (2), it was held that it was unnecessary to plead any such circumstance: "It is quite true I have your money in my hands but unfortunately you paid them thinking you owed the money. I have gone and spent it on a luxury." That was held in *Standish* v. *Ross* (2) not to be an answer to the claim. But it seems to us that that case has no application whatever to a case like the present where the converse is the fact, where the seller has failed to deliver to the buyer that which he contracted to deliver; and it is unaffected by the fact that the unfortunate buyer has been held liable to a third person and the still more lamentable fact that the unfortunate seller has got a remedy back only against an insolvent person a risk to which every commercial man is liable.

Then a point is raised about limitation. It is said that this case falls within Art. 62 of the Limitation Act, because it is a case of money had and received to the use of the plaintiff. No doubt, if one were drawing a pleading in an English Court in the approved Bullen and Leake style, after setting out the facts which after all, is the real function of a pleading one would end up by saying "the money claimed is money had and received to the use of the plaintiffs". But it does not follow that that Article is exhaustive, because a later Article, Art. 96, provides for a special case of money had and received to the plaintiff's use. It runs as follows:—

"For relief on the ground of mistake	3 years	When the mistake becomes known to the plaintiff."

It specifies that the time when limitation begins to run in such a case is when the mistake becomes known to the plaintiff. It seems to me that the special Article must override the general provisions of Art. 62 and that it fixes a time when the plaintiff's cause of action depends upon the fact that he was mistaken, as different from the time when the mistake was ascertained; or, as I suppose, in certain cases it may be that you would have to qualify that by saying "the time when the plaintiff ought to have discovered his mistake if he used reasonable diligence". However, we are not concerned with that here, because, having regard to the known habits and customs of the piece-goods market here, I do not think any Judge would venture to say that 8 months was too long a time for the goods to be passing from hand to hand in their wholesale state as bales. It is a well-settled principle on which the English Courts have acted for centuries that, in all cases where something turns upon a mistake or concealment of fact by the fraud or deceit of the other side, the time from which limitation must be taken to run is always the time when it was brought to the plaintiff's knowledge that there had been a mistake or a fraud. We, therefore, think that the learned Trial Judge was right on all the points in this case and that the appeal must be dismissed with costs; but there will be this modification of the decree and Mr. K. S. Krishnaswami Iyengar has very wisely accepted it because, after all, it is apparently rather a hard case—that is, the time from which interest is to be taken to run is not the initial short delivery but the time when the demand was made upon the defendants by the plaintiffs, *i. e.*, the 24th April 1919. The decree will be modified to that extent; otherwise the appeal will stand dismissed with costs.

Krishnan, J.—I agree with the learned Chief Justice that this appeal fails. The first point taken on the facts of the case is that it has not been proved that all the 8 bales in each of which a shortage of 10 pieces is claimed by the plaintiff, contained only 50 pieces each and not 60. It is said that it is only as regards 3 bales the shortage has been properly proved as they were opened and the pieces actually counted, but as regards the other bales there is no doubt whatever that the late learned Chief Justice is right in the view he took that they should be taken as shown to have contained only 50 pieces each. One of the bales opened for the purpose of finding out whether the 6 bales left in the hands of Motilal contained only 50 pieces each or 60, was taken at random as a sample bale from the lot and it was found to con-

(2) (1849) 3 Ex. 527; 19 L. J. Ex. 185; 154 E. R. 954; 77 R. R. 715.

tain only 50 pieces. That evidence is quite sufficient to justify the finding as regards all the 8 bales. The fact of the shortage is thus established.

The next question is one of law based on the ruling of the learned Chief Justice, then Mr. Justice, Courts-Trotter, and Mr. Justice Ramesam in *K. M. P. R. Eirm* v. *Official Assignee of Madras* (1). That case has now been explained by the Chief Justice; it does not really apply to the facts of the present case, and it is, therefore, unnecessary to consider how far that case overstated the law. I should, however, not be taken as agreeing to the statement of the law in that case, for I am inclined to think there is a little over statement in it.

Reference has been made to *Baylis* v. *Bishop of London* (3) and *Newall* v. *Tomlinson* (4). It is, however, unnecessary to pursue this matter further as the facts of this case are quite different from the facts of those cases. It is said that, because the seller from whom the defendant purchased the goods became insolvent, the defendant has lost his chance of getting his money from the seller and, therefore, he should not be called upon to pay for shortage to his buyer. There is no authority cited to show that this doctrine is correct. It was the misfortune of the defendants that their seller has become insolvent. Whether he became an insolvent after the defendants got notice that a claim was going to be made against them by the plaintiffs or not, is not very clear. For, if the insolvency happened only afterwards it will be clearly defendant's own fault if they did not take steps in time to recover what they would have been entitled to claim from their seller. However that may be, we are not concerned with the question. It is clear that the defendants are bound to return the price which they received for the 10 pieces in each of the 8 bales in which there was a shortage.

The last question argued is one of limitation and it is one of some difficulty. It is contended that Art. 62 applies to the case. I do not see how that Article can be applied, for it refers to money had and received by the defendant for the plaintiff's use. It does not refer to a case like this where money had been paid under a mistake of fact and is now sought to be recovered on the ground that it was so paid. Both the parties believed that the bales contained 60 pieces each and the price was paid and received on that footing; it was subsequently found out that there was a mistake, there being only 50 pieces in each of the 8 bales. The excess price paid is clearly money paid by mistake and Art. 96 applies as the late learned Chief Justice has held. I agree, therefore, that the bar by limitation does not arise on the facts of this case. The appeal will be dismissed with the modification of the decree proposed as regards interest.

Coutts-Trotter, C. J.—I should just like to add that, at the time I and my brother Ramesam decided the case of *K. M. P. R. Firm* v. *Official Assignee of Madras* (1) *Baylies* v. *Bishop of London* (3) was not cited to us and I should like to consider that case further before expressing any final opinion as to the correctness of our decision in *K. M. P. R. Firm* v. *Official Assignee of Madras* (1).

V. N. V.
N. H.

Appeal dismissed with modification of decree.

(3) (1913) 1 Ch. 127; 82 L. J. Ch. 61; 107 L. T. 730; 57 S. J. 96; 29 T. L. R. 59.
(4) (1871) 6 C. P. 405; 25 L. T. 382.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEALS
NOS. 38 AND 51 OF 1925.
August 7, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

PARASHURAM D. SHAMDASANI—PLAINTIFFS—APPELLANTS

versus

THE TATA INDUSTRIAL BANK, LTD.—DEFENDANTS—RESPONDENTS.

Costs—Chamber summons adjourned to hearing—Costs, award of—Review of taxation—Procedure—Discretionary charges—Taxing Officer, duty of—Principles applicable.

When a Chamber summons is adjourned to be dealt with by the Judge at the hearing of the action, the summons becomes merged in the hearing and costs relating to the summons are in the discretion of the Trial Judge. [p. 155, col. 1]

No increase of charges can be allowed on a review of taxation over those charged in the bill of costs. [*ibid.*]

On a review of taxation it is open to the party objecting to the taxation to show that the Taxing Officer erred on a question of principle or has omitted to take into consideration all those matters which he

is required to take into consideration. The Taxing Officer is not at liberty to lay down a scale for discretionary charges which is out of all proportion for the work done. [p. 155, col. 2; p. 156, col. 1.]

Charges in respect of instructions for brief are only discretionary in witness actions. They are principally intended to cover the trouble and expense incurred in collecting evidence for the trial of an action. Nothing beyond a nominal charge is allowed for instructions in matters which are heard on affidavit. The reason is that all the materials for preparing the brief have already been charged for. Under the rules of the Bombay High Court the charge for instructions on motion is discretionary, but the charge for instructions in Chamber matters is not discretionary. [p. 156, col. 1.]

In order to enable the Taxing Officer to exercise his discretion where large sums are charged for instructions it is necessary that attorneys should give him all the necessary particulars so that he may be able to decide what is reasonable to be allowed. [p. 158, col. 1.]

The Taxing Officer should deal himself at first hand with the discretionary charges and he should discourage any tendency on the part of attorneys to enter into their bills amounts far in excess of what they expect to be allowed, because they are afraid that whatever they charge a reduction will be made. [p. 158, cols. 1 & 2.]

There is no reason why an individual who files a suit against a powerful and wealthy corporation like a Bank or a Railway Company should have to pay costs on a higher scale simply because his opponents are wealthy and powerful and defeat would be more disastrous to them than if they had been companies of little importance. To some extent the importance of the result of the action may affect the question of costs, but proper attention must be paid to the difficulty or triviality of the points raised, and the existing means of knowledge in the hands of the defendants to meet the attack. The Taxing Officer must have some sense of proportion, and must form some idea of the actual work done and the actual time taken by the attorneys in preparing the brief, with a view to awarding them reasonable remuneration for the work done, having regard also to the other charges made in the bill for particular items of work. [p. 159, col. 1.]

Sir *Chimanlal Setalvad* (with him Mr. *Kanga*, Advocate General), for the Respondents.

JUDGMENT.

Macleod, C. J.—These appeals arise from the taxation of the bill of costs of the first and sixth defendants which were ordered to be paid by the plaintiffs under the decree in Suit No. 3643 of 1923, and can be dealt with in one judgment.

The plaint was declared on August 29, 1923. The first defendant and defendants Nos. 2 to 5 filed their respective written statements on September 21. The sixth defendant filed his written statement on September 20. The first and sixth defendants filed their affidavit of documents on September 22, 1923. Thereafter, on October 1, the plaintiffs took out a summons returnable on October 3, for a supplemental affidavit.

The suit had already been fixed for hearing for October 3, so the Chamber Judge directed that the summons should be dealt with by Pratt, J., on whose board the suit had been placed for hearing. The summons was not adjourned for hearing in Court. When the suit was called on Pratt, J., first disposed of the plaintiffs' application for further discovery, and delivered judgment rejecting the application on October 8. The suit was then adjourned as part-heard to November 12. It came on again on November 19, and was heard on various days until November 29, when judgment was reserved. It was delivered on December 14.

The first and sixth defendants brought in their bills of costs for taxation.

The items relating to the summons for further discovery, including items for Counsel's fees, were placed in a separate column, and an argument arose before the Taxing Officer on the question whether the fees to Counsel could be allowed as costs of the summons as Counsel had not been certified under rule 505. The Taxing Officer held that the Chamber Judge did not dispose of the summons but referred it to the Trial Judge. Various other objections were raised and disposed of, but before the allocaturs were signed the plaintiff applied for a review under r. 529. The plaintiffs' objections were then heard and the Taxing Officer issued his certificate on September 20.

The plaintiffs' application for a review of taxation came on before Kemp, J., on February 16, 1924, when Counsel for the defendants agreed to apply to Mr. Justice Pratt to certify for Counsel on the Chamber summons. The other objections of the plaintiffs were then heard judgment being reserved until the application to Pratt, J., had been heard. On March 12, Counsel appeared before Pratt, J., on a notice of motion issued by defendants Nos. 1 to 6. The Judge said: "There is no question that the summons was a fit one for Counsel. Accordingly I make the motion absolute with costs. The costs payable under the judgment shall include costs of Counsel." On April 9, 1925, Kemp, J., delivered judgment on the review of taxation The first objection of the plaintiffs was with regard to the allowance of refreshers to Counsel at the hearing of the summons. The Judge held that the Taxing Officer had no power to allow such refreshers, but against this disallowance he in-

creased the brief fee of twenty gold *mohurs* allowed by the Taxing Officer to thirty. The costs of one conference with Counsel held on November 26, 1923, were disallowed. All the other objections raised by the plaintiffs were disallowed. The plaintiffs were ordered to pay four-fifths of the costs of the first and the sixth defendants respectively. The plaintiffs have appealed against the order of Pratt, J., passed on March 12, and against the order of Kemp, J., passed on April 9.

The Taxing Officer was right in allowing fees to Counsel for arguing the questions involved in the summons of October 1. But it seems strange that the position, when a summons is adjourned to be dealt with by the Judge at the hearing of the action, has not been understood. The summons became merged in the hearing, and the question whether the defendants should file a further affidavit of documents was a question to be dealt with as one of the questions arising at the hearing. The costs relating to such question were at the discretion of the Trial Judge. There was no necessity to draw up a separate order, as the defendants were not ordered to make further affidavits, the costs relating to the question of discovery could have been dealt with in the decree.

I think then that Kemp, J., was wrong in allowing the defendants to make an application to Pratt, J., He should have held that the Taxing Officer was right in allowing Counsel's fees as part of the costs of the summons. There is no necessity, therefore, to consider whether the order of Pratt, J., was wrong; only as the motion before him should never have been made, the appeal against that part of the order which directs the plaintiffs to pay the costs of the first and sixth defendants must be allowed with costs.

The defendants have not cross objected to the decision of Kemp, J., disallowing refreshers to Counsel when the question of further discovery was argued. But on the footing that costs were payable as costs of a summons the Judge was wrong in increasing the brief fee from twenty to thirty gold *mohurs*, thus diminishing the effect of his disallowance of the refreshers by ten gold *mohurs*. No increase of charges can be allowed on a review of taxation over those charged in the bill of costs. As a matter of fact to allow twenty-five gold *mohurs* on the brief plus twenty as fee for brief on the summons was wrong. All that should have been allowed was twenty-five gold *mohurs* on the brief and fifteen for a refresher on the 9th and the taxation must be altered accordingly. There is another minor objection of the plaintiffs to the allowance of the charges for instructing Counsel in Chambers on October 1. Strictly speaking, these costs could not be allowed as Counsel was not certified. If Kemp, J., had realized the effect of his order which put an end to the proceedings as proceedings in Chambers, he might have certified Counsel for the application before him instead of making the costs costs in the summons, but considering the order passed by Pratt, J. I am not prepared to hold that those charges should be disallowed. With regard to the fees allowed to Counsel on the brief for hearing which were allowed at thirty and twenty-five gold *mohurs* for senior and junior Counsel respectively with refreshers of fifteen and thirteen gold *mohurs*, the plaintiffs object to refreshers above ten and eight gold *mohurs* being allowed It certainly appears to us that the fees to Counsel have been allowed on a very liberal scale. The case was no doubt of considerable importance to the defendants, but as I shall point out later it cannot be possibly said that it was a case of extra difficulty. Still we are not prepared to differ from the Judge on this point.

I now come to the plaintiffs' objection to the three items charged for instructions in both bills:

(1) Rs. 125 allowed on the brief to show cause against the notice of motion.

(2) Rs. 3 0 allowed on the brief to show cause against the Chamber summons.

(3) Rs. 3,000 allowed on the brief for the hearing.

(4) (5) and (6). Similar items in the bill of the sixth defendants.

The defendants object to our dealing with those items in any way on the ground that we have no jurisdiction in questions of *quantum*.

It would be very strange if the Court had no jurisdiction at all to deal with discretionary charges. Even the Judge admits that it is open to a party objecting to show that the Taxing Officer erred on a question of principle or has omitted to take into consideration all those matters which he is required to take into consideration. I should go further and say that the Taxing Officer is not at liberty to lay down a scale for discretionary charges which is out of

all proportion to the work done. High Court, r. 521 (1) says :—

"No costs are to be allowed on taxation which do not appear to the Taxing Officer to have been necessary or proper for the attainment of justice or defending the rights of the party or which appear to the Taxing Officer to have been incurred through overcaution, negligence, or mistake, merely at the desire of the party."

That must apply to taxation between party and party only.

Rule 522 says :—

"In dealing with fees or allowances, which are discretionary, the Taxing Officer in exercise of such discretion shall take into consideration the other fees and allowances to the attorney and Counsel, if any, in respect of the work to which any such allowance applies, the nature or importance of the suit or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and cost of the proceeding and all other circumstances."

In the table of fees for attorneys and parties attached to the High Court Rules at p. 397 instructions for brief (including perusing papers and examining witnesses) whether on final disposal at first hearing, settlement of issues, final trial or on motion are discretionary. Now, it has been generally recognised that the Courts in India will follow the decisions of the English Courts in matters of taxation and it follows that the Taxing Officer should follow as far as it can be ascertained the practice observed in England. From the precedents of bills of costs in Bannehr and Porter's Guide to Costs it can be seen that instructions for brief are only discretionary in witness actions. They are principally intended to cover the trouble and expense incurred in collecting evidence for the trial of an action. Nothing beyond a nominal charge is allowed for instructions in matters which are heard on affidavit. The reason is that all the materials for preparing the brief have already been charged for. It may be said that under our table of fees the charge for instructions on motion is discretionary, but the charge for instructions in Chamber matters is certainly not discretionary. It is not easy to find in the reports cases in which the *quantum* of discretionary charges are mentioned and considered, but in *Duke of Beaufort* v. *Earl of Ashburnham* (1), the Court thought that a charge of £ 105 for instruction even in an action in which thirty witnesses had been summoned and intricate questions were involved was unusually high, considering that £ 121 had been allowed for making abstracts and copies of documents which in reality formed the instructions in the brief, but after consulting the Taxing Master, it refused to interfere. In *Hill* v. *Peel* (2) and two other cases, the taxation of the costs in three Parliamentary petitions was considered. In two cases the Master allowed 100 guineas for instructions for brief and in the third, the *Penryn case*, 150 guineas including preliminary expenses. The report mentions that in the *Southampton case*, the brief was very voluminous and contained instructions for the examination of eighty-five witnesses and the Master was asked to reconsider his taxation on the ground that the allowance was insufficient. In the other cases the decision of the Taxing Master was upheld. The important point to notice is that in such a heavy matter as a Parliamentary petition, in which a large number of witnesses had to be collected and their proofs taken, far less was allowed to the Solicitors for instructions than in the case before us.

In *Slingsby* v. *Attorney-General* (3), a petition was presented by a Charles Eugene Slingsby, an infant, by his next friend seeking to establish that he was the lawful child of C. H. R. Slingsby and Dorothy Slingsby, and that he was, therefore, tenant in tail male in remainder expectant on the death of his father of the Slingsby estates. The petitioner was successful at the trial, but the judgment in his favour was reversed by the Court of Appeal which decided that the costs of the parties cited in both Courts should be paid by the next friend. The bill of costs brought in for taxation by the Solicitors of the parties cited contained (*inter alia*) two items to which objection was taken. One was an item of £1,365 which was brought in as a lump sum in respect of "instructions for brief" and the other was an item of £ 3,890 in respect of payments to American lawyers. The Registrar had allowed £735 for the first

(1) (1863) 7 L. T. 710; 13 C. B. (N. S.) 598; 32 L. J. C. P. 97; 9 Jur. (N. S.) 822; 11 W. R. 267; 143 E. R. 237; 134 R. R. 671.

(2) (1870) 5 C. P. 172.

(3) (1918) P. 233; 87 L. J. P. 146; 119 L. T. 104.

item and £1,993 for the second. The next friend took out a summons to review the taxation which was heard before Coleridge, J., who affirmed the decision of the Registrar. The next friend appealed.

Swinfen Eady, L. J., said at page 238*:—

"The Registrar has dealt with that (the item of £1,365)...by allowing £735 as a lump sum for the charges. Objection is taken to his taxation, and he deals with it in this way is his answer: 'I have carefully considered this case which, in my opinion, was an extremely difficult and complicated one, and I am of opinion that the sum I have allowed is a proper figure.' That is the whole answer to the objection. I think it is well settled that the Court will not interfere with the exercise of a discretion by a Taxing Master where he has not acted upon any wrong principle or applied any wrong consideration. The allowance to be made,for 'instructions for brief' is a matter peculiarly within the discretion of the Taxing Master, and, as was said by Bucklay, L. J., in *In re Estate of Ogilvie* (4): "On questions of *quantum* the decision of the Taxing Master is generally speaking final. It must be a very exceptional case in which the Court will even listen to an application to review his decision." That is the practice. The decision of the Taxing Master is not absolutely final even on a question of *quantum*. For instance, a large sum might be allowed, but from the very fact of the amount the Court might see that the Master, in arriving at so large a sum, must have acted on a wrong principle or have taken something into consideration which he ought not to have done. It doubtless requires an exceptional case to call for the interference of the Court, but exceptional cases do occasionally arise. In the present case, in my opinion, the bill has been improperly made out, and the Registrar has not had before him the proper materials upon which he could reasonably exercise his discretion."

Then at page 240*, the learned Lord Justice says:—

"In my opinion, the heading 'Instructions for brief' is intended to cover those items, the nature of which is thus stated by Master King in his book on Costs on the High Court Scale, at pages 37, 38: 'A summary statement in the bill carried in for taxation of the details of the matters to which regard is to be had under this item... greatly facilitates the task of arriving at a proper allowance.' Then he refers to *Hill* v. *Peel* (2): "The length of the documents perused (in cases in which perusal has not previously been charged), the names of the witnesses who have been attended, the places to which journeys have been made, with the time occupied in each, and the amount of the travelling expenses, should be stated.' If those details are given in the bill it enables the Master to form a considered judgment as to the sum which is proper to be allowed under the heading 'Instructions for Brief.'

And Bankes, L. J., said (page 244*):—

"If I could be satisfied that the Registrar had dealt with these questions on the right principle I would not for one moment interfere or attempt to interfere with the exercise of his discretion, however much I disagreed with the result at which he had arrived, but it appears to me manifest on these materials that the Registrar has proceeded upon an entirely wrong principle... The next point is this: The bill under the heading of 'Instructions for Brief' is made out in a way which did not present to the Registrar materials upon which he could, in my opinion, properly exercise his discretion."

Then, after pointing out that the bulk of the work had been done in America by American lawyers which had been separately paid for, the judgment proceeds (page 246*):—

"Any work that remained to be done in this country by the Solicitors, either in respect of the necessary preparation for the taking of the evidence on commission, or after that evidence had been returned in relation to the preparation for trial, would properly be matters which the Registrar was entitled to take into consideration if he was directing himself properly, if I may use that expression, which is, I suppose, another way of saying if he was acting on a right principle. If these were the only matters it seems to me very difficult for him to have come to the conclusion that the case was an extremely difficult and complicated one; and that again leads me to the conclusion that he has not had the materials which would enable him to direct his mind to the real points, but that, in the absence of the materials which would

(4). (1910) P. 243 at p. 245; 79 L. J. P. 113; 103 L. T. 154.

*Pages of (1918) P.—[*Ed.*]

have kept him within a right principle, he has allowed himself to consider generally the nature and the importance and, from some points of view, the complicated character of the case."

It would appear that the answer of the Registrar to the objection to his charges for instructions, which was in much the same terms as the answer of the Taxing Officer in this case, was not considered satisfactory.

So, in order to enable the Taxing Officer to exercise his discretion, where large sums are charged for instructions, it is necessary that attorneys should give him all the necessary particulars so that he may be able to decide what is reasonable to be allowed. The particulars given in the bills before us can afford but little information.

The next question is whether the Taxing Officer has made a proper attempt in this case to exercise his discretion. We have consulted the Taxing Master and the Assistant Taxing Master to ascertain the practice in the office and explain the figures in the margin of the bills. It appears that the bills are first checked with regard to out of pocket expenses charged for and are then taxed provisionally in the taxing office by a taxing clerk. Apart from the charges which are according to scale he also taxes provisionally in pencil the discretionary charges. We do not think this practice is to be commended. Now in these bills it is a most remarkable coincidence that in all the discretionary charges the Taxing Officer has adopted the suggestions of the taxing clerk. The taxing clerk evidently works on some preconceived rule of knocking off a certain proportion of all charges for instructions It is impossible to conceive that the Taxing Officer, if he had approached the taxation with an independent mind and duly made himself acquainted with the particulars of the case and the necessary work to be done for defending the rights of the parties, should have come to exactly the same conclusion as the taxing clerk who was not capable of estimating what was a proper charge and deducted two-fifths by some rough and ready method of his own from the amounts charged by the attorneys. It is essential that the Taxing Officer should deal himself at first hand with discretionary charges, and that he should discourage any tendency on the part of attorneys to enter in their bills amounts far in excess of what they expect to be allowed, because they are afraid that whatever they charge, a reduction will be made. The practice under our rules that bills should be taxed between party and party and between attorney and client at the same time is a departure from the English practice, and enables an attorney to get an allocatur against his client without running the risk of the costs of taxation being disallowed under r. 534, and it may be a question for consideration whether this rule should not be altered. We also gathered that it was not the usual practice to allow between attorney and client a portion of the charges for instructions disallowed between party and party, but there seems to be no reason why an attorney should not be allowed such a charge if the Taxing Officer considers that at the request of the client work has been done which does not come within the terms of r. 521 (1).

I shall now point out what the Taxing Officer should consider in this case, in order to satisfy himself that the charges made by the attorneys for defendants Nos. 1 and 6 were reasonable. There is the date of the service of the summons when the attorneys first had notice of the suit, which seems to have been September 6; briefs were delivered on October 2. So the work charged for preparing the briefs must have been done between those days. Then there are the questions arising from the plaint. From the judgment it appears that the plaintiffs really raised only two points :—

(1) That the notice of July 5, 1923, convening the meeting was defective.

(2) That he had not been properly treated at the meeting.

In their written statements the defendants deny that the notice was invalid and set out what occurred at the meeting.

Then there are the documents disclosed in the affidavit of documents and the documents put in at the hearing. It should be considered whether, as a matter of fact, there was any of those documents the contents of which were not fully known and which had not been fully considered by the attorneys for the two Banks, while the negotiations for their amalgamation had been going on. The oral evidence would only relate to what took place at the meeting, particulars of which would also be with the Solicitors. The preparation

then of the brief would not require much more than indexing the documents which should be placed before Counsel. The instructions in the brief were short, and rightly so, and are charged for according to scale.

Now, turning to the judgment, the Judge deals with the points raised by the plaintiffs against the validity of the notice. He says the first five points refer merely to the details of the calculation (about these basic figures 200 lakhs of assets of the vendor company and 80 lakhs of the assets of the purchaser company were arrived at). The attorneys of the two Banks were perfectly acquainted with the details before the suit was filed. The same may be said with regard to points Nos. 6 to 9. The rest of the judgment deals with the events at the meeting. Now, although it was of the greatest importance that the attempt of the plaintiffs to upset the amalgamation should be defeated, there was nothing of any extra difficulty in the defence. As the Judge pointed out the plaintiffs carried on a hopeless struggle. There does not seem any reason why an individual who files a suit against a powerful and wealthy corporation like a Bank or a Railway Company should have to pay costs on a higher scale simply because his opponents are wealthy and powerful, and defeat would be more disastrous to them than if they had been companies of little importance. To some extent, I admit the importance of the result of the action may affect the question of costs, but then proper attention must be paid to the difficulty or triviality of the points raised, and the existing means of knowledge in the hands of the defendants to meet the attack. The Taxing Officer must have some sense of proportion, and must form some idea of the actual work done and the actual time taken by the attorneys in preparing the brief, with a view to awarding them reasonable remuneration for the work done, having regard also to the other charges made in the bill for particular items of work.

The Taxing Officer should then have noticed that the amounts he was allowing in these bills for instructions were far too high, so high that in the words of Swinfen Eady, L. J., "either he acted on a wrong principle or took something into consideration which he ought not to have done."

His answer to the plaintiffs' objections was: "In a suit of this magnitude and with the enormous issues at stake, the length of the trial, etc., I think the amount fair and reasonable." Granting that these are factors which should be taken into consideration, they are not absolute but relative. The foundation for the charge is the preparation for the brief. The magnitude of the suit, the issues at stake, are reasons for increasing the scale of the charge, but the length of the trial will not necessarily correspond with the work done in the preparation of the brief. A case in which a large number of witnesses have to be examined will probably result in a lengthy trial unless it is settled, but a trial may last several days without much evidence being taken or much preparation being required, and the present case is an excellent illustration of that.

We must, therefore, remit these bills to the Taxing Officer to review his taxation in the light of our remarks. The appellants will get their costs in this Court and in the Court below.

Coyajee, J.—I concur.

Z. K. *Appeals allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST MISCELLANEOUS APPEAL NO. 45 OF 1925.

September 14, 1925.

Present :—Mr. Simpson, A. J. C.

Musammat PARBATI—APPLICANT—APPELLANT

versus

SHEO BALI—OBJECTOR—RESPONDENT.

Will—Flattery—Fraud.

If a legatee by flattery succeeds in persuading a testator to make a Will in his favour, that will be upheld unless it is tainted with fraud. [p. 160, col. 1.]

When a person makes false allegations to his uncle about the unchastity of the latter's wife, and thus induces him to make a Will in his own favour, the Will is tainted with misrepresentation and fraud and cannot be upheld. [*ibid.*]

First miscellaneous appeal against an order of the Second Additional District Judge, Lucknow at Unao, dated the 26th January 1925.

Mr. *Salik Ram*, for the Appellant.

Mr. *H. N. Dass*, for the Respondent.

JUDGMENT.—The appellant, *Musam-*

mat Parbati, is the widow of Krishna Dutt. She applied for Letters of Administration propounding a Will in her favour. Krishna Dutt owned a house with its contents and a grove, the whole estate is valued at Rs. 500 only. The Will was dated 30th October 1922, and was registered. The terms of the Will were that the appellant, *Musammat* Parbati, was to have a life-estate in her husband's property and then it was to go to his nephew Sheo Bali, the respondent. The application mentioned the existence of a later Will, dated 16th May 1923, executed by the testator and registered, but the applicant claimed that hers ought to be regarded as the last Will and testament of the testator, because Sheo Bali had deceived the testator, and taken advantage of his illness and mental weakness.

The learned District Judge came to a finding that *Musammat* Parbati's Will could not be regarded as the last Will in face of the existence of this later Will, and accordingly he dismissed her application with costs. She has appealed.

The appeal succeeds. The case is just on the border line. The evidence shows that Sheo Bali hung about the old man's bed during the latter part of his life, flattered him and endeavoured to supplant his wife in the old man's esteem, and the execution of the Will shows that he succeeded. But this would not be enough. There is nothing to show that he dominated the will of the testator. If a legatee by flattery succeeds in persuading a testator to make a Will in his favour, that will be upheld unless it is tainted with fraud. But I find that the present Will was obtained by fraud. The first Will of the 30th October was in every way a suitable Will. The testator had no son or daughter. His nearest relation was his widow, who had been married to him for forty or fifty years. There was nothing against her, and it was only fair that she should inherit the property for her life. The second Will contains allegations, which are shown to be false, that the appellant was unchaste and so forth, cuts her out altogether and substitutes Sheo Bali.

It is a fair legal inference from these facts that Sheo Bali induced the testator to believe what was not true, that his wife was of bad character and had left his house. There is little positive evidence that it was Sheo Bali who implanted this falseness in his uncle's mind, but there was no one else who could benefit by the misrepresentation and, as I say, it is a fair legal inference that Sheo Bali procured this Will by means of misrepresentation and fraud.

I, therefore, allow the appeal and set aside the order of the learned District Judge, and grant Letters of Administration to *Musammat* Parbati in respect of the estate of her late husband. The opposite party will bear the costs of the applicant throughout.

N H. *Appeal allowed.*

BOMBAY HIGH COURT.

INSOLVENCY CASE NO. 322 OF 1925.

June 22, 1925.

Present:—Mr. Justice Taraporewala.

In re NAGINLAL MAGANLAL JAICHAND.

Ex parte GUNVANTRAI DHIRAJLAL DESAI.

Presidency Towns Insolvency Act (III of 1909), s. 90—Civil Procedure Code (Act V of 1908), s. 24—Insolvency proceedings instituted in High Court—Stay of proceedings in subordinate Court.

The power of withdrawal conferred by s. 24 of the C. P. C. can be exercised by the High Court only on its Appellate Side and cannot be exercised by a Judge sitting on the Original Side of the High Court. The powers of the Insolvency Court given thereto by s. 90 of the Presidency Towns Insolvency Act, being only such powers as are exercised by the High Court in the exercise of its Ordinary Original Civil Jurisdiction, the power of transfer or withdrawal under s. 24 of the C P. C. is consequently not a power which the High Court can exercise as an Insolvency Court. [p. 162, col. 1.]

The expression "any suit or other proceeding" in s. 18 of the Presidency Towns Insolvency Act means suit or other proceeding other than an insolvency proceeding. Insolvency proceedings are not included within the purview of that section. [p. 162, col. 2.]

Section 22 of the Presidency Towns Insolvency Act enables a Court to stay its own proceedings and does not empower it to order some other Court to stay proceedings. [p. 163, col. 1]

The High Court exercising its jurisdiction as an Insolvency Court has, therefore, no power to stay insolvency proceedings pending in a Court subordinate to it. [p. 162, col. 1.]

Mr. *Jinnah*, for the Petitioner Creditor.

Sir *Chimanlal Setalvad*, for the Official Liquidator.

JUDGMENT.—The executor of the petitioning creditor in this insolvency proceeding has taken out this notice of motion against the First Class Subordinate Judge, Ahmedabad, and three other persons being the Receivers of the estates of the insolvents

appointed by the First Class Subordinate Judge, Ahmedabad, in insolvency proceedings pending in the said Court, and Mr. Shivdasani, the Liquidator of the Whittle Spinning and Manufacturing Company, Limited, for an order (*a*) either to transfer or stay the proceedings in the Court of the First Class Subordinate Judge at Ahmedabad and order the Receivers appointed by the First Class Subordinate Judge at Ahmedabad to hand over all the assets, effects, papers, vouchers, information collected, etc., to the Official Assignee of Bombay subject to the payment of such allowance, if any, as to this Court may seem right to be made to the said Receivers out of the estate of the said insolvents come into their hands, or (*b*) to direct the First Class Subordinate Judge's Court at Ahmedabad requesting the said Court to act merely in aid of this Hon'ble Court and auxiliary thereto in administering the estates of the said insolvents and in the meantime for an order against the said Receivers to the effect above mentioned, and for such other directions as to this Court may seem right.

This application was opposed by Mr. Shivdasani who appeared by Counsel.

The facts relevant to the present notice of motion are as follows :—

A petition was presented in the Court of the First Court Subordinate Judge, Ahmedabad, for adjudicating all the three persons, who have been adjudicated insolvents in the proceedings before this Court, insolvents under the Provincial Insolvency Act. On the said application the First Class Subordinate Judge of Ahmedabad made orders on February 18 and 19, 1925, appointing respondents Nos. 2, 3 and 4 as provisional Receivers respectively of the estates of the three insolvents. Before the final order of the adjudication, however, was made by the Court at Ahmedabad a petition was presented in this Court by the petitioning creditor for adjudicating the said three persons insolvents, and an order of adjudication was made on the said petition by this Court on March 9, 1925. Thereafter on March 21, 1925, the Ahmedabad Court made a final order adjudicating the said three persons insolvents. An application was made to this Court for stay of the proceedings in this Court under s. 22 of the Presidency Towns Insolvency Act on the ground that the insolvency proceedings were pending in the Ahmedabad Court and that it would be more convenient for that Court to proceed with the insolvency proceedings. The said application was heard by Mirza, J., in the vacation and dismissed by him. I am told that the petitioning creditor in the Ahmedabad Court Mr. Shivdasani, has appealed against the said order of Mr. Justice Mirza and the said appeal is pending. I was further told by Counsel for Mr. Shivdasani that the petitioning creditor in this Court had applied to the First Class Subordinate Judge at Ahmedabad to stay the insolvency proceedings before him under s 36 of the Provincial Insolvency Act on the ground that this Court had refused to stay the proceedings pending before it in insolvency against the said insolvents, and that the proceedings would be more conveniently carried on in this Court, and that the Ahmedabad Court dismissed the application and refused to stay the proceedings pending before it. The executor of the petitioning creditor in this Court has now applied by the present notice of motion for transfer or stay of the insolvency proceedings in the Ahmedabad Court.

There is thus in a way an impasse. The Receivers appointed by the Ahmedabad Court are collecting the assets of the insolvents under the orders of the Ahmedabad Court and the Official Assignee of Bombay is at the same time entitled to collect the assets, the same having vested in him under the order of adjudication passed by this Court, and there is no doubt that it would be in the interest of all parties concerned that the insolvency proceedings should be carried on in one or other of these two Courts.

The question before me is whether under the circumstances, I have got the jurisdiction to order either a transfer or a stay of the insolvency proceedings pending in the Ahmedabad Court.

Mr. Jinnah for the petitioning creditor contended that under s. 90 of the Presidency Towns Insolvency Act this Court has the like powers, and has to follow the like procedure, as it has and follows in the exercise of its Ordinary Original Civil Jurisdiction, and that under s. 24 of the C. P. C. the Court has power to withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and try or dispose of the same. As pointed out by me, in the course of the argument, it has been held

by a Full Bench of this Court in *Narayan Vithal* v. *Jankibai* (1), that the powers under s. 24 of withdrawal can be exercised by the Judges sitting on the Appellate Side of this Court only and not by a Judge sitting on the Original Side of the High Court. The powers of the Insolvency Court given thereto under s. 90 of the Presidency Towns Insolvency Act, being only such powers as are exercised by this Court in the exercise of its Ordinary Original Civil Jurisdiction, the power of transfer or withdrawal is necessarily not one which is delegated to this Court under s. 90 and is, therefore, not one which this Court can exercise.

Mr. Jinnah relied upon the decision in *Srinivasa Iyengar* v. *Official Assignee of Madras* (2). There the learned Judges assumed that the Judge sitting on the Original Side could exercise the powers under s. 24 of the C. P. C. Therefore, the decision is of no value in this matter.

I hold that I have no power as a Judge in insolvency to order a withdrawal of the proceedings in insolvency from the Court of the Subordinate Judge at Ahmedabad to this Court.

Mr. Jinnah then contended that in any event under s. 18 of the Presidency Towns Insolvency Act, this Court had power to stay the insolvency proceedings in the Ahmedabad Court. The section, in my opinion, is not very happily worded. The corresponding section in the English Bankruptcy Act of 1914 is s. 9. It runs as follows:—

"9. (1). The Court may, at any time after the presentation of a bankruptcy petition, stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."

The wording of s. 9 of the English Bankruptcy Act would clearly not include insolvency proceedings which may be initiated by the debtor himself or by his creditors.

The object of s. 9 of the English Bankruptcy Act and of s. 18 of the Presidency Towns Insolvency Act is really to protect the property and person of the insolvent from any action, execution or other legal process, against him, and to ensure the proper administration and distribution of his estate among the creditors.

Looking at s 18 itself, I am of opinion that the wording thereof is more consistent with the interpretation that insolvency proceedings are not included under that section. The sub-cl. (1) gives the power to this Court to stay any suit or other proceedings pending against the insolvent in any Court. Now, insolvency proceedings could only be pending before the Judge exercising insolvency jurisdiction in the High Court. Therefore, any suit or other proceeding, so far as the Judge or Judges of this Court are concerned, must necessarily mean suit or other proceedings other than an insolvency proceeding. As to insolvency proceedings this Court is empowered to stay them under s. 22 in its own Court.

Coming to sub-cl. (2) of s. 18, which provides for the service of the order made under sub-cl. (1), it directs that the order may be served on the plaintiff or other party prosecuting such suit or proceeding. Now, in the insolvency proceedings, there is neither the plaintiff nor any party prosecuting the proceeding immediately after the adjudication order is made. It is the Court that administers the estate of the insolvent, and the Official Assignee who takes all the necessary steps for collecting the estate of the insolvent and distributing the property among the creditors. There is no party which can be said to prosecute the proceedings. There is no doubt that when the petition is presented by the creditor, so far as the hearing of the petition and making of the order is concerned, he is a party thereto prosecuting the said petition. But immediately an order of adjudication is made, he is no longer a party prosecuting the proceedings under such order although he is entitled to appear under certain circumstances before the Court and ask for directions just as any other creditor is entitled to do.

Had the insolvency proceedings been included under s. 18, one would have found some provisions in sub-cl. (2) for service of the order made under sub-cl. (1), on a Receiver of the insolvent's estate appointed by any other Court exercising jurisdiction in insolvency. In my opinion, the wording

(1) 30 Ind. Cas. 560: 39 B. 604; 17 Bom. L. R. 655 (F.B.)

(2) 21 Ind. Cas. 77; 38 M. 472 14 M. L. T. 184; 25 M. L. J. 299; (1913) M. W. N. 1004; (1914) M. W. N. 45

of sub-cl. (2) is consistent only with the construction that insolvency proceedings are not included under s. 18.

The provision as to service of the order staying any action or proceeding under the English Bankruptcy Act is contained in s. 9, sub-cl. (2), and is identical with the provision under s. 18, sub-cl. (2), of the Presidency Towns Insolvency Act.

This point is also made clear by looking at the other sections of the Presidency Towns Insolvency Act, the Provincial Insolvency Act, and the English Bankruptcy Act. Section 22 of the Presidency Towns Insolvency Act specifically provides for stay of insolvency proceedings in one Court when they are pending in more Courts than one. That section enables the Court to stay its own proceedings and not to order some other Court to stay proceedings, and the powers are exercisable on the Court being satisfied that insolvency proceedings are pending in any other British Court and that the property of the debtor could be more conveniently distributed by such Court among his creditors. No doubt, an application was made under that section to this Court to stay the proceedings pending in this Court and this Court refused to do so. It merely means that in the exercise of the discretion given under s. 22 this Court thinks that the other Court in which the insolvency proceedings are pending would not be able more conveniently to distribute the property of the debtor.

Then coming to the Provincial Insolvency Act, it appears that the District Courts and the Courts subordinate thereto, which exercise insolvency jurisdiction under s. 3 of the Provincial Insolvency Act, have not been given a power to stay any suit or other proceeding pending against the insolvent in any other Court, but it is provided by s. 29 that any Court in which the suit or other proceeding is pending should, on proof of proceedings under the Provincial Insolvency Act, either stay the proceedings or allow it to continue on such terms as the Court may think fit. However, s. 22 of the Presidency Towns Insolvency Act is reproduced in s. 36 of the Provincial Insolvency Act, and the District Courts are given the same powers to stay their proceedings on proof of pendency of insolvency proceedings in another Court against the same debtor and that property of the debtor could be more conveniently distributed by such other Court. The reproduction of s. 22 of the Presidency Towns Insolvency Act in the Provincial Insolvency Act shows that the insolvency proceedings are considered on a different footing from a suit or other proceeding pending against the insolvent and, therefore, they are treated separately by separate sections.

It is to be noted that under the English Bankruptcy Act insolvency jurisdiction is given both to the High Court and to the County Courts. By s. 105, sub-cl. (2), of the English Bankruptcy Act it is specifically provided that a Court having jurisdiction under the Act shall not be subject to be restrained in the execution of its powers under the Act by the order of any other Court, nor shall any appeal lie from its decision except in manner directed by the Act.

Section 100, sub-cl. (2), provides for transfer of proceedings in bankruptcy from one Court to another as follows:—

"Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one Court to another Court, or may, by the like authority, be retained in the Court in which the proceedings were commenced, although it may not be the Court in which the proceedings ought to have been commenced."

By s. 172 it is provided that the Lord Chancellor may with the concurrence of the other Lords make general rules for carrying into effect the objects of the Act provided that the general rules so made shall not extend the jurisdiction of the Court.

The Bankruptcy Rules of 1915 made under the powers so given provide by rr. 18 to 25 for the transfer of insolvency proceedings from one Court to another.

The English Bankruptcy Act thus makes it quite clear that s. 9 thereof on which s. 18 of the Presidency Towns Insolvency Act is based, does not empower the Court exercising the insolvency jurisdiction to stay proceedings in insolvency pending in any other Court.

On all these considerations, I have come to the conclusion that s. 18 does not empower me in the exercise of insolvency jurisdiction to stay insolvency proceedings in the Ahmedabad Court.

Although in the course of the argument Counsel stated to me that they had not

found any decision on the construction of s. 18, I have found that there is one given by Mr. Justice Marten [*In re Maneckchand Virchana Patni* (3)]. Mr. Justice Marten came to the same conculsion and held that s. 18 did not empower this Court to stay proceedings in insolvency in any other Court. Mr. Justice Marten held that the words "other proceeding" in s. 18 should be *ejusdem generis* or analogous to a suit. He, however, put his judgment on another ground, namely, that the District Court was not subject to the superintendence of the Commissioner in Insolvency and that consequently on that ground alone s. 18 was not complied with. With great respect to the learned Judge, I do not agree with him on this point. If the said construction was correct, the words in s. 18, sub-cl. (1) "or in any other Court, subject to the superintendence of the Court" would be absolutely nugatory and of no effect because the power to stay proceedings pending against an insolvent before any Judge or Judges of the High Court is provided for in the first part of the section. The meaning put upon the word "Court" in the section by Mr. Justice Marten, however, is, in my opinion, not correct, in view of the definition of the word "Court" as used in the Presidency Towns Insolvency Act. Section (2) (*h*) defines the "Court" as the Court exercising jurisdiction under the Act, and s. 3 provides that the Courts having jurisdiction in insolvency under the Act shall be.

(*a*) the High Courts of Judicature at Fort William, Madras, and Bombay; and

(*b*) The Chief Court of Lower Burma.

Therefore, the Court exercising jurisdiction under the Insolvency Act is the High Court of Bombay and not an individual Judge thereof. Section 4 makes it quite clear. It provides that all matters in respect of which jurisdiction is given by this Act shall be ordinarily transacted and disposed of by or under the direction of one of the Judges of the Court, and the Chief Justice or Chief Judge shall, from time to time, assign a Judge for that purpose. I am, therefore, exercising this jurisdiction by reason of the Chief Justice having assigned me as the Judge for transacting and disposing of matters in insolvency. But I am exercising the jurisdiction which is given to the High Court under s. 3. Section 18, sub-cl. (1), further makes it clear that the "Court" referred to therein is the High Court as the power is given by the first part of the section to stay any suit or any proceeding pending against insolvent before any Judge or Judges of the Court. The Judge or Judges of the Court are necessarily of the High Court and cannot refer to a Single Judge, who by reason of being assigned for that purpose exercises jurisdiction in insolvency. The District Court of Ahmedabad as much as any other District Court or Subordinate Judge's Court in the Bombay Presidency is subject to the superintendence of the High Court. Therefore, in the exercise of the jurisdiction of the High Court in insolvency, I have power under s. 18 to stay any suit or other proceeding pending against the insolvent in a District Court or Subordinate Judge's Court in the Bombay Presidency which is subject to the superintendence of the Bombay High Court.

The notice of motion thus fails so far as prayer (A) is concerned.

Coming to prayer (B) of the notice of motion the petitioning creditor has asked for that relief under s. 126. In my opinion as the order of this Court refusing to stay insolvency proceedings is under appeal, it would be futile to give any direction as prayed for by the executor of the petitioning creditor until the appeal is decided. If the Appeal Court reverses the order of this Court, all insolvency proceedings in this Court will be stayed or annulled and there would be no occasion to ask for the aid of the Ahmedabad Subordinate Judge's Court under s. 126. If the order of this Court is confirmed by the Appeal Court the question will then arise, if no proper steps are taken for the transfer of the insolvency proceedings in the Ahmedabad Subordinate Judge's Court to this Court, as to how far the Ahmedabad Court should be asked to aid this Court in the insolvency proceedings under s. 126. The executor of the petitioning creditor may then renew his application on proper grounds. At present I do not see any use in giving any directions under prayer (B) of the notice of motion.

I, therefore, make no order on this notice of motion.

Z. K. *Motion discharged.*

(3) 75 Ind. Cas. 61; 24 Bom. L. R. 872; (1922) A. I. R. (B.) 390; 47 B. 275.

MADRAS HIGH COURT.

CIVIL APPEAL No. 24 OF 1922.

November 21, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Odgers.

GUNTUPALLI RAMAKRISHNAYYA —PLAINTIFF—APPELLANT

versus

GUNTUPALLI PITCHAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Inam—Karnam *service* inam—*Enfranchisement, effect of—Re-grant—Grant to stranger—Office-holder, rights of.*

The enfranchisement of a service *inam* operates as a re-grant.

Venkata Jagannadha v. *Veerabhadrayya*, 61 Ind. Cas. 667; 44 M 643; 41 M. L. J. 1; 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M. L. T. 14; 26 C. W. N. 302; (1922) A. I. R. (P. C.) 96; 48 I. A. 244 (P. C.), *Krishna Sastri* v. *Singaravelu Mudaliar*, 91 Ind. Cas. 130; (1925) M. W. N. 218; 48 M. L. J. 470; (1925) A. I. R. (M.) 780; 48 M. 570, *Govrikantam* v. *Ramamurthy*, 80 Ind. Cas. 557; 19 L. W 663; 46 M. L. J. 482; 34 M. L. T. 231; (1924) A. I. R. (M.) 837; (1924) M. W. N. 565 and *Venkata Rao* v. *Mango Rao*, 87 Ind. Cas. 376; 49 M. L. J. 71, followed.

There is no presumption that an enfranchisement of a service *inam* land operates for the benefit of the office-holder. Where the title-deed is granted not to the holder of the office but to a stranger, the latter alone acquires title under the grant.

The enfranchisement amounts to a re-grant and Government can do what they like with the land when they are re-granting it.

Appeal against a decree of the Court of the Subordinate Judge, Guntur, in O. S. No. 39 of 1920.

Mr. *A. Krishnaswami Iyer*, for the Appellant.

Messrs. *G. Lakshmanna* and *K. Kameswara Rao*, for the Respondent.

JUDGMENT.

Phillips, J.—The plaintiff in this suit seeks to recover certain land which originally formed a portion of a *karnam* service *inam* which has since been enfranchised. The plaintiff became *karnam* in 1908 and this portion of the *inam* was enfranchised in 1909 in favour of the defendant who admittedly was not an office-holder. The plaintiff continued in office for some years but was then removed and now brings this suit in 1920 to recover the land. He bases his claim on the following facts. He contends that, when the land was enfranchised in 1909, it was enfranchised by Government not for the benefit of the person in whose name the title-deed stands but for the benefit of the office-holder. He being the office-holder at that time must be deemed to have had the land enfranchised for his benefit and it then became his private property. The fact that he is now out of office, therefore, does not affect his right to recover the land. In this argument I think there are two fallacies. In the first place it necessitates a presumption that, when Government enfranchised this land in favour of the defendant who was not an office-holder they must be taken to have intended to enfranchise it in favour of the office-holder, although in terms they enfranchised it in favour of a stranger. It is impossible to draw any such presumption when we have the clear terms of the title deed against it. In the second place, it is based on the assumption that the enfranchisement does not amount to a re-grant; but in the case in *Venkata Jagannadha* v. *Veerabhadrayya* (1), a decision of the Privy Council to the case of a *karnam* service *inam* was specifically distinguished from that of a *poligar's inam*, and it appears to me that it was held that in a case of a service *inam* the enfranchisement does amount to a re grant. This view has been held by a Bench of this Court in *Krishna Sastri* v. *Singaravelu Mudaliar* (2) to which my learned brother was a party, and again by a Single Judge Wallace, J., in *Govrikantam* v. *Rammaurthy* (3) and by Devadoss, J., in *Venkata Rao* v. *Mango Rao* (4). A contrary view was taken by a Bench of this Court in *Lakshminarasimham* v. *Venkataratnayamma* (5) but the balance of opinion is against that view and I wish to express my concurrence with the majority. If, therefore, the enfranchisement amounts to a re-grant, it cannot be denied that Government can do what they like with the land when they are granting it and, therefore, the grant to the stranger defendant is perfectly justifiable and cannot be impeached by the plaintiff.

In this view the appeal fails and is dismissed with costs.

Odgers, J.—I agree. I adhere to the view I expressed in my referring judgment in *Krishna Sastri* v. *Singaravelu Mudaliar* (2) as to the effect of the Privy Council

(1) 61 Ind. Cas. 667; 44 M 643; 41 M. L. J. 1; 34 C. L. J. 16; 14 L. W. 59; (1921) M. W. N. 401; 30 M. L. T. 14; 26 C. W. N. 302; (1922) A. I. R. (P. C.) 96; 48 I. A. 244 (P. C.).

(2) 91 Ind. Cas. 130; (1925) M. W. N. 218; 48 M. L. J. 470; (1925) A. I. R (M.) 780; 48 M. 570.

(3) 80 Ind. Cas. 557; 19 L. W. 663; 46 M. L. J. 482; 34 M. L. T. 231; (1924) A. I. R. (M.) 783; (1924) M. W. N. 565.

(4) 87 Ind. Cas. 376; 49 M. L. J. 71.

(5) 70 Ind. Cas. 642; 30 M. L. T. 334.

decision in *Venkata Jagannadha* v. *Veerabhadrayya* (1) and also to the view that I expressed there that the decision in *Lakshminarasimham* v. *Venkataratnayamma* (5) cannot be supported,

V. N. V. *Appeal dismissed.*

Z. K.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1481 OF 1923.

January 30, 1924.

Present:—Mr. Justice Le Rossignol.

Sirdar SAHDEV SINGH—APPELLANT

versus

VIDYAWATI WIDOW OF DWARKA NATH SINGH AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 5, 10—Death of party—Legal representative, question of—Appeal, whether lies.

An order passed under r. 5 of O. XXII of the C. P. C. determining the question as to whether a certain person is or is not the legal representative of a deceased party is not open to appeal.

Rule 10 of O. XXII of the C. P. C. is a residuary rule governing only those cases which are not provided for by the preceding rules.

First appeal from an order of the Senior Subordinate Judge, Delhi, dated the 24th March 1923.

Mr. *L. C. Mehra*, for the Appellant.

Lala *Badri Das*, R. B., and Lala *Nawal Kishore*, for the Respondents.

JUDGMENT.—In 1916 one Dwarka Nath Singh obtained a decree for the sale of mortgaged property in satisfaction of his mortgage-debt and died in November 1918. His widow was brought on the record in execution proceedings in 1919 and the present appeal arises out of an application by a nephew of the decree-holder to be brought on the record as a legal representative of the decree-holder. The Court below has held that he is not the legal representative and has refused to bring him on to the record as such.

He has appealed to this Court and the preliminary objection taken by the respondents is that the appeal is not competent. The order of the Court below was passed under O. XXII, r. 5 and that order is not appealable. Appellent's Counsel urges that O. XXII, r. 10, applies to the case but that rule is clearly a residuary rule governing only those cases which are not provided for by the preceding rules.

For these reasons I dismiss the appea with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 316 OF 1922.

February 18, 1925.

Present:—Mr. Justice Madhavan Nair.

Nawab SULAIMAN ALIKHAN AND OTHERS—DEFENDANT No. 1 AND HIS LEGAL REPRESENTATIVES—APPELLANTS

versus

MENNA VENKATANARAYANA GARU AND OTHERS—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Contribution, suit for—Co-judgment-debtors—Decree, form of.

In a suit by one of three co-judgment-debtors for contribution against the two others, the decree that must be passed is not a joint one against both for the whole amount, but a several one for a moiety against each or his legal representative.

Second appeal against a decree of the Court of the Subordinate Judge, Cocanada, in A. S. No. 4 of 1921, preferred against that of the Court of the Additional District Munsif, Cocanada, in O. S. No. 308 of 1919, (O. S. No. 1082 of 1916 on the file of the Court of the District Munsif, Ramachandrapur).

Mr. *N. Rama Rao*, for the Appellants.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.—The first defendant is the appellant. He is now dead and his legal representatives have been brought on record. Plaintiff's suit was one for contribution against the persons who were along with others, judgment-debtors in O S. No. 358 of 1904 on the file of the Court of the Principal District Munsif of Masulipatam. A joint decree was passed against the two defendants by the Court of first instance. On appeal the Subordinate Judge departed from the usual rule of passing several decrees against the two defendants because he was under the impression that there was only one judgment-debtor in the said O. S. No. 358 of 1904 and the others were all his legal representatives. The report submitted by the Subordinate Judge shows that on this assumption he was wrong. It follows, therefore, that the joint decree against the two defendants should not have been passed by the lower Court.

So far as the first defendant is concerned the lower Court's decree is modified and the plaintiff will get a decree for half the amount against the assets of the first defendant in the hands of his legal representatives. In other respects the decree of the lower Court will stand. The parties will pay and receive proportionate costs. The first respondent's Vakil's fee in this case is fixed at Rs. 35.

Decree varied.

V. N. V.
N. H.

PATNA HIGH COURT.

CIVIL REVISIONS NOS. 228 TO 240 OF 1924
AND
APPEALS FROM APPELLATE DECREES NOS. 913 TO 951 OF 1924.
May 20, 1925.
Present :—Mr. Justice Ross and
Mr. Justice Kulwant Sahay.

S. N. MULLICK—PLAINTIFF—APPELLANT
versus
GANGA GOPE AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105, O. IX, r. 13—Case transferred from one Court to another—Notice to defendant, absence of—Adjournment, application for, rejection of—Ex parte *decree—Application to set aside* ex parte *decree, dismissal of—Appeal—Appellate Court, power of, to set aside* ex parte *decree.*

A suit pending in one Court was transferred to another Court and on the date of hearing the defendant applied for time on the ground that he was not aware of the transfer and was not ready to go on with the case. This application was refused and the case was heard on that date *ex parte* and was decreed *ex parte* on a subsequent date. Defendant filed an application under O. IX, r. 13 of the C. P. C., to set aside the *ex parte* decree but the application was rejected and no appeal was presented against that order. On appeal against the *ex parte* decree, however, the Appellate Court set aside the *ex parte* decree on the ground that an adjournment should have been granted on the application of the defendant and remanded the case to the Trial Court for decision according to law :

Held, (1) that the defendant not having been informed of the order transferring the case from one Court to another the application of the defendant for adjournment should have been granted; [p. 168, col. 1.]

(2) that as the improper refusal of the Court to grant time to the defendant on that date had affected the decision of the case the defendant was entitled on appeal to have the decree set aside and the case reheard, apart altogether from any question raised in any application under O. IX, r. 13 of the C. P. C., as to whether he had sufficient cause for non-appearance on the date when the decree was passed. [*ibid.*]

Appeals against an order of the District Judge, Gaya, dated the 13th February 1924, reversing that of the Munsif, Gaya, dated the 7th August 1923.

Mr. *S. N. Bose*, for the Appellant.

Messrs. *N. K. Prasad (II)* and *D. L. Nandkeolyar*, for the Respondents.

JUDGMENT.

ROSS, J.—These are appeals against the decrees of the District Judge of Gaya in certain rent suits which were decreed *ex parte* by the Additional Munsif of Gaya, and there are also applications in revision in certain of the cases. It appears that on the 19th of July 1923 the cases were fixed for trial on the 3rd of August 1923. In the meantime on the 31st of July they were transferred from the Court of the Third Munsif where they had been instituted to the Court of the Additional Munsif. On the 3rd of August the defendants applied for time on the ground that they were not aware of the transfer and were not ready to go on with the case. This application was refused and the cases were heard on the 3rd of August *ex parte* and decided on the 7th of August. On the 5th of September the defendants filed petitions under O. IX, r. 13, to set aside the *ex parte* decrees and on the 29th of September 1923 they also filed appeals against the decrees themselves. On the 3rd of October the Munsif rejected the petitions under O. IX, r. 13, and no appeal was presented against that order. On the 13th of February 1924, the District Judge decreed the appeals and remanded the suits for hearing on the merits.

It is contended on behalf of the plaintiff-appellant that it was not competent to the District Judge in appeal from the *ex parte* decrees to enter into questions which fell within the scope of the applications under O. IX, r. 13, and that even if he could do so, he was not entitled to do so in these cases where the applications under O. IX, r. 13 had been rejected. The learned Counsel for the respondents relies, on s. 105 of the C. P. C., and contends that where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal and that he is entitled to question the propriety of the order of the 3rd of August refusing an adjournment as well as the propriety of the order of the 3rd of October dismissing the application for re-hearing under O. IX, r. 13. The latter contention raises a question of some diffi-

culty and there is a decision of the Madras High Court in *Badrel Chinna Asethu* v. *Vattipalli Kesarayya* (1) which is against the respondents. It is not necessary, however, to decide that question in these appeals because it is, in my opinion, clear that the respondents may question the propriety of the order of the 3rd of August refusing an adjournment. The learned District Judge has found that the defendants were not informed of the order transferring the case from the Court of the Third Munsif to the Court of the Additional Munsif. In my opinion, therefore, the application for adjournment made on the 3rd of August ought to have been granted. As the improper refusal to grant time on that date affected the decision of the case, the respondents were entitled to have the decrees set aside and the cases re-heard, apart altogether from any question raised in any application under O. IX, r. 13, as to whether they had sufficient cause for non-appearance on the 7th of August when the decrees were passed.

There was a further defect in the proceedings in the Court below in that the suits were consolidated after evidence for the plaintiff had been taken.

On these grounds I think that the decision of the learned District Judge was right and that these appeals must be dismissed with costs. The applications in revision are also dismissed with costs. There will be one set of costs in the appeals and one set of costs in the revision applications. Hearing fee one gold *mohur*.

Kulwant Sahay, J.—I agree.

Z. K. *Appeals dismissed.*

(1) 60 Ind. Cas 215; 39 M. L. J. 697; 12 L. W. 507; (1920) M. W. N. 780; 29 M. L. T. 63.

LAHORE HIGH COURT.

CIVIL APPEAL No. 1821 OF 1920.

December 11, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Fforde.

DEVI DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ANANT RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 3, 5, Sch. I, Art. 168—Civil Procedure Code (Act V of 1908), s. 151, O. XLI, rr. 17, 19—Appeal—Adjournment—Default of appearance on adjourned date—Dismissal for default—Application for re-admission filed beyond limitation—Extension of time—Inherent power of Court, exercise of.

Arguments were heard in an appeal by a District Judge and a date was fixed for announcement of judgment. Judgment was not, however, pronounced on the date fixed as it was represented to the Court that there was an appeal pending in the High Court the decision of which would be a determining factor in the case. The District Judge accordingly adjourned the case to another date. On that date the appeal was called on and in the absence of the parties was dismissed in default under O. XLI, r. 17 of the C. P. C. More than 30 days after the dismissal of the appeal the appellant filed an application under r. 19 of the Order asking for the re-admission of the appeal on the ground that he was not aware of the last date of hearing on which the appeal had been dismissed for default:

Held, (1) that the last date of hearing having been fixed in order to enable the Court and the parties to consider the effect of the decision of the High Court in the appeal pending before that Court, the parties were bound to appear on that date and that the Court was entitled to dismiss the appeal for default on the failure of the parties to appear;

(2) that s. 5 of the Limitation Act could not be resorted to for the purpose of extending the limitation prescribed by Art. 168 of Sch. I to the Limitation Act for an application to re-admit an appeal dismissed for default;

(3) that the Court would not in such a case exercise its inherent powers to help an appellant as this would be tantamount to overriding an express statutory provision enacted in s. 3 of the Limitation Act.

Appeal from an order of the District Judge, Amritsar, dated the 4th June 1920.

Mr. *L. C. Mehra*, for the Appellants.

Mr. *C. H. Carden Noad*, for the Respondents.

JUDGMENT.—This appeal has come up to this Court in the following circumstances.

An appeal was heard by Lala Ganga Ram Wadhwa as the District Judge of Amritsar and the 11th of July 1919 was fixed for judgment. Judgment was not, however, pronounced, dates being given for that purpose from time to time upto the 9th August 1919. On that date it appears that the District Judge's attention was drawn by the Counsel for the appellants, to the fact that there was an appeal pending in the High Court the decision of which would be a 'determining factor in the present case.' He accordingly adjourned the case to the 8th December 1919 as appears from the vernacular record. On that date Mr. Brasher had assumed charge of the District Court. The appeal was called on and in the absence of the parties was dismissed, in default under O. XLI, r. 17, C. P. C. On the 26th April 1920, the

appellants filed an application under O. XLI, r. 19 asking for the re-admission of the appeal on the ground that the appellants were not aware that the 8th of December 1919 had been fixed in the case. The learned District Judge (Mr. Brasher) dismissed the application under O. XLI, r. 19, holding that it was barred under Art. 168 of the Limitation Act and that time could not be extended under s. 5 of that Act. He also considered that s. 151 of the C. P. C., did not enable him to assist the appellants.

They have now come up to this Court through Mr. Lal Chand Mehra whom we have heard. There can be no doubt that s. 5 of the Limitation Act cannot be resorted to for the purpose of extending the limitation prescribed by Art. 168. Moreover to exercise our inherent power would be tantamount to overriding the express statutory provision enacted in s. 3 of the Limitation Act. It has been contended that the 8th December 1919 was merely a postponement of the order fixing a date for the announcement of judgment. To this contention we are, however, unable to accede. The proceedings of the 9th August 1919 clearly show that the adjournment was given to enable the Court and the parties to consider the effect of the decision of the High Court on the appeal pending before the Court.

In these circumstances the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 30 OF 1922.

June 10, 1925.

Present:—Mr. Justice Das and Mr. Justice Adami.

THE MIDNAPUR ZEMINDARY CO., LTD.—PLAINTIFFS—APPELLANTS

versus

RAM KANAI SINGH DEO AND OTHERS —DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Execution of document—Agent, authority of, proof of—Presumption—Succession Act (X of 1865), ss. 179, 269—"All the property of the deceased", meaning of—Property conveyed by administrator without sanction of Court—Conveyance, whether can be challenged—Landlord and tenant—Lease of mineral rights—Lessee, failure of, to work mines, effect of—Constructive possession—Dispossession—Abandonment—Trespass, effect of—Injunction, suit for, maintainability of.

No presumption arises under s. 90 of the Evidence Act as to an agent's authority to execute a document which must always be proved in the usual way. [p. 172, col. 1.]

The expression "all the property of the deceased" in s. 179 of the Succession Act must be construed as meaning the actual property of the deceased, whether held by him for his own benefit or for the benefit of others. [p. 172, col. 2.]

A disposal of property belonging to a deceased person by the administrator of the estate of the deceased without the previous permission of the Court is voidable at the instance of any other person interested in the property, that is to say, an objection to such a sale must proceed either from the heirs of the deceased or from those persons who have a beneficial interest in the property. [p. 173, col. 1.]

Delivery of possession is essential to the completion of a lease under the Transfer of Property Act only where the lease has been made by oral agreement and a lease by oral agreement cannot be made where it is from year to year or for any term exceeding one year or reserving a yearly rent. Delivery of possession is not, therefore, necessary for the completion of a permanent lease under the Act. Such a lease can be created by a registered instrument. [p. 173, col. 2.]

By possession is meant possession of a character of which the thing to be possessed is susceptible, and for many purposes the law regards the right to possession as equivalent to possession; especially where the property is not in the actual possession of any one. [p. 173, col. 2; p. 174, col. 1.]

The omission of an owner or lessee of mineral rights to work the mines does not show that he is not in possession of the mines. The person in whom the title to the mines rests must be deemed to be in constructive possession of the mines as an owner or lessee, as the case might be, and such constructive possession is a sufficient foundation for an action in trespass. [p. 174, col. 1.]

The mere failure by a lessee of mineral rights to work the mines does not amount to an abandonment of the lease. The mere fact that the lessor treats the lease as having been surrendered does not in any way operate to the prejudice of the lessee unless the lessor actually takes possession of the demised land and retains possession for the statutory period. Where a trespasser enters upon such land and after working the mine for a short period abandons possession, the lessee of the mines is restored to the same position in all respects which he occupied before the intrusion took place. [p. 174, col. 2; p. 175, col. 1.]

The refusal of the lessor to recognize the title of the lessee does not amount to the dispossession of the lessee from the land. What is wanted on the part of the lessor is a positive act of dispossession so as to enable him to invoke the doctrine as to lapse of time. In the absence of such positive act of dispossession the lessee may invoke the doctrine as to constructive possession. He may for a time be dispossessed; but when the trespasser abandons possession the lessee is in the same position in all respects as if no intrusion had taken place. [p. 175, col. 2.]

A permanent lessee of mineral rights in a certain piece of land is entitled to obtain an injunction against a trespasser, even if he is not himself in actual possession of the land, if he satisfies the Court

that the injury which is apprehended will be either continuous or frequently repeated or very serious. [p. 174, cols. 1 & 2.]

Appeal against a decision of the Subordinate Judge, Manbhum, dated the 17th December 1921.

Messrs. *P. C. Manuk*, *A. Sen* and *S. N. Palit*, for the Appellants.

Messrs. *Sultan Ahmed*, *C. C. Das*, *L. N. Singh*, *S. M. Mullick* and *N. N. Sen*, for the Respondents.

JUDGMENT.

Das, J.—I think this appeal must succeed. The plaintiff company claims the mineral rights in *Perganna* Barabhum under a permanent *mokarrari* lease granted by Raja Braja Kishore Singh Deo, the then proprietor of the *perganna*, to one Kenny on the 12th November 1881; and the suit out of which this appeal arises was for a declaration of its title to those rights, for damages, and for a permanent injunction restraining the defendants from carrying on mining operations in the *perganna*.

The present proprietor (whose estate is under attachment under the provisions of the Encumbered Estates Act) has been cited as defendant No. 1 in the action—defendant No. 2 is the manager of the estate appointed under the Act. On the 5th September 1911 the present proprietor granted a mining lease of the *perganna* for 999 years to Herambo Nath Banerji, cited as defendant No. 3 in the action. Herambo in his turn granted a prospecting license to Guzder, the 5th defendant, on the 11th February 1920. It is admitted that Guzder is actually carrying on underground operations through his agent, Chandan Singh, named as defendant No. 4. The suit was originally instituted against defendants Nos. 1 to 4, the plaintiff not being aware that Chandan Singh was the agent of Guzder. The plaint was subsequently amended and Guzder was added as a party to the suit on the 23rd November 1920.

The defendants contested the suit on grounds which are common to them. The Subordinate Judge has given effect to most of these objections and has dismissed the plaintiff's suit on the following grounds: *first*, on the ground that the plaintiff Company has not established its title to the minerals; *secondly*, on the ground that the plaintiff Company, not being in possession of the thing demised, is incompetent to maintain an action for trespass and, therefore, for injunction; *thirdly*, on the ground that there was, by operation of law, an abandonment by Kenny of his interest under the lease of 1881, entitling the proprietor to enter into a fresh arrangement with Herambo; *fourthly*, on the ground that the suit is barred by limitation; and *lastly* on the ground that the plaintiff Company is estopped from disputing the title of Herambo under the lease of the 5th September 1911.

I will first consider the question of title. As I have said, the then proprietor of Barabhum executed a permanent *mokarrari* lease in favour of Kenny on the 12th November 1881. The validity of the lease was unsuccessfully challenged by the defendants in the Court below, and it was not in controversy before us. We start then with this, that Kenny acquired a permanent, transferable and heritable interest in the minerals in *Perganna* Barabhum under the lease of the 12th November 1881. Now it appears that though the lease was taken by Kenny in his own name he was in fact acting on behalf of himself and eleven other persons. On the 24th February 1882 Kenny executed what is called a deed of declaration of trust in which he declared that "he, his heirs, executors, administrators, representatives shall and will henceforth stand and be possessed of the said mines and minerals and all mining rights granted by the said *patta* .....in trust for the said several persons whose names are set forth in the first column of the Second Schedule hereto according to the shares and interests set opposite to their respective names in the second column of the Second Schedule hereto." It is not necessary to give the names of the persons interested in the *patta* of the 25th November 1881; it is sufficient to say that Kenny had three shares out of 32 and that eleven other persons whose names appear in the Second Schedule had the remaining shares.

On the 28th January 1891, a Company was formed called the Barabhum Co., Ltd., with a view "to acquire lands for the mining purposes and mining rights of all kinds in Manbhum, Singhbhum, and Chota Nagpur and elsewhere in British India and in particular the mining rights in *Perganna* Barabhum acquired by one Nathaniel Kenny under a perpetual lease from Maharaja Braja Kishore Singh dated the 12th November 1881, and now vested in the said Nathaniel Kenny as trustee in terms of an indenture dated the 24th February 1882." On the 5th

February 1891, an agreement for sale of the property which was the subject-matter of the *mokarrari patta* of the 25th November 1881, was entered into between Barabhum Co., Ltd., and a number of persons called the vendors including all the persons who according to the deed of declaration of trust were interested in the *patta* of the 25th November 1881. By this agreement the vendors agreed to sell to Barabhum Co., Ltd., the underground rights of *Perganna* Barabhum for the sum of Rs. 32,000 which was agreed to be paid and satisfied by the allotment to them of 320 shares in the capital of the Company. It appears that these shares were allotted to the vendors in the proportion in which they were interested in the lease of the 25th November 1881. It will be noticed that various persons are mentioned as vendors whose names did not appear in the deed of declaration of trust as being interested in the demised property; but the explanation is that these persons came to acquire an interest by subsequent transfers. Meanwhile Kenny died in England before the legal estate could be conveyed. He left a Will of which Probate was taken in England. Mr. Foley, acting under instructions from the English executors and as their constituted attorney, obtained Letters of Administration to the estate of Kenny from the Calcutta High Court on the 21st November 1905, "with effect within the province of Bengal." On the 29th January 1908, Foley as the administrator of the estate and effects of Kenny conveyed the property to the Company. On the 14th July 1916, the Company transferred its interest to Billinghurst and on the 14th July 1917, Billinghurst conveyed it to the plaintiff Company.

Now there is no dispute as to the validity or sufficiency of the transactions by which the Barabhum Co., Ltd., conveyed the property to Billinghurst and Billinghurst conveyed it to the plaintiff Company. The only question is as to the conveyance of the property to Barabhum Co., Ltd. Now Kenny's interest in the thing demised being admitted, what infirmity is there in the title of the plaintiff Company? The learned Subordinate Judge attacks both the declaration of trust of the 24th February 1882, and the conveyance by Foley to Barabhum Co., Ltd., on the 29th January 1908. He attacks the declaration of trust on the ground that Kenny had no authority to declare himself a trustee for his co-sharers. The view of the learned Subordinate Judge on this point may be stated in his own words:—"Under this deed Mr. Kenny constituted himself to be the trustee of the eleven other co-sharers. I do not think that he could constitute himself to be a trustee on behalf of the eleven. He could create a trust and make himself a trustee only in respect of his own property and not in respect of the property of others. He was, therefore, in my opinion not a trustee, but only a *farzidar* of those eleven persons in respect of the shares in the lease-hold property." It is not necessary for me to say anything more than this that the view of the learned Subordinate Judge cannot be supported for a single moment. The legal title was in Kenny; but as between him and his co-sharers he was entitled to a small share in the demised property. The deed itself states that the eleven persons, who had a beneficial interest in the demised property, had requested Kenny to execute a declaration of trust in respect of the property. It was but right and proper that Kenny should make an open declaration to the effect that though the legal title was in him, he was holding the property on behalf of himself and eleven other persons. The learned Subordinate Judge has entirely misunderstood the position. It is not that Kenny constituted himself a trustee on behalf of his co-sharers, but that he was, by construction of law, a trustee bound to convey the legal title to his co sharers, whenever called upon to do so. This is all that the declaration of Kenny amounts to.

The learned Subordinate Judge next turned his attention to the agreement of the 5th February 1891 and found that it was not proved in accordance with law. The learned Subordinate Judge is entirely right when he says that it was for the plaintiff to prove that the twelve persons who were interested in the demised property or their representatives in-interest actually executed this agreement. Now it appears that eight of these persons representing 11-annas share in the subject-matter of the lease, executed this document through their constituted attorneys and it is quite true that there is no evidence in this case that these attorneys had any authority to execute the agreement on behalf of the 11-annas share-holders. The objection as to the sufficiency of proof was

taken in the Court below and the learned Subordinate Judge decided, in my opinion, rightly, that no presumption arises under s. 90 of the Evidence Act as to an agent's authority which must be proved in the usual way. I agree that the plaintiff Company has not established that this agreement was executed by all the persons interested in the subject-matter of the lease of the 25th November 1881; but, in my opinion, the question as to the proof of this particular document does not fall to be considered. The learned Subordinate Judge made unnecessary difficulty for himself. We know that the legal title in the thing demised was in Kenny although there were various other persons beneficially entitled to specific shares in it. We may put out of our mind the agreement of the 5th February 1891. Kenny died and on his death Probate was obtained of his Will in England. As I have said, Foley obtained Letters of Administration to the the estate of Kenny "with effect within the province of Bengal." Now what is the position? Upon the grant of Letters of Administration to Foley, the demised land (which was then within the province of Bengal) vested in Foley as such administrator; and Foley was competent to deal with the property in due course of administration. As will be remembered, Foley conveyed the demised property to Barabhum Co., Ltd., on the 29th January 1908. The learned Subordinate Judge objects to this transaction. He remembered that the declaration of trust showed that Kenny was a beneficial owner of only a small share in the property and that in regard to the remaining shares he was a trustee of eleven other persons; and he thought that as Kenny's Will did not purport to deal with the legal title in the demised property, that title did not vest in Foley so as to enable him to convey it to Barabhum Co., Ltd.

Now it is quite true that Kenny did not deal with the demised property in his Will and the learned Subordinate Judge is right in saying that "so far as this property is concerned, he died intestate." But even the estate of an intestate has to be administered in due course of law; and s. 179 of the Indian Succession Act says that the "executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." Now what is the meaning of the words "all the property of the deceased"? There is high authority for the view that the words "all the property of the deceased" must be construed as meaning the actual property of the deceased, whether held by him for his own benefit or for the benefit of others: see *De Souza* v. *Secretary of State for India* (1). There is no reason to doubt, therefore, that the demised property vested in Foley as such administrator under s. 179 of the Indian Succession Act.

The next question is whether Foley was entitled to convey the property to Barabhum Co., Ltd. Now before dealing with this question let me examine what Foley purported to do. The deed of conveyance of the 29th January 1908, recites the following transactions:—

First, the *mokarrari patta* of the 12th November 1881 granted by Raja Braja Kishore Singh to Kenny,

Second, the deed of declaration of trust by Kenny by which he declared that he, his heirs, executors and administrators and representatives should and would stand and be possessed of the subject-matter of the lease of 1881 in trust for the several persons whose names appeared in the Second Schedule of the deed,

Third, the agreement of the 5th February 1891 by which the persons then entitled to the subject-matter of the lease of the 25th November 1881 agreed to sell the mining rights conferred by that lease to Barabhum Co., Ltd., for Rs. 32,000 which sum should be paid and satisfied by the allotment to the vendors of 320 shares in the capital of the Company.

It then recites that the said shares have long since been allotted to the said parties and that ever since the completion of the agreement of the 5th February 1891, the Company has been in possession of the mining rights conferred by the said *patta*, but that the legal estate was still outstanding in Kenny. In these circumstances Foley as the administrator of the estate of Kenny transferred the mining rights conferred by the *patta* of the 25th November 1881 to Barabhum Co., Ltd.

Now what is there to object to in the transaction? In point of form, the property stood in the name of Kenny and Foley as the administrator of the estate of Kenny

(1) 12 B. L. R. 423.

was competent to convey the property to Barabhum Co., Ltd., in due course of administration. If substance is to be regarded, then, there is no doubt that though the legal title was in Kenny the persons who were beneficially entitled to the property had already conveyed their interests to the Barabhum Co., Ltd., for valuable consideration, and were entitled to call upon Kenny or on the administrator after his death to convey the legal estate to Barabhum Co., Ltd. Now it may be said that Foley had no business to convey the property to Barabhum Co., Ltd., without the permission of the Court. The general rule established under s. 269 of the Indian Succession Act is that ordinarily an administrator ought to obtain the previous permission of the Court before conveying the property to a third party. But then that section provides that a disposal of the property by the administrator in contravention of the rule stated in para. 3 of s. 269 is voidable at the instance of any other person interested in the property. In other words, if any objection was to be made to the conveyance of the 29th January 1908 that objection could proceed either from the heirs of Kenny or the heirs of the beneficiaries recognised as such in the deed of declaration of trust. The objection could neither proceed from the landlord nor from any other party claiming through the landlord. In my opinion the conveyance in favour of Barabhum Co., Ltd., is not open to attack. That being so, the plaintiff Company has clearly established its title to the demised property, for it is not disputed that the Barabhum Co., Ltd., validly transferred the property to Billinghurst on the 14th July 1916 and that Billinghurst validly transferred it to the plaintiff Company on the 14th January 1917.

The next point is whether the present suit by the plaintiff Company is maintainable. The learned Subordinate Judge has shown some re-search into the intricacies of the English Common Law. He says that neither the plaintiff Company nor its predecessors ever got possession of the demised property; and that, that being so, the demise only gave the lessee a right of entry in the property or, which is the same thing, an *interesse termini* which is not sufficient as a foundation for an action for trespass or a suit for injunction and damages. Now, so far as I know, this doctrine has been applied in England only to leases for years; it has, for instance, never been applied to what are known as freehold leases. Now the lease with which we are concerned is a perpetual lease, a lease creating a permanent, transferable and heritable interest in the thing demised, in which the landlord has no right of reversion: *Sonet Kooer* v. *Himmut Bahadoor* (2). A lease of this nature is, so far as I am aware, unknown to the English Common Law and I do not think that it is quite necessary to apply a doctrine applicable to English leases to a lease which is unknown to English Law. In the next place, it is as well to look to the definition of a lease in the Transfer of Property Act, a Statute with which we should be acquainted. At Common Law, possession under the instrument is necessary to complete a lease, so that after a lease has been granted, and before actual entry has been made by the lessee, he is for many purposes not a tenant. Under the Transfer of Property Act a lease of immoveable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. It will be noticed that delivery of possession is essential to the completion of a lease under the Transfer of Property Act only where it has been made by oral agreement, and a lease by oral agreement cannot be made where it is from year to year or for any term exceeding one year or reserving a yearly rent. Now if, as I hold, delivery of possession is not necessary for the completion of a permanent lease under the Transfer of Property Act, I do not see why we should import into our system the complications of English Law where delivery of possession is necessary to complete a lease. In the third place, what foundation is there for the suggestion that the plaintiff Company is not in possession? By possession is, and must be, meant possession of that character of which the thing is capable. We are concerned in this litigation with underground rights which are not capable of possession as a house, a watch or a ring is. For many purposes the law regards the right to possession as equivalent to possession; especially when the property is not

(2) 1 C. 391; 25 W. R. 239; 3 I. A. 92; 3 Sar. P. C. J. 608; 3 Suth. P. C. J. 257; 1 Ind. Dec. (N. S.) 245 (P. C.).

in the actual possession of any one. It is quite true that the plaintiff Company has not yet worked the mines; but, "the mere omission of the mineral owner to do anything with the subject-matter of his grant will not be a disseisin or dispossession of him in favour of the surface owner" (See Pollock and Wright on Possession, p. 87). Now obviously there is no question of a "disseisin" unless, to start with there is a seisin, and, in my opinion, the omission of the mineral owner to work the mines does not show that he is not in possession of the mines. I hold that the plaintiff Company was in constructive possession of the thing demised and that constructive possession is a sufficient foundation for an action in trespass (Clerk and Lindsell on Torts, 6th Edition, 380). In the fourth place, it is not necessary to embarrass ourselves with a discussion as to forms of action known to English Common Law. If it were necessary to do so, one might say that though a person, not in possession, is not entitled to maintain trespass, he is entitled to maintain trover and to recover the value of personal chattels wrongfully converted by another to his own use. It is necessary to see what is the substance of the plaintiff Company's claim in this case. There is an injury to the plaintiff Company's right both actual and threatened. It has proved its title. It shows that the defendants or some of them have carried away coal which belongs to it, and are threatening to carry away more coal or convert that coal to their personal use. Is it to be supposed that the plaintiff Company has no remedy because it is not in actual possession of the thing demised? Now even at Common Law, a tenant having a mere *interesse termini* could maintain an action for damages for recovering the value of coal wrongfully converted by another to his own use and he could also maintain an action for injury to his rights—*Gillard* v. *Cheshire Lines Committee* (3) and these are the remedies which the plaintiff Company is seeking in this case. In regard to the question of injunction the case upon which the learned Subordinate Judge relies does not, in my opinion, establish that a plaintiff, not in possession, is not entitled under any circumstances to injunction, even if he satisfies the Court that the injury which is apprehended will be either continuous or frequently repeated or very serious. The case of *Wallis* v. *Hands* (4) was decided on its own facts and is not an authority for the proposition that "a man having only *interesse termini* cannot bring a case for injunction." In my opinion the plaintiff Company is entitled to maintain this action.

The next question is whether there was by operation of law an abandonment or surrender of the lease by Kenny. There is no doubt that the plaintiff Company has not worked the mines; but there is ample authority for the view that mere non-user does not amount to an abandonment. The passage which I have already cited from Pollock and Wright may be referred to in this connection. It is not necessary to cite authorities, for the principle is well recognised. The learned Subordinate Judge relies upon the following circumstances in support of his theory as to abandonment. He says that in 1901 the proprietor treated the lease as having been surrendered or abandoned. In 1904 the manager of the proprietor granted a prospecting license to Messrs. Mackinnon Mackenzie & Co., whose agent Robinson worked a particular kind of mineral called *galena* in one of the *mouzas* called Beldi; and the learned Subordinate Judge says that "the inference is that when the *zemindar* found that for a period of 20 years the lessee had not worked but had left the country, he inferred that the lessee had surrendered the lease and entered upon possession," and he says that, since the *zemindar* entered upon possession, the lease was extinguished. There is, in my opinion, neither principle nor authority in favour of the startling proposition laid down by the learned Subordinate Judge. A contention very much like the one which found favour with the learned Subordinate Judge was advanced before the Privy Council in *Agency Co.* v. *Short* (5). Lord Macnaghten in dealing with the contention said that in the case of mines, the doctrine contended for might lead to startling results and produce great injustice. It is quite true that the proprietor treated the lease as having been surrendered in 1901; but what he understood is of no consequence unless he

(3) (1884) 32 W. R. 943.

(4) (1893) 2 Ch. 75; 62 L. J. Ch. 586; 3 R. 351; 68 L. T. 428; 41 W. R. 471.

(5) (1888) 13 A. C. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.

actually took possession of the demised land and retained possession for the statutory period. It is quite true that in 1904 he granted a lease to Messrs. Mackinnon Mackenzie & Co., and that Mackinnon Mackenzie & Co., worked the *galena* in one of the *mouzas* comprised within the *Perganna*. It is not suggested that any of the subsequent lessees has been in possession for the statutory period. That being so, there was no abandonment of his interest by Kenny.

I will now deal with the question of limitation. The defendants rely upon the following facts as establishing that the plaintiff's suit is barred by limitation. On the 9th November 1909, a letter was written by Mathewson as *putnidar* of the *Perganna* contending that the mining rights in the *Perganna* belonged either to the Government or to him as representing the *zemindar*. This letter throws no light on the question of possession. On the 21st October 1905, the proprietor gave a mining lease to Sullivan. Admittedly Sullivan has never worked the mines and he surrendered the lease by a registered document. No question of dispossession, therefore, arises. Between August 1904 and September 1905, Messrs. Mackinnon Mackenzie & Co., worked a particular kind of mineral called *galena* in village Beldi under a license from the Manager of the Encumbered Estate. The extent of that working is shown by the local inspection note of the learned Subordinate Judge and the amount of the working is to be found in Ex. R. It appears that they took Rs. 17,415 worth of *galena* and that they paid the Rajah Rs. 162 as balance of the royalty due. It may be admitted that there was an ouster of the plaintiff Company or its predecessors-in-title by Messrs. Mackinnon Mackenzie & Co., of village Beldi comprised within the *Perganna* between August 1904, and September 1905; but Messrs. Mackinnon Mackenzie & Co., entered upon possession without title, for the proprietor had no power to grant a lease to Messrs. Mackinnon Mackenzie & Co. They ceased to work in September 1905; and the rightful owner, that is to say, the plaintiff Company, or its predecessors-in-title, on Messrs. Mackinnon Mackenzie & Co., abandoning possession of the *mouza* was in the same position in all respects as it was before the intrusion took place. As Lord Macnaghten in *Agency Co.* v. *Short* (5) says "there is no one against whom he can bring an action. He cannot make an entry upon himself." Time undoubtedly began to run as against the plaintiff Company in August 1904 in regard to *Mouza* Beldi; but, in my opinion, it ceased to run in September 1905 when Messrs. Mackinnon Mackenzie & Co. abandoned possession of the *mouza*. On the 15th June 1906 the Manager of the Encumbered Estate wrote a letter to Messrs. Hoare Miller & Co., the managing agents of Barabhum Co., Ltd., informing them that the Raj ignored Kenny's lease. The Manager in his letter said "the mining rights have remained latent from the date and year the lease was granted." Messrs. Hoare Miller & Co. replied to this letter which has not been put in by the defendants. On the 24th June 1906, there was another letter from the Manager in which he repeated that the proprietor refused to recognize Kenny's lease. In my opinion the refusal to recognize Kenny's leas did not amount to dispossession. What was wanted on the part of the proprietor was a positive act of dispossession so as to enable him to invoke the doctrine as to lapse of time. As I have said, the rightful owner may invoke the doctrine as to constructive possession. He may for a time be dispossessed; but when the trespasser abandons possession the rightful owner, to quote the words of Lords Macnaghten, "is in the same position in all respects as he was before the intrusion took place." The letters Ex. G-1 and G-2 throw no light whatever on this point. On the 9th April 1907, the Raj gave a lease to Gobind Bose. It is not suggested that Gobind Bose took possession by virtue of this lease or carried on any underground operations. One may, therefore, ignore Gobind Bose's lease. On the 5th September 1911, the Raj gave a lease to Herambo who in his turn granted a prospecting license to Guzder on the 5th June 1919 and again on the 11th February 1920. It is not suggested that Herambo defendant No. 3 took possession by virtue of his lease or that he carried on any underground operations. The plaintiff's cause of action arose for the first time when Guzder through Chandan Singh began to act under the prospecting lease. The suit having been instituted on the 14th June 1920 is amply within time.

The last question is as to estoppel. It

is difficult to understand the view of the learned Subordinate Judge on this point. It is contended that "as the predecessors-in-interest of the plaintiff Company by not working the minerals in the *Perganna* made the defendant believe that the *zemindar* had the right to settle the minerals and as in that belief he paid Rs. 25,000 as *salami* to him for the lease of the minerals, the plaintiff Company, is estopped from claiming a leashold interest in the minerals as against him." In my opinion it is only necessary to state the proposition to reject it. I hold that there is no question of estoppel to be tried.

I would accordingly allow the appeal, set aside the judgment and the decree passed by the Court below. The plaintiff Company is entitled to a declaration of title in its favour and to a permanent injunction restraining the defendants and their agents and servants from working and appropriating the minerals in *Perganna* Barabhum. The plaintiff Company is also entitled to its costs in this Court and in the Court below.

Adami, J.—I entirely agree.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 84 OF 1925.

September 16, 1925.

Present:—Mr. Dalal, J. C.

RAM SAMUJH SINGH—PLAINTIFF—APPELLANT

versus

Musammat MAINATH KUER—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 59—Attestation of mortgage—Executant illiterate—Person writing name of executant, whether can attest—Scribe, when attesting witness—Contract Act (IX of 1872), s. 65—Agreement discovered to be void—Suit to recover consideration—Cause of action, when arises.

Where a person writes on a mortgage-deed the name of the executant who is illiterate and then his own name by way of attestation, there is no proper attestation of the deed as required by s. 59 of the Transfer of Property Act, as a person cannot be an attesting witness to his own act. The matter would be different if the executant puts a mark or thumb impression on the deed, for then it could be argued that the person attested to the mark or the impression. [p. 176, col. 2; p. 177, col. 1.]

Sristidhar Ghosh v. *Raksha Kali Dassi*, 63 Ind. Cas. 507; 49 C. 438; 26 C. W. N. 264; (1922) A. I. R. (C.) 168, relied on.

A scribe may also assume the position of an attesting witness if he signs the document after seeing the document duly executed. But where the scribe signs as scribe before the execution of the document by the executant, he cannot be considered an attesting witness unless he again signs by way of attestation after witnessing the execution of the document. [p. 177, col. 1.]

Ram Bahadur Singh v. *Ajudhia Singh*, 34 Ind. Cas. 370; 1 P. L. J. 129; 20 C. W. N. 699; 3 P. L. W. 93, relied on.

Jagannath Khan v. *Bajrang Das Agarwala*, 62 Ind. Cas. 97; 48 C. 61, distinguished.

In the absence of special circumstances, the time at which an agreement is discovered to be void, so that cause of action to recover the consideration arises under s. 65 of the Contract Act, is the date of the contract. [p. 178, col. 1.]

Ananda Mohan Ray v. *Gour Mohan Mullick*, 74 Ind. Cas. 499; 50 C. 929; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 I. A. 239; 28 C. W. N. 713; 40 C. L. J. 10 (P. C.), followed.

Appeal against the judgment and decree of the District Judge, Rae Bareli, dated the 24th November 1924, confirming that of the Sub-Judge, Partabgarh, dated the 20th December 1923.

Mr. *Ghulam Hasan*, for the Appellant.

Messrs. *Radha Krishna* and *Avadh Behari Lal*, for the Respondent.

JUDGMENT.—The plaintiff's suit for sale on foot of what purported to be a mortgage-deed was dismissed by the Subordinate Judge of Rae Bareli and so was the first appeal to the District Judge. He has come here in second appeal.

The deed has been held to be genuine and the consideration thereof established. What the lower Court decided was (1) that there was no due attestation (*a*) because one of the so-called attesting witnesses was Bisheshar Lal who had signed on behalf of the lady and (*b*) because the scribe who had seen the document signed on behalf of the executant in his presence could not be considered an attesting witness, and (2) that the suit for a money decree was barred by limitation.

These findings are correct. It has been held by a Bench of the Calcutta High Court in *Sristidhar Ghosh* v. *Raksha Kaly Dassi* (1) that where the writer of a mortgage-bond wrote out the name of the executant who was illiterate and then signed his own name by way of attestation the deed was not properly attested as required by s. 59 of the Transfer of Property Act. A former ruling of the Calcutta High Court is quoted in support. In the present case

(1) 63 Ind. Cas. 507; 49 C. 438; 26 C. W. N. 264; (1922) A. I. R. (C.) 168.

there is no mark or thumb impression of the lady executant *Musammat* Mainath Kuar and Bisheshar Lal had signed her name on her behalf presumably with her authority. Under such circumstances Bisheshar Lal cannot be an attesting witness to his own act. The execution was the act of Bisheshar Lal and no way the act of the lady. The matter would have been different if the lady had either put her mark or her thumb impression because then it could have been argued that Bisheshar Lal was an attesting witness to the mark or the impression.

The other point also as regards the scribe being put forward as an attesting witness is well settled by authority. In the present case Anwar Uddin was the scribe and signed as scribe and did not sign again after the deed was executed on behalf of the lady. The Chief Justice of the Patna High Court has discussed the law on the subject in *Ram Bahadur Singh* v. *Ajudhia Singh* (2). The observations of Jwala Prasad, J., who wrote a separate judgment are pertinent. A scribe may also assume the position of an attesting witness if he signs the document after seeing the document duly executed. The learned Judge observed at page 132* of the report: "On looking into the evidence, I find that that witness does not say that the scribe witnessed the execution of the deed. The fact that Lal Behari Lal is described as *katib tamassuk* does not show that he did not witness the execution. It often happens that the scribe of a deed does witness the execution and he may sign the deed because he has done so and yet describe himself as *katib*. In the present case there is no evidence that Lal Behari Lal did witness the execution of the deed and it cannot be presumed that he did." There is the same difficulty in the present case. Anwar Uddin was examined as a witness and does not say that he signed the document after witnessing the execution and did not sign again as an attesting witness. Under the circumstances he cannot be considered an attesting witness.

On behalf of the appellant a Bench case of the Calcutta High Court [*Jagannath Khan* v. *Bajrang Das Agarwala* (3)], was quoted. It does not appear from the report, however, that the scribe had not signed as an attesting witness as well. It appears that the scribe had signed in two places and the learned Judges possibly took the view that, when he signed the second time, he had done so in attestation of the execution of the deed. Such an inference cannot be drawn in the present case.

It is not enough that a witness should see the actual execution but as an attesting witness he must further sign the document as a witness. If this were not insisted upon, it would be easy enough for parties to fabricate evidence subsequently and bring witnesses to swear that though they did not sign the document they were present when it was executed. Their Lordships of the Privy Council quoted this principle in *Shamu Patter* v. *Abdul Kadir Rowthan* (4): "And the principle was given effect to in the House of Lords in *Burdett* v. *Spilsbury* (5). The Lord Chancellor summed up the conclusion in these words:—'The party who sees the Will executed is in fact a witness to it, if he subscribes as a witness, he is then attesting witness.'"

In favour of a money-decree it was argued that the consideration did not fail at the very commencement but only now during the proceedings in the present suit when it was discovered that the document was not properly attested. The Privy Council case of *Harnath Kuar* v. *Indar Bahadur Singh* (6) was quoted in support. The circumstances of that case, however, were peculiar. At page 184* of the report their Lordships stated the peculiar circumstances of that case: "As their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of January 2, 1880, and that the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted and that was well within the period of limitation." In the present case

(2) 34 Ind. Cas. 370; 1 P. L. J. 129; 20 C. W. N. 699; 3 P. L. W. 93.

(3) 62 Ind. Cas. 97; 48 C. 61.

*Page of 1 P. L. J.—[*Ed.*]

(4) 16 Ind. Cas. 250; 35 M. 607 at p. 614; 39 I. A. 218; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935, 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596 (P. C.).

(5) (1842) 10 Cl. & F. 340; 59 R. R. 105; 8 E. R. 772.

(6) 71 Ind. Cas. 629; 45 A. 179; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 316; 27 C. W. N. 949; 50 I. A. 69; 18 L. W. 383; 26 O. C. 223; 33 M. L. T. 216; 5 P. L. T. 281; 2 Pat. L. R. 237 (P. C.).

*Page of 45 A.—[*Ed.*]

there are no such circumstances. The plaintiff himself knew all the conditions under which the document was executed and his knowledge must be present that it was not properly attested. There was no subsequent failure of consideration in this case. The ruling of their Lordships in *Harnath Kuar* v. *Indar Bahadur Singh* (6) has been subsequently explained in *Ananda Mohan Roy* v. *Gour Mohan Mullick* (7). There it was held that in the absence of special circumstances, the time at which an agreement is discovered to be void, so that cause of action to recover the consideration arises under s. 65 of the Indian Contract Act 1872, is the date of the contract. Admittedly the suit was filed more than 6 years after the date of the re-payment provided in the deed.

The appeal fails and I dismiss it with costs.

N. H. *Appeal dismissed.*

(7) 74 Ind. Cas. 499; 50 C. 929; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 I. A. 239; 28 C. W. N. 713; 40 C. L. J. 10 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2643 OF 1922.

June 12, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

THAKURDIN TEWARI—PLAINTIFF—APPELLANT

versus

MAHAMMAD IBRAHIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 105—Increase in area of tenancy—Application for enhancement of rent—Dismissal for non-prosecution—Subsequent suit, whether barred—Procedure.

A suit for increased rent on the ground of increaae in area is not maintainable when a similar claim was made in an application under s. 105, Bengal Tenancy Act, which was dismissed for non-prosecution.

Becharam Choudhuri v. *Puran Chandra Chatterji*, 88 Ind. Cas. 637; 41 C. L J. 456; 29 C. W. N. 755; (1925) A. I. R. (C.) 845, followed.

But such a suit cannot be wholly dismissed, but should be treated as one for rent at the original rate.

Abeda Khatun v. *Majub Ali Chowdhury*, 59 Ind. Cas. 760; 48 C. 157; 24 C. W. N. 1020; 33 C. L. J. 304, followed.

Appeal against a decree of the Additional District Judge, Noakhali, dated the 26th May 1922, reversing that of the Munsif, Additional Court, Sudharam, dated the 30th of June 1920.

Babu *Jitendra Kumar Sen Gupta*, for the Appellant.

Babu *Hem Kumar Bose*, for the Respondents.

JUDGMENT.—The plaintiff brought the suit out of which this appeal arises to recover arrears of rent for the years 1324, 1325 and part of 1326 *B. S.* claiming increase of rent on the ground of increase in area. The first Court held that the plaintiff was entitled to increase of rent though not to the full amount claimed. On appeal it was held that the suit was not maintainable as the plaintiff had made an application under s. 105 of the Bengal Tenancy Act claiming additional rent for excess area and that application was dismissed for non-prosecution. Having regard to the recent Full Bench decision in the case of *Becharam Choudhuri* v. *Puran Chandra Chatterji* (1), there can be no doubt that the lower Appellate Court is right so far as it decides that the claim for additional rent for excess area cannot be maintained in this suit. But it is contended on behalf of the appellant that there is no reason why the plaintiff should not get rent at the old rate which is undisputed. From the plaint and the written statement it appears that there was no dispute that the original rental of the holding was Rs. 22 and pies 11.

Apart from the question of enhancement the only matter about which there appears from the pleadings to have been any dispute was the question of possession of 4 *gandas* of land in *Dag* No. 442. That dispute need not be decided in the suit. In the case of *Abeda Khatun* v. *Majub Ali Chaudhury* (2) the facts were somewhat similar to the facts of the present case. In that case the plaintiffs instituted a suit for enhancement of rent and recovery of arrears of rent at an enhanced rate, one of the alleged grounds for enhancement being increase in area. There also the plaintiffs had filed an application under s. 105 of the Bengal Tenancy Act for enhancement of rent on the same ground. It was held that s. 109 was a bar to the plaintiffs claiming enhancement of rent in that suit. But the decree which had been granted to the plaintiffs by the first Court for arrears of rent at the existing rate was restored.

(1) 88 Ind. Cas. 637; 41 C. L. J. 456; 29 C. W. N. 755; (1925) A. I. R. (C.) 845.

(2) 59 Ind. Cas. 760; 48 C. 157; 24 C. W. N. 1020; 33 C. L. J. 304.

We think that now that the claim for enhancement has been abandoned by the plaintiff the suit may be treated as a suit for rent at the original rate and he is entitled to a decree for arrears of rent at that rate.

We accordingly decree this appeal and set aside the judgment and decree of the lower Appellate Court. The plaintiff will get a decree for arrears of rent for the years 1324, 1325 and the *Sraban kist* of 1326 *B. S.* at the rate of Rs. 22 and pies 11 with cesses at Rs. 1-2-7 per year, that is to say, for two years and four months.

The plaintiff will get proportionate costs in all Courts with interest at six per cent. per annum.

The contending defendant will get proportionate costs in all Courts with interest at 6 per cent. per annum.

N. H. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 6 OF 1922.

March 2, 1925.

Present :—Mr. Justice Phillips and Mr. Justice Odgers.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, BY THE COLLECTOR OF SALEM—APPELLANT

versus

SREERAMOORTHI CHETTIAR AND OTHERS—RESPONDENTS.

Adverse possession—Crown lands—Adverse possession proved for forty years—Crown, whether should prove proprietary right within sixty years—"Subsisting title," meaning of.

Where original title in certain lands is admitted to have been with Government, a person seeking to establish his right to them by adverse possession must prove his possession for full sixty years. The fact that the claimant is able to prove possession for a long time, *viz.*, forty years, would not entitle him to a presumption as to possession for sixty years, nor cast on the Government the onus of showing possession of proprietary right within sixty years. [p. 180, col. 1.]

Secretary of State for India v. *Chelikani Rama Rao*, 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.), followed.

Secretary of State for India v. *Vira Rayan*, 9 M. 175; 3 Ind. Dec. (N. S.) 519, *Secretary of State for India* v. *Kota Bapanamma Garu*, 19 M. 165; 6 Ind. Dec. (N. S.) 820 and *Sri Raja Chetikani Rama Rau* v. *Secretary of State for India*, 5 Ind. Cas. 882; 33 M. 1; 7 M. L. T. 128; 20 M. L. J. 66, dissented from.

In the case of a claim to Crown lands by adverse possession, it is misleading to talk of proof of "subsisting title" by Government, when there is a finding of original title in the Government, which title has not been displaced by proof of adverse possession. [p. 180, col. 2.]

Second appeal against a decree of the District Court, Salem, in A. S. No. 80 of 1924, presented against an order of the Court of the Special Forest Settlement Officer, Salem, dated the 16th May 1914.

The Advocate-General, for the Appellant.

Messrs. *C. V. Anantakrishna Iyer* and *E. R. Krishna Iyer*, for the Respondents.

JUDGMENT.

Phillips, J.—The only question for decision in this case, is, whether the plaint forests which were constituted as Government Reserve in 1910, belong to Government or form part of the plaintiff's Chinnakalrayan *jagir*. The learned District Judge has considered the evidence and has come to the conclusion that the plaintiff is the owner of these forests; and has given a decree accordingly. This second appeal is filed by the Secretary of State for India in Council and it is contended that this finding of the District Judge is not warranted by law and that upon the fact found by him, the suit must be dismissed.

There is no grant produced in this case, nor any other evidence of the manner in which the plaintiff obtained his *jagir*. It would appear probable, that the *jagir* was originally obtained by the plaintiff's predecessors-in-title squatting upon the land many years ago. However that may be, the real question for decision now is, whether the District Judge has found as a fact that these forests were originally included in the *jagir*, or whether he means to find that inasmuch as the plaintiff was proved to be in possession and enjoyment since 1872, the presumption must be raised that the land belongs to him.

The latter, is, I think the correct interpretation of the judgment, as will appear from paras. 18 and 19, in the first of which he sets out all his findings of fact and in the second the legal inference to be drawn from these facts. The most important finding of fact is the first namely, that neither party has produced satisfactory evidence of title apart from the evidence of possession and enjoyment. The second finding is, that there is no evidence from which it can be stated definitely in whose

possession and enjoyment the slopes (*i. e.*, the suit forests) were down to the year 1872. From these two findings I think it is clear that the Judge did not mean to find that the title of plaintiff was proved ; but inasmuch as possession for 38 years had been proved it was incumbent on Government to prove a subsisting title, failing which possession for sixty years might be inferred. The learned Judge refers to the decision of the Privy Council in *Secretary of State for India* v. *Chelikani Rama Rao* (1), but he distinguishes that case on the ground that there the legal problems started with the position that the title was in the Crown, whereas in the present case the Government has shown no subsisting title. There seems to be a certain amount of confusion in the learned Judge's mind as to the difference between "title" and "subsisting title". Undoubtedly the title must originally have been in the Government, for otherwise no grant could have been made of the land and when the Judge talks of "subsisting title" he appears to think that inasmuch as there has been adverse possession for a number of years, that original title has vanished, unless Government can show that it is still subsisting. This question of "subsisting title" has been very clearly dealt with in the judgment of the Privy Council in *Secretary of State for India* v. *Chellikani Rama Rao* (1), where they deal with the prior judgments of this Courts, namely, *Secretary of State for India* v. *Vira Rayan* (2), *Secretary of State for India* v. *Kota Bapanamma Garu* (3) and *Sri Raja Chetikani Rama Rao* v. *Secretary of State for India* (4), the last of which was then under appeal. In these prior cases it had been consistently held that if a person had been in possession of land for a long period, it was incumbent on the Crown to show possession of the proprietary right within 60 years, namely, that it was incumbent on Government to establish not merely original title but a "subsisting title". This view has been directly negatived by the Privy Council. After referring to the view of this High Court expressed as follows: "Though the title was originally in the Crown, still, as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, that is, within sixty years before the notification," their Lordships remark: "In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors' possession for sixty years, their Lordships' opinion is, as stated, that this is erroneous. But with reference to the "subsisting title' it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonging to the Crown. That fact is fundamental; until adverse possession against the Crown is complete, that is to say, is for the period of sixty years, that fundamental fact remains; and that fact forms 'subsisting title' ".

It is, I think, clear from this *dictum*, that it is misleading to talk about "subsisting title" when there is a finding of original title in the Government which title has not been displaced by proof of adverse possession. Consequently the District Judge having found that there is no evidence on which a finding as to possession and enjoyment prior to 1872, can be based, held that the plaintiff has failed to prove adverse possession for the full period of sixty years and consequently his title against Government has not been perfected. His finding that possession for over sixty years must be presumed is, therefore, wrong. It is argued for the plaintiff that there are certain observations in the judgment which go to show that the learned Judge really found that the plaintiff had title from the time of his grant and reference is made to the following observations:—

Paragraph 11 "I think the inference is legitimate that from 1872 to 1884 P. W. No. 1's uncle was in possession as lessee of these blocks and that they were really part of the *jagir* itself."

Again in para. 18: "The legitimate conclusion is from 1873 onwards down to the date of the notification, these slopes have formed part of the Chinnakalrayan *jagir*.

As I have pointed out above, I am satisfied that from the conclusions of fact specified in para. 18 and the legal inferences drawn therefrom in para. 19 that this

(1) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 586; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.).

(2) 9 M. 175; 3 Ind. Dec. (N. S.) 519.

(3) 19 M. 165; 6 Ind Dec. (N. S.) 820.

(4) 5 Ind. Cas. 882; 33 M. 1; 7 M. L. T. 128; 20 M. L. J. 66.

statement, "that the slopes formed part of the Chinnakalrayan *jagir*" only means that this conclusion is arrived at from the presumption that arises from possession since 1872, and is not a finding of fact apart from the question of adverse possession.

In this view the plaintiff must be deemed not to have established his title and consequently the appeal must be allowed and plaintiff's claim dismissed with costs throughout.

Odgers, J.—I agree.

V. N. V.

N. H. *Appeal allowed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 54 OF 1923.

November 27, 1923.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol, KT.

AKHTYAR AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

AKBAR AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Suit against several defendants, dismissal of—Appeal against some defendants—Suit decreed—Execution of decree—Objection by defendants not made parties to appeal, whether can be entertained.

Where a suit is dismissed by the Trial Court and an appeal is preferred against such dismissal against some only of the defendants and the suit is decreed in appeal, the other defendants who have not been impleaded as respondents in the appeal, although not judgment-debtors, are parties to the suit within the meaning of s. 47 of the C. P. C., and an objection urged by them in the execution proceedings that the decree is not binding on them must be determined by the Executing Court.

Letters Patent Appeal against the judgment of Mr. Justice Abdul Raoof, passed in Civil Appeal No. 1256 of 1922, dated the 6th January 1923.

Lala *Nanwa Mal*, for the Appellants.

Mr. *Badr-ud-din Koreshi*, for the Respondents.

JUDGMENT.—The suit was for possession of land against Alawal and his sons. The Trial Court dismissed the suit and the plaintiffs appealed, but in the appeal impleaded Alawal only and not his sons.

They were successful in their appeal, but in execution Alawal's sons obstructed and urged that the decree did not bind them. The Executing Court directed them to bring a regular suit and dismissed their objection.

The learned Judge in Chambers has reversed this order and held that their objection had to be disposed of by the Executing Court and the decree did not bind the objectors. It is quite clear that though the sons of Alawal are not judgment-debtors; they are parties to the suit and as such, must be heard by the Executing Court only.

Another point taken is that as the objectors approached the Executing Court before actual ejectment, their objection was premature. This is a new point and appears to be irrelevant since objectors were parties to the suit.

Ground No. 3 is not pressed.

We dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 825 OF 1921.

November 10, 1924.

Present:—Mr. Justice Krishnan.

C. GOVINDASWAMI PILLAI—PLAINTIFF—APPELLANT

versus

DORAISWAMI MUDALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Agreement to sell or mere offer—Specific performance—Specific Relief Act (I of 1877), s. 27.

A person executed a document in the following terms: "if it so happens that I have to sell it (the property) out of necessity, I will sell it to you for Rs. 60 and I bind myself to take the money from you and convey the land to you. I will give you ten days' time from the date of my proposing to sell it, within which time you should pay me the money and take the sale-deed from me. But if you fail to pay the money within the ten days I will overlook your right and claim and I will be at liberty to sell it as I like":

Held, that the document could not be treated as a contract to sell since there was nothing in it to compel a purchase of the property on the terms set out in it. It would only amount to an offer and until that offer were perfected by acceptance there was no binding contract resulting, though when once the offer were accepted, there would be a binding contract. [p. 182, col. 2.]

Egala Nagappa Naidu v. *Muniswamy Iyer*, 65 Ind. Cas. 720; 46 M. 30; 30 M. L. T. 175; 15 L. W. 409; (1922) M. W. N. 201; (1922) A. I. R. (M.) 16; 42 M. L. J. 432, relied on.

Where a later purchaser of a property claims priority over an earlier purchaser of the same property by virtue of a prior agreement, such agreement must be a completed one which could be specifically enforced under s. 27 of the Specific Relief Act [p. 182, col. 1.]

Second appeal against a decree of the Court of the Subordinate Judge of Chittoor, in Appeal Suit No. 59 of 1920, (Appeal Suit No. 188 of 1918 on the file of the District Court, Chittoor), preferred against that of the Court of the District Munsif, Chittoor, in Original Suit No. 507 of 1916.

Mr. *S. Duraisami Iyer*, for the Appellant.

Mr. *A. C. Sampath Iyengar*, for the Respondents.

This second appeal and the memorandum of objections coming on for hearing on the 13th of February 1924, the Court delivered the following

JUDGMENT.—In this case the plaintiff sued to recover two items of property described in Schedules A and B. He got a decree in the first Court for both these properties. In appeal the Subordinate Judge has disallowed his claim for A Schedule property. He purchased this property under Ex. A, dated 26th April 1914. The 3rd defendant who is the contesting defendant before me also purchased the very same property on 9th May 1914. The 3rd defendant claims priority for his purchase over that of the earlier purchase by the plaintiff on the ground that he had a contract, under which the owner of the property, the 1st defendant, had agreed to sell it to him, of an earlier date than the 26th April 1914. That agreement was produced and it is Ex. III. The agreement was found to be genuine. The question that I have to decide turns upon s. 27 of the Specific Relief Act. If it is an agreement which could be specifically enforced under s. 27 against the plaintiff as purchaser subsequent to the date of that agreement then the 3rd defendant's claim would be good. If there was an agreement established of an earlier date, it would be for the plaintiff who subsequently purchased the property to show that he is a transferee for value who has paid his money in good faith and without notice of the original contract. But before the 3rd defendant can take advantage of s. 27, cl. (*b*), of the Specific Relief Act he has to show that he has a contract in his favour to sell. The document he produced, Ex. III, it is argued by the appellant's Vakil, does not amount to a contract at all but amounts only to an offer by the owner of the property to give a sort of right of pre-emption to the 3rd defendant. It says "If it so happens that I have to sell it (the property) out of necessity, I will sell it to you for Rs. 60 and I bind myself to take the money from you and convey the land to you. I will give you ten days' time from the date of my proposing to sell it within which time you should pay me the money and take the sale-deed from me. But if you fail to pay the money within the ten days I will overlook your right and claim and I will be at liberty to sell it as I like." It is argued by the learned Vakil for the appellant that this does not amount to a contract at all but it is only a binding offer on the part of the 1st defendant to the 3rd defendant that he would sell the property to him first, if necessity arises for him to sell it, at the price of Rs. 60. The document cannot be treated as a contract, for there is nothing in it to compel the 3rd defendant to buy the property on the terms set out in it. As was held in a recent decision of this High Court in *Egala Nagappa Naidu* v. *Muniswamy Iyer* (1), such a document as this would only amount to an offer and until that offer is perfected there is no binding contract resulting. No doubt when once the offer is accepted, there will be a binding contract. Exhibit III, therefore, by itself, is not sufficient to justify the finding of the Subordinate Judge that the 3rd defendant's purchase should prevail as against the plaintiff's earlier purchase. But the question that has been now raised was not properly put forward in the lower Appellate Court and I think, therefore, that an opportunity should be given to the 3rd defendant to show, if he can, that this offer in Ex. III became a completed contract by his acceptance before the date of the sale to the plaintiff. If he is able to prove that, then the plaintiff will have to show that he paid the purchase-money in good faith and without notice of that contract, to save his purchase being postponed to the purchase by the 3rd defendant; but till the 3rd defendant proves the existence of a binding contract prior to 26th April 1914, the date of Ex. A, no question under the Specific Relief Act will arise.

The Subordinate Judge will be requested to submit findings on the issues whether

(1) 65 Ind. Cas. 720; 46 M. 30; 30 M. L. T. 175; 15 L. W. 409; (1922) M. W. N. 201; (1922) A. I. R. (M.) 16; 42 M. L. J. 432.

Ex. III was converted into a binding contract between the parties by its acceptance by the 3rd defendant before the 26th April and, if so, whether the plaintiff is a transferee for value who paid his money in good faith without notice of that contract. Both parties will be allowed to adduce fresh evidence. The findings will be returned in two months from this date and ten days will be allowed for objections.

As regards the memorandum of objections filed in this case, it seems to me that there is no ground to support it. The finding of the lower Appellate Court that the property in Schedule B belonged to the 2nd defendant, as whose property the plaintiff purchased it, and was not the property of the 1st defendant is conclusive against the 3rd defendant. That finding is supported by the evidence of the plaintiff's witnesses and I must accept it in second appeal. The memorandum of objections will, therefore, be dismissed with costs.

* * * * * * * * *

This second appeal coming on for final hearing after return of the findings of the lower Court [which were to the effect that there was no completed contract between defendants Nos. 1 and 3 before the date of the plaint sale, and even if there were one, the plaintiff was *bona fide* purchaser for value without notice] the Court delivered the following

JUDGMENT.—I accept the finding and as a result the second appeal is allowed and the decree of the lower Appellate Court is set aside and that of the District Munsif is restored. There will be no costs to either side in the appeal or the second appeal. This does not affect the order on the memorandum of objections.

V. N. V.
N. H.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1054 OF 1923.

June 11, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

NITAI PADA DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

SARAT KUMARI DASI—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 182—Raiyat *holding homestead as under*-raiyat, *ejectment of.*

Under s. 182, Bengal Tenancy Act, a *raiyat* holding homestead as an under-*raiyat*, would be governed by the same provisions as regards ejectment from the homestead as regulate his *raiyati*.

Krishna Kanta Ghose v. Jadu Kasya, 28 Ind. Cas. 839; 19 C. W. N. 914; 21 C. L. J. 475, followed.

Appeal against a decree of the Subordinate Judge, Nadia, dated the 19th of December 1922, reversing that of the Additional Munsif at Chuadanga, dated the 27th of March 1922.

Babu *Urukramdas Chakravarty*, for the Appellants.

Babu *Baranashibashi Mukherjee*, for Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the defendants from a decision of the Subordinate Judge of Nadia, reversing a decision of the Additional Munsif of Chuadanga.

The suit was brought by the plaintiff to eject the defendants from certain homestead lands. It has been found that the defendants are *raiyats* of the village and that they held their homestead otherwise than as a part of their holding as *raiyats*. The whole of the homestead is held under persons who are themselves *raiyats* and, consequently the position of the defendants as regards the homestead is that they are under-*raiyats*. The first Court dismissed the suit but the second Court has decreed it for the reasons stated in the judgment of that Court.

The facts of this case are identical with the facts in the case of *Krishna Kanta Ghose* v. *Jadu Kasya* (1). It was there held that according to the provisions of s. 182 the provisions regulating the homestead would be the provisions which regulate the *raiyati*. This decision, to which I myself was a party, seems to me in accordance with the natural meaning of the

(1) 28 Ind. Cas. 839; 19 C. W. N. 914; 21 C. L. J. 475.

words of s. 182 and on further consideration I am not prepared to say that the decision is wrong. This being so, the present case is concluded by the case of *Krishna Kanta Ghose* v. *Jadu Kasya* (1) to which I have just referred.

In the result, the appeal succeeds and we restore the decision of the Munsif and the appellants will be entitled to the costs incurred in this Court and in both the lower Courts. No other question arises in the appeal.

Ghose, J.—I agree.

N. H. *Appeal allowed.*

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1112 AND 1124 OF 1922.

August 5, 1924.

Present:— Justice Sir Jwala Prasad, KT., Acting Chief Justice, and Mr. Justice Kulwant Sahay.

MAHADEO SINGH—PLAINTIFF—APPELLANT

versus

BASGIT SINGH—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 49—Civil Procedure Code (Act V of 1908), O. V, rr. 16, 17—Notice to quit, service of, mode of—Refusal to sign acknowledgment, effect of—Notice, whether must be affixed, on outer door of house.

A notice to quit under cl. (*b*) of s. 49 of the Bengal Tenancy Act must be served in the manner provided in O. V of the C. P. C. for the service of summonses, and in a case to which the provisions of r. 17 of O. V are applicable, those provisions must be strictly complied with. Where, therefore, the person upon whom the notice is to be served takes the notice but refuses to sign an acknowledgment that he has received the notice, the serving officer must affix a copy of the notice on the outer door or some other conspicuous part of the house in which the person to be served ordinarily resides or carries on business or personally works for gain. The failure to comply with this provision would render the service of the notice ineffectual. [p. 184, col. 2; p. 185, cols. 1 & 2.]

Second appeals against a decision of the Subordinate Judge, Arrah, dated the 29th August 1922, reversing that of the Officiating Munsif, Buxar, dated the 11th January 1922.

Mr. *H. Prasad*, for the Appellant.

Mr. *Sambhu Saran*, for the Respondent.

JUDGMENT.

Jwala Prasad, A. C. J. — These appeals arose out of suits in ejectment. The defendants were under-*raiyats* and the plaintiffs were occupancy *raiyats*. The plaintiffs sought to eject the defendants upon the ground that notice was served on them under s. 49 of the Bengal Tenancy Act. The defendants raised various pleas and the following issues were framed in the Trial Court:—

1. Whether the plaintiffs have any valid cause of action?

2. Is the suit barred by time?

3. Was notice duly served on the defendants?

4. Are the defendants *shikmidars* of the plaintiffs? Is there any custom that *shikmidars* obtain occupancy rights in the land they hold as such?

5. Whether the plaintiffs are entitled to recover possession of the disputed land?

6. Whether the plaintiffs are entitled to *wasilat*?

The Munsif found all the issues in favour of the plaintiffs and decreed the suits.

On appeal the Subordinate Judge dismissed the suits upon the preliminary ground that there was no proper service of notice as required by s. 49 of the Bengal Tenancy Act.

The plaintiffs contend that the view taken by the Subordinate Judge is wrong and that he ought to have held that there was proper service of notice under s. 49. The report of the peon showed that the defendants took the notice but refused to grant receipts therefor. The learned Subordinate Judge says that under O. V, r. 17 the peon ought to have affixed a copy of the notice on the outer door or some other conspicuous part of the house in which the defendants generally resided. There is no special rule for the service of notice to quit under cl. (*b*) of s. 49 of the Bengal Tenancy Act. There is, however, a rule framed by the Government under s. 189 of the Act. This is r. 3 Part I of the Government Rules in Appendix I of the Bengal Tenancy Act. That rule says that :—

"Notice required to be served under this Act shall be served in the manner provided in the C. P. C., for the service of summons."

Therefore, the rules laid down in O. V of the C. P. C., relating to the service of summons will apply to notices served under s. 49 of the Bengal Tenancy Act. Rule 16 of O. V, provides that:—

"Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other

person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons."

Rule 17 provides that :—

"Where the defendant or his agent or such other person as aforesaid, refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendants.....the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

The serving officer is then required to submit his report and to file a report verifying the correctness of the same either by an affidavit or by examination on oath in Court. The Court then is required, under r. 19, to declare that the summons has been duly served or to pass such order under r. 20 for substituted service if it finds that the defendant is avoiding the service of summons upon him. The order-sheet in the present case, regarding the service of notice, does not record any order of the Court that the notice was duly served upon the defendants under r. 19 of the Order. Perhaps that rule does not apply to notices issued under the Bengal Tenancy Act for the rule numbered 3 of the Government Rules only says that the process shall be served in the manner provided in the C. P. C. Rule 19 relates to the proof of service by the affidavit of the serving officer or his examination on oath in Court and the decision of the Court that the service was duly made. There is no doubt as held by the Court below that r. 17 relating to the mode of service, was not complied with. In the case of *Nagishwar Bux Rai* v. *Bisseswar Dayal Singh* (1), it was held, where the defendant refused to acknowledge service of summons that the non-compliance with r. 17 regarding the affixing of a copy of the summons on the outer door or a conspicuous part of the house in which the defendant resides, does not vitiate the service of summons. In that case, however, the evidence was that the defendant, when served with notice and a copy of the plaint, retained the same and thus made it impossible for the peon to affix copy upon the door of his house. There was in that case a further judicial declaration of the Court under r. 19 of O. V that the summons was duly served. In the circumstances of that case, therefore, it was held that the defendant was not entitled to have the *ex parte* decree set aside under O. IX, r. 13 of the Code, upon the ground that the summons "was not duly served." It was regarded that at the utmost non-compliance with r. 17 was an irregularity and did not necessarily vitiate the service of summons when there was upon the affidavit of the peon and the circumstances of the case such as the withholding of the copy delivered to the defendant, a finding of the Court under r. 19 that the summons was duly served. The words "duly served" occur in r. 13 under which the application of the defendant was to set aside the *ex parte* decree. These circumstances are not present in the present case and, therefore, the decision is distinguishable. In the present case, which is a suit for ejecting the defendants, the Court below is right in holding that the provisions relating to the service of notice laid down in O. V, r. 17 should be strictly complied with. It has been argued that there is some doubt as to whether notice was required to be served through the Court upon the defendants and a private notice would have been sufficient which would not have necessitated a compliance with the requirements of the rules in O. V. This may be, but when the plaintiffs choose to have the notice served through the Court the service must be in accordance with rules prescribed for the service of notice.

It was then argued that the defendants took the notice and, therefore, were apprised of the contents thereof that they were required to vacate the land at the end of the agricultural year next following that in which the notice to quit was served. But knowledge of the defendants is not sufficient to entitle the plaintiffs to bring suits for ejectment under s. 49. If that was so then it would have been permissible to the plaintiffs to prove that there was verbal notice

(1) 78 Ind. Cas. 889; 2 Pat. 236; 2 Pat. L. R. 58; (1924) A. I. R. (Pat.) 446; 5 P. L. T. 576.

served upon the defendants in a suit for ejectment. The law requires a written notice to be served and that is in the interests of the *raiyat* concerned and when a notice is required to be served it must be served in accordance with the rules prescribed for service. Therefore, I agree with the view taken by the learned Subordinate Judge in these cases and dismiss these appeals with costs.

Let it be noted that inasmuch as the Subordinate Judge disposed of the defendants' appeals upon the preliminary issue he did not decide the other issues in the case raised and determined by the Munsif. These issues are, therefore, undetermined in the case.

Kulwant Sahay, J.—I agree.

Z. K. *Appeals dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 855 OF 1923.

June 11, 1925.

Present :—Justice Sir Ewart Greaves, Kt., and Mr. Justice B. B. Ghose.

SAILABALA DEB AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAIKUNTHA NATH GHOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Legal necessity—Daughter's marriage—Hindu widow's power of alienation—Widowed sister of husband, maintenance of—Purchaser, if bound by widow's mis-management—Pressing necessity.

The daughter's marriage is a primary duty of a Hindu widow. The texts limiting the extent of the expenses to a fourth part of the father's estate, are not imperative but only directory. [p. 187, col. 2; p. 188, col. 1.]

The extent and limit of Hindu widow's power to dispose of her husband's estate depends upon the circumstances of the disposition and must be consistent with the law regulating such disposition. [p. 188, col. 1.]

Churaman Sahu v. *Gopi Sahu*, 1 Ind. Cas. 945; 37 C. 1; 13 C. W. N. 994; 10 C. L. J. 545, *Ramasami Ayyar* v. *Vengidusami Ayyar*, 22 M. 113; 8 M. L. J. 170; 8 Ind. Dec. (N. S.) 79 and *Kassi Nath Bysack* v. *Hura Sundari*, 2 Morley's Digest 198, followed.

Debts incurred by a Hindu widow for the maintenance of her mother-in-law and widowed sisters of her husband who were maintained by him in his lifetime, are sufficient to justify a sale by the widow. [p. 189, col. 1.]

The purchaser from a Hindu widow is not bound by any previous act of mis-management by the widow so long as he is satisfied that there was pressing necessity for the sale. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Second Court, Sylhet, dated the 2nd January 1923, reversing that of the Second Court, Moulvi Bazar, dated the 29th of July 1921.

Babus *Brajo Lal Chakrarty* and *Hemendra Kumar Das*, for the Appellants.

Babus *Jogesh Ghandra Roy* and *Birendra Kumar De*, for the Respondents.

JUDGMENT.

Ghose, J.—This is an appeal against the judgment and decree of the Subordinate Judge, Second Court of Sylhet, reversing those of the Munsif, second Court of Maulvi Bazar.

The suit was for recovery of certain plots of land on the allegation that the plaintiffs were the reversionary heirs of one Baidyanath. Baidyanath was the son of one of three brothers Jithram, Mohouram and Kalicharn. Baidyanath was the son of Kali Charan. The plaintiffs are the descendants of Jithram and Mohouram. Baidyanath died leaving a widow Chandramoni and an unmarried daughter Sukhomoni. Chandramoni died on the 21st July, 1908. She had during her lifetime executed a deed of gift in favour of her daughter Sukhomoni and her husband Brindaban of 12-annas share of her husband's estate on the occasion of the marriage of Sukhomoni. Afterwards, Chandramoni and Sukhomani jointly sold certain properties to the defendant No. 1, plaintiffs' sued for the recovery of all those properties on the allegation that there was no legal necessity for the gift by Chandramoni or for the sale by Chandramoni and Sukhomoni. The Munsif made a partial decree in favour of the plaintiffs, dismissing only that part of the suit which related to lands which were not in the possession of the defendant and to one plot of land which did not belong to the estate of Baidyanath. He found that there was no legal necessity either for the gift by Chandramoni or for the sale effected by Chandramoni and Sukhomoni. On appeal by the defendants, the Subordinate Judge found that there was a legal necessity for the gift on account of the marriage of the daughter, Sukhomoni, and the gift was a reasonable one having regard to all the circumstances disclosed in the evidence. He also found that the sale was also for legal necessity and on those findings he has dismissed the plaintiffs' suit. On appeal by the plaintiffs before us, it is not disputed that the expenses for the marriage

of an unmarried daughter would be a legal necessity but it is contended that the gift was of an excessive share and with regard to that excessive share the gift would be void; the widow might, according to certain texts of the Hindu Law, make a gift of 4-annas share of the husband's estate and the gift in excess of that share is invalid and the plaintiffs are entitled to recover possession of 8 annas-share. It is also contended that according to the terms of the gift only the life-estate of the widow Chandramoni was given away and the daughter or her son-in-law had no interest in the estate after the death of the widow.

The next contention with regard to the gift is that Sukhomoni and her husband Brindaban were only given a life-estate in the property and as they took as tenants-in-common Sukhomoni could not claim the share which had been given to Brindaban on his death, and as Brindaban is dead the plaintiffs are entitled to the half share of the 12-annas which was given to Brindaban. With regard to the sale by the *kobala* Ex. F, it is contended that the debt for maintenance which caused the necessity for sale was incurred not only for the maintenance of the widow and her mother-in law, that is, the mother of the last male owner, but also for the widowed sisters of Baidyanath and as the maintenance of the widowed sisters was not a charge on the estate of Baidyanath there was no legal necessity for the debts incurred at any rate, to the extent of the maintenance of the sisters and, therefore, the sale is bad. It was further contended that there were untrue allegations made in the *kobala* as regards the desire of the ladies to perform *sradh* at Gaya of their husbands and that also vitiates the sale as one for legal necessity. The most important question seems to be the question which is urged with reference to the texts of the Hindu Law as regards the portion of the estate which might be spent for the purpose of a daughter's marriage. In support of the contention on behalf of the appellants, reference was made to Ch. XI, s. (1), Verse (66) of the Dayabhaga which runs as follows: "The widow should give to an unmarried daughter a fourth part out of her husband's estate to defray the expenses of the damsel's marriage. Since sons are required to give that allotment, much more should the wife, or any other successor, give a like portion." The reference to the sons will be found in Ch. III, s. (2) Verse (36) of the Daya Bhaga which runs as follows: "If the funds be small, sons must give a fourth part to daughters, deducting it out of their own respective shares". Thus Manu says, "To the maiden sisters let their brothers give portion out of their own allotments respectively; let each give a fourth part of his own distinct share; and those who refuse to give it shall be degraded". Reference was also made to the case of *Churaman Sahu* v. *Gopi Sahu* (1), where the question as to the validity of a gift to a daughter of a family governed by the Mitakshara Law on the occasion of the daughter's *gowna* ceremony was considered. It was argued that under the Mitakshara also the portion that a maiden daughter should be given is a fourth share of what she would have been entitled to receive, if instead of being a daughter she had been a son. This fourth share, however, cannot be considered to be the limit of what a maiden daughter should obtain as her marriage portion because with reference to the text of Manu, which has already been stated above, it will be seen that if a girl has got more than four brothers and if each were to give one-fourth out of his share to the daughter, the daughter would get more than what each son would get. The reference to what the widow should give under the Daya Bhaga also seems to me to fix the minimum of what should be given as a marriage portion, since the reason stated in the last sentence is that the wife or any other successor should give as much as the sons, and this shows that the widow must spend at least the fourth part of her husband's estate to defray the expenses of an unmarried daughter's marriage. That seems to be the reasonable view to take. Because the daughter's marriage is a primary duty of a Hindu and to limit the amount to be spent for her marriage to a fourth part of the estate left by the father would, in many cases, make it impossible for the widow to give her daughter in marriage. To take a concrete case: if a man in a good position in society dies leaving a small estate, to say, that the widow cannot spend more than the fourth part of the estate would practically make it impossible for the daughter to be given in marriage under the present conditions of society. It seems to me,

(1) 1 Ind. Cas. 945; 37 C. 1; 13 C. W. N. 994; 10 C. L. J. 515.

therefore, that these provisions were made simply for the purpose of ascertaining by a ready method of what should be considered as a reasonable sum to be spent for the marriage of a daughter having regard to the conditions of society at that time. The verses are not imperative but only directory and only indicate what should be considered as reasonable. This view was taken by Mr. Justice Subramania Ayyar in the case of *Ramasami Ayyar* v. *Vengidusami Ayyar* (2). Having referred to the opinion of the different commentators as regards what should be given as a daughter's share for her marriage expenses, he observed that the better and sounder view was that the authorities should be understood to empower a qualified owner like a widow to to do all acts proper and incidental to the marriage of a female according to the general practice of the community to which she belongs. The principle was also laid down by Lord Gifford in the case of *Kassinath Bysack* v. *Hura Sundari* (3) which also was cited in the case of *Churaman Sahu* v. *Gopi Sahu* (1) mentioned above. His Lordship said that a Hindu widow had "for certain purposes a clear authority to dispose of her husband's property, and might do it for religious purposes, including dowry to a daughter." He added that it was absolutely impossible to define "the extent and limit of her power of disposing it because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition". This principle was followed in the case of *Churaman Sahu* v. *Gopai Sahu* (1) by the learned Judges of this Court where although the gift which was made on the occasion of the *gowna* ceremony exceeded the fourth part of the estate it was upheld, although no doubt the rule as regards a fourth part was referred to as being a reasonable proportion that might have been spent. In the present case the Subordinate Judge has found that the daughter was married in accordance with the wishes of the father and the ancestors of the plaintiffs took active part in the ceremony and also in the execution of the deed of gift. The Subordinate Judge rightly points out that the fact that they were attesting witnesses to the deed of gift does not estop the plaintiffs from claiming the property, but that the persons who were interested as possible reversionary heirs joined in the transaction, shows that it was not considered unreasonable. The value of the property included in the gift was only Rs. 1,000. Having regard to these findings of fact, the first contention of the appellant must fail.

The argument that the widow only conveyed her life-interest by the deed of gift, and the next argument that the donees were given only a life-estate is also not supported by the document. The gift was in these terms: "I divest myself of all my interests in the property and cause the same to vest in you and your successors. From to-day you continue to enjoy the said lands by being entitled thereto" and so on. That shows unmistakeably that the gift was an absolute gift to the daughter and the son-in-law although in the succeeding portions of the document restrictions have been imposed upon their power of sale so long as sons or daughters are not born to them. That does not mean that their interest was limited to a mere life-estate. Whether those restricttons are binding or not it is not necessary for us to decide in the present case. It is enough for the present case to state that they got an estate of inheritance. If this is so, after the death of Brindaban his share devolved upon his widow Sukhomoni and plaintiffs cannot claim any interest in the property. The argument with regard to the sale by the ladies in favour of defendant No. 1 must next be considered.

The finding of the learned Judge is "the plaintiffs and Chandramoni were hard-pressed for maintenance, re-payment of debts, etc., is sufficiently proved by the defendant. The documents filed establish that Ex. F (the deed of sale in question) was executed under legal necessity for maintenance and payment of debts incurred for the purpose". That amounts to a finding of fact which cannot be questioned in second appeal. But it has been contended, as I have stated above, that the maintenance of the widowed sisters of Baidyanath would be no legal necessity. Reliance has been placed on the case of *Bai Mangal* v. *Bai Rukhmini* (4), but in that case the widowed sisters claimed a maintenance out of the brother's estate and that right was negatived. Here it appears, that the widowed sisters used

(2) 22 M. 113; 8 M. L. J. 170; 8 Ind. Dec. (N. S.) 79.
(3) 2 Morley's Digest 198.
(4) 23 B. 291; 12 Ind. Dec. (N. S.) 193

to be maintained by Baidyanath during his lifetime, and the finding amounts to this, that these three sisters had nothing to depend upon their husband's family and, therefore, the brother used to maintain them as a moral obligation and they were living as dependent members of his family. After his death the widow did not turn them out but used to maintain them as her husband used to do previously. To say, that debts incurred for their maintenance along with the maintenance of the widow herself and her mother-in-law, would not be sufficient to justify a sale seem to be a question which is not maintainable. But assuming that the widow was guilty of mis-management in maintaining her husband's widowed sisters, that does not vitiate a purchase made of the property for the purpose of re-payment of the debts incurred by the widow. The purchaser is not bound by any previous act of mis-management by the widow so long as he is satisfied that there was a pressing necessity for the sale and such necessity has been found by the Court below.

On these grounds the appeal must fail and is dismissed with costs.

Greaves, J.—I agree.

N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 68 OF 1924.

October 7, 1925.

Present:—Mr. Ashworth, A. J. C.

BHARATH SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHEODAT SHARMA—PLAINTIFF AND BARBAND SINGH—DEFENDANT—RESPONDENTS.

Mortgage—Hindu father, mortgage by—Suit for possession by mortgagee—Consideration challenged by sons—Procedure—Hindu Law—Antecedent debt—Mortgage by father—Personal remedy barred—Mortgage, whether antecedent debt—Evidence Act (I of 1872), s. 68—Unattested document—Admissibility for collateral purposes.

A suit for possession by a mortgagee from a Hindu father was resisted by the sons on the ground that certain of the items of the consideration for the mortgage were not binding on them. The mortgagee contended that if any of the items was binding on the sons, he could not be refused possession under the mortgage-deed, and that the proper occasion for coming to a decision as to the amount for which the sons were liable under the deed would be when the question of paying the money arose:

Held, that it was necessary, or at least desirable, for the Court to define the plaintiff's right to possession, and in order to do this, it had to decide both as regards the *quantum* of the mortgaged property and as regards the sum for which that *quantum* must be held to be mortgaged, and that it was not a mere question of accounts. [p. 190, col. 1.]

Murli Dhar v. *Raghubar Singh*, 4 O. C. 171 and *Narain Singh* v. *Shimbhoo Singh*, 1 A. 325; 4 I. A. 15; 3 Suth. P. C. J. 357; 3 Sar. P. C. J. 673; 1 Ind. Dec. (N. S.) 223 (P. C.), distinguished.

The fact that the personal remedy under a mortgage by a Hindu father is barred by limitation does not prevent the mortgage being, at a subsequent sale, regarded as creating an antecedent debt. [p. 190, col. 2.]

Brij Narain Rai v. *Mangla Prasad Rai*, 77 Ind. Cas. 689; 46 A. 95; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.) and *Arumugham Chetty* v. *Muthu Koundan*, 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96, followed.

No distinction should be drawn between documents which are the basis of the suit, and those whose production is required for collateral purposes, so far as their admissibility in evidence is in question. [p. 190, col. 2.]

Awadh Ram Singh v. *Mahbub Khan*, 79 Ind. Cas. 725; 10 O. L. J. 525; (1924) A. I. R. (O.) 255, followed.

Lachhman Prasad v. *Baldeo Prasad*, 48 Ind. Cas. 396; 5 O. L. J. 625; 21 O. C. 312, dissented from.

First appeal against the judgment and decree of the Additional Subordinate Judge, Hardoi, dated the 28th August 1924.

Messrs. *Ali Zaheer* and *Salik Ram*, for the Appellants.

Messrs. *Hargobind Dayal* and *Radha Krishna*, for the Respondents.

JUDGMENT.—This first appeal arises out of a suit by a mortgagee for obtaining possession of the mortgaged property under the terms of the mortgage. The mortgage, which was executed on the 29th September 1914, provided alternatively for sale of the property or for delivery of possession to the mortgagee in the event of the mortgage-money not being paid on the 27th June 1915. The appellants are sons of the mortgagor, and have resisted the mortgagee's suit for possession in respect of two-thirds only of the mortgaged property, on the ground that they are not bound by their father's mortgage.

The consideration for the mortgage-deed was treated under five heads by the lower Court. A sum of Rs. 2,460 was found to be due under a previous mortgage-deed dated 4th January 1907. A sum of Rs. 244 was found to be due under another mortgage creating a further charge dated 5th

November 1915; Rs. 57 under a simple money bond dated 14th February 1914; Rs. 193-4-0 Government revenue and Rs. 46 for cash. In this appeal the appellants' Counsel only presses his case in respect of the first, second and the fifth items.

A preliminary objection has been raised by the respondents' Counsel that, if any of the considerations for the mortgage is binding on the sons, the appellants, then the plaintiff cannot be refused possession under the mortgage-deed, and that the proper occasion for coming to a decision as to the amount for which they are liable under the deed will be when the question of paying the money arises. This contention cannot prevail for the following ground. This is not a case where it is a question of the amount of money required to redeem the property, and, accordingly, the rulings, *Murli Dhar* v. *Raghubar Singh* (1) and *Narain Singh* v. *Shimbhoo Singh* (2) do not appear to me to be relevant. In this case the plaintiffs in effect not only ask for possession, but ask for a declaration in respect of their title to possession. I consider that it was necessary, or at least desirable, for the Court to define the plaintiffs' right to possession, and, in order to do this, it must decide to what extent, both as regards the *quantum* of the mortgaged property, and as regards the sum for which that *quantum* must be held to be mortgaged. It is not a mere question of accounts.

The lower Court has held that the first mortgage dated 4th January 1907 is binding on the appellants as it called into existence what must now be regarded as an antecedent debt of the father. It has been argued that any personal liability against the father, arising out of this debt, would have ceased to exist under the Law of Limitation by the date of the deed now in suit. Against this contention have been quoted the rulings reported as *Brij Narain Rai* v. *Mangal Prasad Rai* (3) and *Arumugham Chetty* v. *Muthu Koundan* (4). The first is the latest ruling of the Privy Council on the subject, and the second is a Madras ruling quoted with approval in the judgment of the Privy Council. Having regard to what is said in these rulings, it is not possible to hold any longer that because the personal remedy against the father is barred under a mortgage, that mortgage cannot at a subsequent date be regarded as creating an antecedent-debt.

The lower Court has allowed the sum of Rs. 244 for which the consideration was the deed of further charge dated 5th November 1915, on the ground that this sum forms but a minor part of the total consideration of the deed in question, and relies upon the ruling, *Ram Dei* v. *Suraj Bakhsh* (5). That ruling may be distinguished on the ground that the burden in that case was on the sons to show that the total consideration was not due, whereas in this case it was on the mortgagee to show that it was due. The lower Court's decision, however, has been defended by Counsel for the respondents on two grounds, one of which was rejected by the lower Court. That ground was that, the requirements imposed by s. 68 of the Evidence Act as to proof of a document, which is required by law to be attested, will only apply when the suit is based directly on that document, and will not apply when proof of that document is required in the suit merely for subsidiary or incidental purposes. Reliance is placed on *Lachhman Prasad* v. *Baldeo Prasad* (6). In the judgment the following words occur:

"It is well established that where a deed is not in suit but is merely filed for a collateral purpose, it need not be proved with the same formalities as when it is sought to enforce its provisions in a suit."

That opinion, thus expressed, was subsequently dissented from by two Judges of this Court in *Awadh Ram Singh* v. *Mahbub Khan* (7), where it was pointed out that no distinction should be drawn between documents which are the basis of the suit, and those whose production is required for collateral purposes, so far as their admissibility in evidence is in question. The other ground on which this item in the consideration was defended was that the sum of Rs. 244, appearing in the further mortgage-deed of 5th November 1915, was made up of small necessary sums, which

(1) 4 O. C. 171.

(2) 1 A. 325; 4 I. A 15; 3 Suth. P. C J. 357; 3 Sar. P. C. J. 673; 1 Ind. Dec. (N S.) 223 (P. C.).

(3) 77 Ind. Cas. 689; 46 A. 95; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 282 (P. C.).

(4) 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96.

(5) 60 Ind. Cas. 177; 7 O. L. J. 509; 23 O. C. 204; 2 U. P. L. R. (O.) 156.

(6) 48 Ind. Cas. 396; 5 O. L. J. 625; 21 O. C. 312.

(7) 79 Ind. Cas. 725; 10 O. L. J. 525; (1924) A. I. R. (O.) 255.

could be proved even if the mortgage-deed itself had not been proved. Reliance for the proof was placed on an admission by the father in the deed under which possession is now sought. No admission by a father can be used against the sons in a case where they are impugning the authority of the father to make them liable for the father's alienation of their property alienated by him otherwise than as manager. According to the pleadings of the sons in such a case their father did not represent the family in making the alienation. The last item is Rs. 46 cash. It is maintained by the appellants that there is no evidence that this sum was for necessity. There is, however, the evidence of the father that this sum was spent in miscellaneous expenses such as the stamp duty and registration, a fact which the Court was entitled to presume as being consonant with the ordinary course of events. The payment was, in my opinion, satisfactorily proved.

The consequence of the above findings is that the decree of the lower Court for delivery of possession to the plaintiff-mortgagee is maintained, but, I am of the opinion that judgment of the lower Court should be varied in two respects. The decision as to the amount for which the deed is binding on the appellants should exclude the Rs. 244 due under the deed of further charge. Moreover, three months' time will be allowed to the defendants for payment of the sum thus found due. If not paid within that time, the plaintiff will be given possession.

In the result the appeal is allowed to the extent indicated. Costs throughout will be according to success and failure.

N. H. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1106 OF 1923.

June 12, 1925.

Present:— Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

JNANENDRA NATH BISWAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JOGENDRA NATH PAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Transfer by tenant—Adverse possession, when begins—Bengal Tenancy Act (VIII of 1885)—Denial of landlord's title—Forfeiture—Remedy.

Limitation does not run against the landlord when the original tenant continues payment of rent after the transfer of the holding by him. [p. 192, col. 1.]

In order to make time run against the landlord there must be complete abandonment of the holding by the tenant and adverse possession by his transferee. [*ibid.*]

Probhabati Dasi v. *Taibaturinessa Choudhurani*, 20 Ind. Cas. 664; 17 C. W. N. 1088; 19 C. L. J. 62 and *Panchkari Chattapadhya* v. *Maharaj Bahadur Singh*, 28 Ind. Cas. 708; 19 C. W. N. 136, referred to.

Under the Bengal Tenancy Act the landlord cannot eject the *raiyat* simply on the ground that the tenant has repudiated the relationship of landlord and tenant. Therefore, the denial of the right of the landlord or repudiation of the tenancy, not followed by a decree of Court dismissing landlord's suit for rent, does not work a forfeiture. [p. 192, col. 2.]

Rajani Kanta Biswas v. *Ekkowri Das*, 34 C. 689; 11 C. W. N. 811; 7 C. L. J. 78 and *Kali Charan Ghosh* v. *Arman Bibi*, 4 Ind. Cas. 473; 13 C. W. N. 220; 5 M. L. J. 276, distinguished.

Where the tenant repudiates the tenancy and the landlord is not entitled to eject the tenant on that ground, the remedy is by a proper suit for a declaration that the transferee acquired no interest from the *raiyat* by the transfer. [p. 193, col. 1.]

Rammesh Chandra Mitra v. *Daiba Charan Das*, 78 Ind. Cas. 497; 28 C. W. N. 602; 39 C. L. J. 356; (1924) A. I. R. (C.) 900, referred to.

Appeal against the decree of the Second Additional District Judge, 24-Perganas dated the 10th March 1923, reversing that of the Munsif Second Court at Basirhat, dated the 10th May 1921.

Mr. *Sarat Chandra Mukerji* (with him Babu *Devendra Nath Bhattacharjya* for Babu *Indu Bhusan Mukerji*), for the Appellants.

JUDGMENT.

Ghose, J.—This is an appeal by the plaintiffs against the judgment and decree of the Second Additional District Judge of 24-Perganas reversing those of the Munsif, Second Court of Basirhat.

The suit was one for recovery of possession of a non-transferable occupancy holding on the ground that the original *raiyats*, defendants Nos. 6 to 8, had transferred the entire *jote* to defendants Nos. 1 to 5 by a *kobala* dated the 8th May 1906. The *kobala* was in favour of the defendant No. 1 alone. The Munsif made a decree in favour of the plaintiff. On appeal, the Additional District Judge has reversed the decree on the ground of limitation. His view was that limitation began to run from the date of the execution of the *kobala* and as the suit was brought more than 12 years after that date it was barred by limitation, on the authority of the cases of *Probhabati Dasi* v.

Taibaturinessa Choudhurani (1) and *Panchkari Chattapadhya* v. *Maharaj Bahadur Singh* (2). It is contended before us on behalf of the plaintiffs that the suit cannot be barred by limitation having regard to the fact that the original *raiyats* had been continuing payment of rent for the holding to the plaintiffs and as there had been no abandonment at the date of the *kobala* the plaintiffs' cause of action had not arisen. Plaintiffs date their cause of action as from the 25th February 1919 on which date the tenants filed a written statement in a suit for rent by the plaintiffs repudiating their liability to pay rent for the holding. It appears to us that the contention of the plaintiffs that limitation did not run against them until there was an abandonment of the holding by the tenants is correct. In the two cases referred to by learned Judge the *raiyat* had given up possession to the transferee and had cut off all connection with the holding. Rent was paid by the transferees for the holding but on behalf of the transferors. It was held by the High Court that the landlord was entitled to evict the transferees of the *jote* as soon as the transfer was completed and the *raiyat* had ceased to have any connection with the lands and, consequently, limitation ran as against the landlord from the date of such transfer, as the suit must be instituted within 12 years unless the landlord could establish any case under s. 18 of the Limitation Act. Those conditions do not apply to the present case and the suit cannot, therefore, be held to be barred by limitation. That, however, does not end the matter. We have to see whether the decree of the lower Court dismissing the suit should be reversed and plaintiffs should get a decree in ejectment. This, in our opinion, the plaintiffs are not entitled to do. The matter stands thus. The tenants were *raiyats* and although they had executed the *kobala* in favour of defendant No. 1 they have not severed their connection with the holding. There has been no abandonment in fact and they are in possession although as sub-lessees of their transferees. The cases are all one way that under such circumstances the landlord would not be entitled to eject the *raiyat*. But it is contended that there is something more in this case and that is the repudiation of the liability to pay rent on the 25th February 1919 and it is urged that that gives the landlord the right to eject the defendants. The first question must, therefore, be enquired into whether repudiation of the tenancy gives the landlord the right to eject his *raiyats*. Under the Bengal Tenancy Act, it is well established that denial of the right of the landlord or repudiation of the tenancy not followed by a decree of a Court dismissing the landlord's suit for rent does not work a forfeiture, and the landlord cannot eject the *raiyat* simply upon the ground that he has repudiated the relationship of landlord and tenant. In the present case, the landlords withdrew from the suit which they had brought for rent on the filing of the written statement by the *raiyats*. The case was not proceeded with and no decision of the Court was obtained whether the landlords were entitled to recover rent from these tenants notwithstanding their repudiation simply because they had executed a *kobala* in favour of a third party and purported to have taken a sub-lease from such transferees. Reliance has been placed on behalf of the appellants on the case of *Rajani Kanta Biswas* v. *Ekkouri Das* (3). That case is, however, quite different from the present one. In that case, the landlords had evicted their *raiyats* and were in possession not on the allegation that their *raiyati* interest subsisted but on a different right alleging that they had transferred their holding to a third person and had taken a sub-lease from him and wanted to enforce their right as sub-lessees as against the landlords. The Court negatived the right of the plaintiffs and held that as such sub-tenants they were not entitled to recover possession. The case of *Kali Charan Ghosh* v. *Arman Bibi* (4) is in point. But that appears to be a solitary case in which it has been held that the repudiation by the *raiyat* of the relationship of landlord and tenant gave the landlord a right to eject him even if the tenant was on the land as a sub-lessee of his transferee. This view, it appears to me, cannot be supported in view of the fact that under the Bengal Tenancy Act repudiation of relationship of landlord and tenant or denial of the landlord's right does not work a forfeiture. The cases to the contrary are numerous and they will be found collected in Mr. Sen's well-known book on the Bengal Tenancy Act at pages 156 and 157 of the

(1) 20 Ind. Cas. 664; 17 C. W. N. 1088; 19 C. L. J. 62.
(2) 28 Ind. Cas. 708; 19 C. W. N. 136.
(3) 34 C. 689; 11 C. W. N. 811; 7 C. L. J. 78.
(4) 4 Ind. Cas. 473; 13 C. W. N. 220; 5 M. L. T. 276.

4th Edition. The true principle seems to be that the plaintiffs are not entitled to eject the *raiyat* defendants, that is to say defendants Nos. 6 to 8, from the holding but they might in a proper suit brought for the purpose be entitled to a declaration that the transferees from the *raiyats* have acquired no interest as against them. This is in accordance with what was laid down in the case of *Rammesh Chandra Mitra* v. *Daiba Charan Das* (5).

No one has appeared on behalf of the respondents but the learned Advocate for the appellants placed all the cases bearing on the point before us.

In the result the appeal must be dismissed.

Greaves, J.—I agree.

Appeal dismissed.

N. H.

(5) 78 Ind. Cas. 497; 28 C. W. N. 602; 39 C. L. J. 356; (1924) A. I. R. (C.) 900.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 39 OF 1924.

February 12, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

VISWANATHA MUDALY AND ANOTHER—DEFENDANTS NOS. 2 & 3—APPELLANTS

versus

DORAISWAMI MUDALY AND ANOTHER—PLAINTIFFS NOS. 1 & 2—RESPONDENTS.

Hindu Law—Dancing woman—Legitimate descendants of her sons—Collateral succession, rule of—Heritable blood, whether exists.

Under the Hindu Law, in order to have heritable blood between two persons, it is not necessary that inheritance to each other should be traced through the father. [p. 197, col. 2.]

The legitimate descendants of the sons of a dancing woman or a prostitute have heritable blood between them, even though the parentage of the sons is unknown and they are not the sons of one man. [p. 194, cols. 1 & 2.]

The principle of collateral succession is applicable to them and is not confined to agnatic relations. [p. 196, col. 2.]

Case-law considered.

All people born in India and of the Hindu faith whose customs and manners are those of Hindus are governed by the Hindu Law in the absence of proof of any special or local custom. Accordingly persons whose paternity is unknown and who are the descendants of Hindu mothers are governed by the Hindu Law, and if the ordinary Hindu Law is applicable, unless there is some prohibition, statutory or otherwise, the whole of that law is applicable and not merely portions thereof. [p. 159, col. 1; p. 196, cols. 1 & 2.]

13

Per *Wallace, J.*—The usage and custom of succession to a dancing girl and *inter se* of male offspring of a dancing girl are those of such succession of the male illegitimate offspring of a degraded married woman. [p. 199, col. 1.]

Illegitimate children of a dancing girl *inter se*, when there is no contest between them and legitimate children, inherit to their mother and to one another If there is heritable blood between any two illegitimate children that heritability carries with it all the adjuncts of heritability under Hindu Law, so that the legitimate male descendants of one branch can claim as reversioners to oust the legitimate widows and legitimate descendants of the other branch. The rule rests on the common maternity of the illegitimate sons. [p. 200, col. 1.]

Appeal against an order of the District Court, North Arcot at Vellore, in A. S. No. 344 of 1922, preferred against a decree of the Court of the District Munsif, Vellore, in O. S. No. 257 of 1921.

Mr. *L. A. Govinda Raghava Iyer*, for the Appellants.

Mr. *A. C. Sampatha Iyengar*, for the Respondents.

JUDGMENT.

Devadoss, J.—The plaintiffs sue for a declaration that the sale of the plaint property in favour of defendants Nos. 1 and 2 is not binding on them as they are the reversioners of one Murugesa Mudali. They claim to be the grandsons of Muthusami Mudali the divided brother of Kachi Muniappa Mudali whose great-grandson was the deceased Murugesa Mudali. The District Munsif held that Muthusami Mudali and Kachi Muniappa Mudali being the sons of a prostitute, there was no heritable blood between them and the plaintiffs had no reversionary right to the estate of Murugesa Mudali and dismissed the suit. The Subordinate Judge has reversed the decree of the District Munsif holding that the plaintiffs are reversionary heirs to Murugesa Mudali and has remanded the suit for disposal on the merits. Defendants Nos. 1 and 2 have preferred this appeal.

Muthusami Mudali and Kachi Muniappa Mudali were the sons of a dancing woman called Thanji Ammal. It is admitted that the plaintiffs are the legitimate grandsons of Muthusami Mudali and that Murugesa Mudali was the legitimate great grandson of Kachi Muniappa Mudali. The question for decision is, does the rule of collateral succession obtain among the legitimate descendants of the two sons of a dancing woman whose paternity is unknown. There is no authority on the point in the Hindu Law Books. We have not been referred to any decision in which the

question was raised or decided. The principle applicable to the present case has to be deduced from the texts of the Hindu Law Books and some of the decided cases.

A good deal of the argument in this case was with reference to the rights and disabilities of the illegitimate sons of *sudras*. It is well-settled that the illegitimate son of a man belonging to the twice-born class cannot inherit to his putative father; he has only a right to maintenance but in the case of *sudras*, the illegitimate son inherits to his father, his share being half of that of the legitimate son, and he takes the whole in certain circumstances. West and Buhler, pages 82, 194, 3rd Edition. Courts have gone the length of holding that a man's legitimate grandson by an illegitimate son succeeds to him in preference to a divided brother on the theory of representation: *Ramalinga Muppan* v. *Pavadai Goundan* (1). It is unnecessary to consider in detail all the decisions that have been quoted at the bar with regard to the rights of the illegitimate son. It is misnomer to call the son of a dancing woman whose paternity is unknown an illegitimate son. The illegitimate son is one born out of wedlock, *i.e.*, no marriage was solemnized between the father and the mother. In the case of sons of prostitutes or dancing women, the paternity is unknown and it is only an euphemism to call them illegitimate sons. In Roman Law they are called *Nullius Filius*. Dancing women have their peculiar customs. Their status is recognised in Hindu society. Their customs have received the sanction of judicial decisions and the adoption of girls by them is recognised by law, and the daughters of dancing women inherit in preference to their sons.

The question in this case is what is the law which is applicable to the descendants of the sons of a dancing woman assuming that the parentage of the sons is unknown and that they are not the sons of one individual. In *Subbaratna Mudali* v. *Balakrishnaswami Naidu* (2), a Bench of this Court held that the male members of the dancing girl caste are Hindus and are usually governed by the Hindu Law and usage. At page 208* the learned Judges observe "All the women appear to have followed the profession of a prostitute. That members of this caste are Hindus is certain, though the ancient writers and their modern exponents find some difficulty in fixing them in one of the four castes; but whether they belong to the *sudra* or fourth caste or to a separate fifth caste is immaterial. That male members of this caste are usually governed by the Hindu Law and usage does not seem to have been questioned, so also when female members marry and have children, as they sometimes do, their family relation is governed by the Hindu Law and presumably the ordinary Hindu Law of Inheritance will govern succession to their properties. At the same time their female children may remain unmarried and become professional *dasis* without any degradation or stigma attaching to them so long as they observe the caste customs." This decision is consonant with reason.

The plaintiffs and the defendants in this case are Hindus, Hindus by religion, as well as by their customs and manners. If the Hindu Law is not applicable to them, what other law is applicable? Though the Srutis and Smritis are applicable only to the Aryans, yet the text-writers have extended the law to all the residents of India, and the Courts have applied the Hindu Law to all the races inhabiting this vast country in the absence of proof of any special or local custom. The Dravidians of Southern India who are of Turanian origin had settled in India long before the Aryans entered it. They had their own laws and customs, which are prevalent even to-day. The Aryans when they settled in this part of India attempted to introduce their customs and laws but they were never completely successful. The laws relating to family relations and succession and inheritance laid down by Manu and the commentators like Yagnavalkya and Vignaneswara were never accepted as binding by all the people. It was the East India Company's Courts that held for the first time that the laws contained in the ancient Srutis and Smritis were applicable to all Hindus in Southern India in the absence of any custom or customary law governing any class of people. Manu in order to extend the influence of the Aryans compendiously uses term "*sudras*" to the people of this country who are not Aryans in the same way as the Europeans use the word "native" to all those who are not of European descent, and postulates

(1) 25 M. 519; 11 M. L. J. 399.
(2) 41 Ind. Cas. 408; 33 M. L. J. 207; 22 M. L. T. 91; 6 L. W. 184; (1917) M. W. N. 569.

*Page of 33 M. L. J.—[*Ed.*]

that they are all *sudras* who have fallen away from the high place once occupied by them in the Aryan polity, as the following verses show: Chapter X verse 43: "The following races of *kshatriyas* by their omission of holy rites and by seeing no *brahmins* have gradually sunk among men to the lowest of the four classes". Verse 44 "Paundrakas, Oodras, Dravidas, Kombojas; Yavanas and Sakas; Paradas, Pahlavas, Chinas, Kiratas, Deradas and C'hasas". Verse 45 "All those tribes of men who sprang from the mouth, the arm, the thigh and the foot of *Brahma* but who became outcastes by having neglected their duties are called *Dasyus* or plunderers, whether they speak the language of the *mlechchhas* or that of Aryas." This attempt on the part of the law-giver Manu to extend the influence of the Aryans among the races who inhabited this land was always pushed in the direction of influencing their religion and the rules of succession. When the East India Company's Courts were established, the Judges took the law from the *pandits* who naturally relied upon the texts of the ancient law-givers, and commentators as authority for their opinions. In course of time, the Courts have come to regard Manu and the commentators as authoritative exponents of the law applicable to all the inhabitants of this country who don't profess any distinctive faith like Muhammadanism or Christianity. The Customary Law was considered as an exception to that contained in the Srutis and Smritis. Under the loose term "Hindu" all classes of people are brought within the pale of "Hindu Law" as expounded in the texts of the various Srutis and Smritis and their commentators. It, therefore, follows that people who have been born in India and who are of the Hindu faith and whose customs and manners are those of Hindus are governed by the Hindu Law.

In the case of a dancing woman or a Hindu prostitute, her religion is Hindu and her customs, manners and observances are Hindu, and her sons are Hindus and the Hindu Law, therefore, is applicable to them.

The caste and persuasion of the mother determine the rights of her son, if illegitimate. In *Lingappa Goundan* v. *Esudasan* (3), it was held that the illegitimate son of a Hindu by a Christian woman was not entitled to maintenance from the estate of his Hindu father. Benson and Bashyam Iyengar, JJ., observe at page 14*: "The Hindu Law lays down certain rules for determining the caste of offspring of unions between parents belonging to different castes (amongst the four recognised main castes) and gives separate names to the mixed castes to which such offspring will belong. In all these cases, the *dharma* or religious rites applicable to the offspring are those prescribed for the mother's caste [*Brindavana* v. *Radhamani* (4)]. The plaintiff, therefore, cannot be regarded as a Hindu by birth, and he is, therefore, beyond the pale of, and not governed by, the Hindu Law. There is no text of Hindu Law, under which an illegitimate son of a Hindu, by a woman who is not a Hindu, can claim maintenance, and in none of the reported cases has maintenance been ever awarded to an illegitimate son who was not a Hindu by birth".

With all due respect it is difficult to see why the illegitimate son of a Hindu is not a Hindu when he follows the Hindu customs and manners. It is the Hindu father who is bound to support his illegitimate son and the mother's religion has nothing to do with his liability to maintain him. It is unnecessary to question the soundness of this decision in this case. The principle of the decision is that the mother's religion determines the rights of her children. If the mother is a Hindu, the children are Hindus, and the Hindu Law, therefore, is applicable to them. In *Myna Boyee* v. *Utaram* (5), the facts briefly are: One Hughes kept two married women as his concubines, one of them was a Gowda *brahmin*. Two sons were born to the *brahmin* woman and he bequeathed his property to the sons. One of the sons died and the other son claimed to succeed to him. The Privy Council held that the illegitimate children of a Brahmin married woman born to a European father were to be considered as Hindus and their rights governed by that law. On remand the Madras High Court held, *Mayna Bai* v. *Utaram* (6), that the sons of an English man by a *brahmin* woman living apart from her husband were Hindus and their rights were to be determined by the rights of the class of Hindus to which they belonged; and they

(3) 27 M. 13.

(4) 12 M. 72; 4 Ind. Dec. (N. S.) 399.

(5) 8 M. I. A. 400; 2 W. R. P. C. 4; 1 Suth. P. C. J. 452; 1 Sar. P. C. J. 797; 19 E. R. 582.

(6) 2 M. H. C. R. 196.

*Page of 27 M.—[*Ed.*]

also held that they were to be regarded as *sudras* or a class still lower, and in the absence of preferable heirs the two sons inherit the property of the mother and of one another. It was not possible to plead any custom in support of the claim. The learned Judges observed at page 203* "Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring, Taukuram and his brother are decided to be Hindus. They are the Hindu sons of a woman who was either a woman of a class lower than the fourth of Manu's classes, and in this case the sons are cognate to her and to one another, as the children of a class not twice-born out of wedlock, and entitled to inherit to their mother, and only not capable of inheriting to their father because he is not a Hindu at all. If not so she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever." They relied upon the Roman Law which recognised the relationship between an erring mother and her sons and of the sons towards one another. It was the influence of Christianity in the West that stood in the way of the claim of an illegitimate son on his putative father. The principle deducible from these decisions is that if the mother is a Hindu and the children follow the Hindu religion and adopt Hindu manners and customs, the law applicable to them is the Hindu Law and it does not matter whether the father is a Christian or Muhammadan, European or an Indian. It necessarily follows that persons whose paternity is unknown and who are the descendants of Hindu mothers are governed by the Hindu Law.

In a recent case the Patna High Court held that the sons of the daughters of Hindus of the *naick* caste who were converted to Muhammadanism but who lived with their Hindu grand-parents and were brought up as Hindus are governed by the Hindu Law and the daughters of the family are governed by the Hindu Law even though they have adopted the profession of dancing girls and have become prostitutes. Jwala Prasad, J., after an exhaustive consideration of the texts contained in the Srutis and Smritis relating to the point and the decided cases bearing on the point, has come to the conclusion that the sons of the prostitutes converted to Muhammadanism who were brought up by the Hindu grand parents as Hindus are governed by the Hindu Law. It follow from this decision that the Hindu Law is the proper law which governs the relations and the inheritance of persons who are Hindus in faith and in customs and manners. Though it is stated that a Hindu is born and not made yet when the question is what is the law applicable to persons who are Hindus in fact, the only answer is that the ordinary Hindu Law is applicable and if the ordinary Hindu Law is applicable, unless there is some prohibition, statutory or otherwise, the whole of that law is applicable. In this case supposing Muniappa Mudali had died without issue and the widow alienated his property improperly would not Muthusami Mudali if he survived Muniappa, be entitled to bring a suit that the alienation was not binding on him as reversioner? If Mtuhusami Mudali could bring such a suit, could not his son bring such a suit? and if he could, his legitimate descendants can certainly bring such a suit. It is consonant with reason and principle that, when a particular system of law is made applicable to a set of persons, the whole of that system should be applied and not portions of it, unless any custom valid and binding is proved to the contrary, or else, the application of that system is modified either by Statute or by anything contained in the rules of that system.

From the decisions in *Myna Boyee* v. *Ootaram* and *Mayua Bai* v. *Uttaram* (6), it is clear that Muthusami Mudali and Kachi Muniappa Mudali had heritable blood between them. This is not seriously disputed by the appellant. The question is whether their descendants can inherit to one another, in other words, whether the principle of collateral succession applies to the descendants of these two persons. The contention of Mr. Govindaraghava Iyer for the appellant is that collateral relationship is traceable only through the father, in other words, it is only in the case of agnatic relations, the principles of collateral succession is applicable, that an illegitimate son cannot inherit to his father's collateral relations and that in the case of Muniappa Mudali and Muthusami Mudali the father being unknown, agnatic relationship does not exist and, therefore, there can be no collateral succession among their descendants. Reliance is placed on the following cases in support of the appellant's contention. Amongst the *sudras* governed by Mitakshara an illegitimate son cannot inherit collaterally in

*Page of 2 M. H. C. R.—[*Ed.*]

preference to legitimate heirs: *Ravji Mahadu Patil* v. *Sakaji Kaloji* (7). Amongst *sudras* governed by Mitakshara Law, an illegitimate son does not inherit collaterally to the legitimate son by the same father [*Shome Shankar Rajendra Varire* v. *Rajesar Swami Jangam* (8)] The illegitimate son is under Hindu Law excluded from all collateral succession [*Dharma Lakshman* v. *Sukharam Ramjirao* (9)]. The son of the legitimate son of a *sudra* could not inherit to his illegitimate son: *Zipru Chindhu* v. *Bomtya Dagadu* (10). It is well-settled that an illegitimate son cannot claim to inherit to his father's collaterals. He cannot claim to succeed to the legitimate son of his father but can succeed only to his father and the father can succeed to him. The relationship is, therefore, only between an illegitimate son and his father. In *Subramania Iyer* v. *Rathnavelu Chetty* (11), it was held that the father was entitled to succeed to his illegitimate son who left no issue, widow or mother. In all the cases where the illegitimate son was denied the right to succeed to his father's collateral relations, the following text of Manu was relied upon: "The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice married woman, a son self given, and a son by a *sudra* are the six kinsmen but no heirs to collaterals" Manu, Ch. IX, verse 160.

But for this text the illegitimate son would have the right to succeed to his father's collaterals. The question of succession to the putative father's collaterals does not arise here and the cases noticed above have, therefore, no application to the present case.

In the time of Manu a woman was allowed to marry more than once as is clear from Manu, Ch. IX, verse 191. The sons of a mother though by different fathers were considered to have heritable blood between them for Nanda Panditha gives the order of precedence among brothers and sisters of whole blood and half blood thus: (1) brothers of the whole blood (2) sisters of the whole blood; (3) sons of the same father and (4) sons of the same mother. The existence of heritable blood between sons of the same mother by different fathers cannot, therefore, be through the father and is attributable only to their being sons of the same mother. It is not, therefore, necessary that in order to have heritable blood, inheritance should be traced through the father. It logically follows that the sons of a dancing woman or a prostitute have heritable blood between them.

If *A* can succeed to *B* in the absence of preferable heirs why should not *A*'s legitimate son succeed to *B* if *A* predeceases *B*, in the absence of law or custom to the contrary? If two men are sons of the same mother, they have heritable blood between them; and if they have heritable blood between them, their descendants also have heritable blood between them unless such a principle is opposed to any distinct text either in Manu or in the Mitakshara or in any one of the various commentaries. There is no text of Manu or any of his commentaries against the descendants of the sons of a prostitute having heritable blood between them. Both Muthusami Mudali and Kachi Muniappa Mudali were brothers and their descendants are all legitimate, *i. e.*, the plaintiffs are the legitimate sons of the legitimate son of Muthusami Mudali, similarly Murugesa Mudali was legitimate in descent from Kachi Muniappa Mudali. There was no *bar sinister* so far as he, or his father, or grand-father was concerned. Seeing that there was heritable blood between Muthusami Mudali and Muniappa Mudali did the tie cease to exist between Muthusami's son and Muniappa's son? If there was heritable blood between the fathers, it is difficult to understand why that should not continue in the case of the sons. If Muthusami Mudali could succeed to Kachi Muniappa, it is difficult to see why the legitimate son of Muthusami should not succeed to Kachi Munippa. The principle of representation as enunciated in *Ramalinga Muppan* v. *Pavadai Goundan* (1), is against the appellant's contention. In that case it was held that the legitimate son of an illegitimate son was entitled to succeed to a man in preference to his divided brother. Bhashyam Iyengar, J., who delivered the judgment in the case observed with regard to *Krishnayyan* v. *Muttusami* (12), *Ranoji* v. *Kandoji* (13) and *Parvathi* v.

(7) 5 Ind. Cas. 964; 34 B. 321; 12 Bom. L. R 204..
(8) 21 A. 99; A. W. N. (1898) 170; 9 Ind. Dec. (N. S.) 773.
(9) 55 Ind. Cas. 306; 44 B. 185; 22 Bom. L. R. 52.
(10) 64 Ind. Cas. 975; 46 B. 424; 23 Bom. L. R. 1195; (1922) A. I. R. (B.) 176.
(11) 42 Ind. Cas. 556; 41 M. 44; 22 M. L. T. 94; 6 L. W. 149; 33 M. L. J. 424; (1917) M. W. N. 688.
(12) 7 M. 407; 8 Ind. Jur. 427; 2 Ind. Dec. (N. S.) 867.
(13) 8 M. 557; 3 Ind. Dec. (N. S.) 382.

Thirumalai (14): "The effect of these decisions is that it is only when the father dies a separated house-holder that an illegitimate son is entitled to inherit to his separate estate, but that when the father dies an "*avibhakta*" (undivided from his brothers or other collaterals) he is entitled only to maintenance." The principle of these decisions is explained as follows in *Thangam Pillai* v. *Suppa Pillai* (15): "But these decisions proceeded on the view that he had no claim by survivorship against his father's co-parceners by *jusrepresentationis*, and that he was neither a co-heir with his father nor a *sapinda* in relation to his father's co-parceners". The learned Judge goes on to observe at page 523*: "Assuming, as explained in *Thengam Pillai* v. *Suppa Pillai* (15), that by reason of his illegitimacy, an illegitimate son cannot claim his father's share as against his father's co-parcener by *jus representationis*, that principle will not be applicable to a legitimate son representing his father, though the father was the illegitimate son of the grandfather. If a *sudra* dies, leaving a legitimate son and a grandson or great grandson by a predeceased illegitimate son, can it be contended that the legitimate son is not bound to allow half a share to the son or grandson of his deceased illegitimate brother, just as he would be, if the illegitimate son did not predecease the father? If the grandson, as representing his father though not claiming under him, would be entitled as against his uncle to claim his father's share, it can hardly be maintained, though his father predeceased the grandfather, that he cannot claim the grandfather's estate as against the grandfather's divided brother. An illegitimate son's right of inheritance to his father's property, or at least to a part of it, is not contingent but absolute, as in the case of a legitimate son, since if he has legitimate half brothers or other heirs of his father down to a daughter's son, he gets a half share and in the absence of such heir, the whole estate. The *sudra's* illegitimate son is, therefore, in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance is liable to obstruction. The principles, therefore, applicable to the succession of sons and grandsons of legitimate sons may by analogy be applied to the sons and grandsons of an illegitimate son, *viz.*, that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died". The learned Judge relies for his opinion upon West and Buhler, III Edition, pages 72,82, 83 and 390 and Mr. Jooly's work on Hindu Law, pages 185, 186. I respectfully adopt the reasoning of that very learned Judge, and I am of opinion that the legitimate descendants of Muthusami Mudali represent Muthusami Mudali and the legitimate descendants of Muniappa Mudali represent Muniappa.

If Muniappa Mudali's son had died without issue would not Muthusami Mudali, if he was alive, have succeeded to the property of that son? and if it is once granted that Muthusami's son represents him and Muniappa's represents him, then it is difficult to understand how their sons could not represent Muthusami and Muniappa respectively. If that is so, then there is heritable blood between them and one line can succeed to the other line according to the principle of collateral succession. It is immaterial to consider whether Thanji was a dancing woman or only a prostitute. Whether the mother be a dancing woman or an ordinary prostitute, the legitimate descendants of her sons have heritable blood between them and this decision does not turn upon any custom or law peculiar to dancing women.

On a careful consideration of the cases quoted at the bar and the various passages in the Hindu Law Books touching on this point I have come to the conclusion that the plaintiffs are the reversionary heirs to Murugesa Mudali.

The appeal is dismissed with costs.

Wallace, J.—I am of the same opinion.

It appears to me that on the plaintiff's own case, the mother of the two brothers was of the dancing girl caste. Both P. Ws. Nos. 1 and 3 state that this woman was a dancing girl and had no fixed husband. She was not, therefore, a married woman who had fallen from lawful wedlock. The law first of all to be applied is then the law founded on usage which governs inheritance to women of the dancing girl caste, the paternity of whose children is unknown and is not a fact for consideration at all.

So far as appears further from the evidence, these two brothers lived in caste,

(14) 10 M. 334; 7 Ind. Dec. (N. S.) 986.
(15) 12 M. 401; 4 Ind. Dec. (N. S.) 628.

*Page of 25 M.—[*Ed.*]

married wives according to the Hindu caste customs and had legitimate offspring.

Authority regarding the law of succession of *natural* offspring of a dancing girl there is, so far as I can find none. Though a recent case *Guddati Reddi Obala* v. *Ganapati Kandama* (16) lays down that the degraded married woman is not for purposes of the law of succession in the position of a dancing girl, I do not think it is incorrect to say that, if the natural sons of such women take their place in Hindu society as respectable members of such and live as caste Hindus following the laws and customs of such, they must be taken as having adopted the usages and customs of the Hindu people with whom they associate. It does not appear to have been pleaded in this case that the law of succession of male offspring of a dancing girl differed in essence from the law of offspring of a degraded married woman and in fact both sides proceeded on the footing that the law was much the same. I may take it then, without wasting time by further remand of the case, that the usage and custom of succession to their mother and *inter se* of male offspring of a dancing girl are those of such succession of the male illegitimate offspring of a degraded married woman. It may also be taken as not in question that such male offspring will not belong to any of the three higher castes, whatever their paternity may have been and that if they are in caste at all, they must be in the *Sudra* caste.

I do not think that the *placita* from various ancient texts really assist this case because they are not, in my opinion, dealing with the rights of succession or inheritance in favour of illegitimate children at all, except in the case of the illegitimate son of a *Sudra*; that is, in those texts 'son' means a legitimate son and 'daughter' means a legitimate daughter. This applies even to the passage from Nanda Pandita quoted at page 207 of the Jolly's Hindu Law, (1885 Edition) illegitimate children have no place in Hindu Law when there are legitimate heirs except in the special case already referred to [see *Meenakshi* v. *Muniandi Panikkan* (17)] I also find very few of the cases cited before us of any real help since this is not a contest between an illegitimate offspring and a legitimate, or a case of a claim by an illegitimate offspring to succeed to his putative father's collaterals. The question is purely whether two illegitimate sons of the same mother have between them heritable blood. The rule laid down in *Mayna Bai* v. *Uttaram* (6) that the children of a prostitute, when the contest is purely between themselves, succeed to the property of their mother and to one another, is, I think, the rule to be followed in this case. As I read that case, the principle did not in the slightest degree depend either on the fact that the father was known or on the fact that the father of both illegitimate sons was the same person. It rested not on the common paternity, but on the common maternity of illegitimate sons: [Compare also the *ratio decidendi* of *Lingappa Goundan* v. *Esudasan* (3).] That principle in this narrow form has never, so far as I can ascertain, been challenged in succeeding cases, and it is also, in my opinion, reasonable and equitable and in consonance with the general spirit of, if not prescribed by the letter of the Law of, the Mitakshara wherein heritability follows propinquity of blood and *sapinda* relationship is determined by the possession of particles of the same body, whether father's or mother's (see Mitakshara quoted by Setlur in his Hindu Texts 1911, Edition, Appendix A page 543 and the view of Sadasivier, J., in his letter of reference in *Subramania Iyer* v. *Ratnavelu Chetty* (11). I do not think that there is any authority in Madras for the proposition that *sapinda* relationship cannot exist without a father.

The only reported cases which I can find of contest between illegitimate children *inter se* are *Mayna Bai* v. *Uttaram* (6), I already dealt with, and *Arunagiri Mudali* v. *Ranganayaki Ammal* (18) in which latter case neither side appears to have raised any general contention that the Hindu Law principle which gives preference to daughters over sons as heirs of their mother could not be applied because Hindu Law generally could not be applied.

I think the net result of the authorities and the case-law is this, that Hindu Law Texts have no application to illegitimate children except in the case of the illegitimate son of a known *Sudra* father, that so far

(16) 17 Ind. Cas. 422; 23 M. L. J. 493; 12 M. L. T. 467; (1912) M. W. N. 1138.

(17) 25 Ind. Cas. 957; 38 M. 1144; 1 L. W. 704; (1914) M. W. N. 672; 16 M. L. T. 270; 27 M. L. J. 353.

(18) 21 M. 40; 7 Ind. Dec. (N. S.) 384.

as the Hindu Law canon goes illegitimate children have no right of succession to either parent, but that the general principles of Hindu Law will be applied to such a case unless such application would violate equity and good conscience and that applying these the Courts will hold that illegitimate children *inter se*, when there is no contest between them and legitimate children, inherit to their mother and to one another.

The next step is more difficult if the Court holds that outside Hindu Law there is heritable blood between any two illegitimate children, will that heritability carry with it all the adjuncts of heritability under Hindu Law, so that the legitimate male descendants of one branch can claim as reversioners to oust the legitimate widows and legitimate descendants of the other branch? That is the point now before us. In essence, the *Arunagiri Mudali* v. *Ranganayaki Ammal* (18) has approved of that principle, although the general question does not appear to have been then argued at all. But it was there taken for granted that Hindu Law principles would be extended to the illegitimate children of a Hindu woman. In *Mayna Bai* v. *Uttaram* (6), as I read it, it was clearly laid down that the illegitimate children of a Hindu mother are to be considered to be Hindus to whom Hindu Law, so far as it can be analogically applied, will be applied and it is not open unless and until special custom to the contrary is proved, for persons who are in the eye of the law Hindus to plead that the ordinary adjuncts of the principle of Hindu Law, for example that of the restricted nature of the estate taken by a widow from the last male owner, do not apply, or that they are entitled to set up new rights of succession and inheritance not known to Hindu Law. I cannot see that such an analogical application of Hindu Law to persons living as Hindus and following Hindu customs and usages can in any way offend the general principles of equity and good conscience. I hold, therefore, that the legal principles to be applied are those set out above.

It is not denied before us that these parties are, so far as they can, conforming to the Hindu Law governing their neighbours, that, for example, their wives were legitimately married to them according to the forms of Hindu Law, and that their wives derive their status as lawful wives and their children their status as lawful children from the fact that their families are conforming to the general usages and customs of Hindus. No special custom derogating from the applicability of Hindu Law principles to the descendants of these two illegitimate brothers has been pleaded or proved in the case. It follows in my view that the ordinary principles of Hindu Law should be applied to them. That the lower Court has done. My opinion, therefore, is that the decision of the lower Court is correct and I agree that this appeal be dismissed with costs.

V. N. V.
N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION No. 17 OF 1925.
July 20, 1925.
Present:—Mr. Findlay, Offg. J. C., and Mr. Prideaux, A. J. C.

GHULAM ABBAS AND OTHERS—DEFENDANTS—APPELLANTS
versus
GOVINDRAO AND OTHERS—PLAINTIFFS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 110—Privy Council Appeal—Subject-matter in dispute—Value of reliefs in appeal and cross-objections—Construction of document, whether substantial question of law.

The combined value of the relief claimed by the appellant in an appeal and that claimed by the respondent in cross-objections, determines the amount of the value of the subject-matter in dispute for the purposes of filing an appeal to the Privy Council. [p. 201, col. 1.]

The question of the proper construction of the particular words and clauses to be found in a particular document cannot be said to be one involving a substantial question of law within the meaning of s. 110 of the C. P. C. [p. 201, col. 2.]

Application for leave to appeal to His Majesty in Council against the decision of this Court in First Appeal No. 78 of 1924, dated the 15th January 1925.

Mr. *Fida Hussain*, for the Appellants.

Sir Dr. *H. S. Gour*, Messrs. *M. B. Kinkhede* and *A. D. Manday*, for the Non-Applicants.

ORDER.—The applicants Ghulam Abbas, Fida Hussain and Ashgar Ali apply for leave to appeal to His Majesty in Council against the decision of Baker, J. C., in First Appeal No. 78 of 1924, dated the 15th of January 1925.

The first point which arises in connection with this application is whether the

subject-matter in dispute on appeal amounts to Rs. 10,000 or upwards. We find that the amount on which the present applicants appealed to this Court was for a relief of Rs. 9,385-11-0, while the plaintiffs-respondents filed a cross-objection which included, amongst other reliefs, a claim that compound interest at 12 annas per cent. per mensem ought to have been allowed, and on this part of the cross-objection the respondents succeeded. The amount of the subject-matter in dispute, therefore, in the case of an appeal to His Majesty in Council being allowed undoubtedly exceeds Rs. 10,000. The first condition laid down in s. 110 of the C. P. C. is thus, in our opinion, fulfilled.

We have now to consider whether the third clause of s. 110 is or is not satisfied in the circumstances of the present case. In this connection the first point requiring notice is whether the decree passed by this Court can be described as one affirming the decision of the Court immediately below. It is true that some variation in the decree was effected as a result of the findings arrived at by Baker, J. C., but, in reality, what the present applicants desire to appeal against is against the decision of Baker, J. C., in so far as he affirmed the decision of the Court below, with the further addition that he gave more relief to the plaintiffs-non-applicants in the matter of interest. Looking, therefore, to the substance of the case before us, we, from the point of view of the consideration of the present application, regard the decision of Baker, J. C., as one affirming the decision of the Court below and we find ourselves in agreement with the view expressed by Maclean, C. J., and Hill and Stevens, JJ., in *Raja Shree Nath Roy Bahadur* v. *Secretary of State for India* (1).

It remains to be decided, therefore, whether in the present case any substantial question of law arises. The first point urged in this connection on behalf of the applicants is that the lower Appellate Court erred in passing a personal decree for money in the circumstances of the present case. We cannot see that any substantial question of law arises in this connection and we agree with the view of Baker, J. C., that in the mortgage in suit there was a personal covenant which the plaintiffs had a right to enforce on the failure of the deed to operate as a mortgage owing to the lack of attestation. In this connection we may refer to the decision of Mears, C. J., and Piggot, J., in *Bishambhar Nath* v. *Muhammad Ubaidullah* (2), where in dealing with a similar application the learned Judges laid down the principle that the question of the proper construction of the particular words and clauses to be found in a particular document, cannot be said to be one involving a substantial question of law within the meaning of s. 110 of the C. P. C. The question of the personal liability of the applicants in the present case is purely one of the construction of the terms of the document in question. We are, therefore, of opinion that no substantial question of law arises in this connection.

The second point urged is that Baker, J. C., erred in his finding that the payments made by the applicants must be considered as payments made towards interest as such. We have been referred to the copies of accounts : *cf.* for example, Exs. P-27, P-28, P-29 and others, in which the actual payments made were simply noted against the amount of the mortgage and a balance was struck. Very clearly, however, as found by Baker, J. C., no full and comprehensive account was kept of interest and the obvious intention must have been to make up the account at a future date. Baker, J. C.'s finding in this connection was, in reality, a pure finding of fact and no question of law seems to us to arise in this connection.

The third point urged is that a question of law arises with reference to the allowance by this Court of interest at the compound rate of 12 annas per cent. per mensem instead of a simple interest at the rate of Re. 1 per cent. per mensem. We do not think that the rate allowed can, from any point of view, be described as a penal or *ad terrorem* one. Even the so-called penal rate is a very moderate and usual one and amounts to nothing more than reasonable compensation for the breach of contract. It is utterly impossible to affirm that Baker, J. C.'s decision on this point gives rise to any substantial question of law.

For the above reasons we are of opinion that no sufficient cause has been made for granting leave to His Majesty in Council and the present application is dismissed. The applicants must bear the non-applicants' costs. We fix Rs. 50 as Pleader's fees.

N. H. *Application dismissed.*

(1) 8 C. W. N. 294.

(2) 79 Ind. Cas. 213; 46 A. 227; (1924) A. I. R. (A.) 559; L. R. 5 A. 158 Civ.

MADRAS HIGH COURT.

CIVIL APPEAL No. 67 OF 1922.

November 18, 1924.

Present :—Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

MUDDANA ADENNA AND OTHERS—DEFENDANTS Nos. 1, 2 AND 4—APPELLANTS

versus

MUDDANA SUBBANNA AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 5 TO 7 AND 3—RESPONDENTS.

Limitation Act (IX of 1908), s. 14, application of—Hindu joint family—Partition suit—Claim for outstandings collected by one member—Previous litigation—Exclusion of time.

N, a member of a Hindu family, brought a suit for partition on the footing that he was adopted by *R*, a deceased brother of his father. *S*, another brother, and his son *V* pleaded partition before *R*'s death, disputed the share claimed and set up the adoption of *V* to *R*. They also alleged that *A*, the father of *N*, had been wrongly collecting certain specified outstandings which in case of partition they insisted ought to be brought by *A* into the hotchpot. *A* denied the existence of the alleged outstandings. The Trial Court found against the adoption and dismissed the suit, though there was a finding that *A* had to account for a few of the items mentioned by *S* and *V*. *N* filed an appeal; *S* and *V* put in a memorandum of objections but relating only to costs. The appeal and memorandum of objections were, however, dismissed. In a later suit by *S* more than 6 years from the date of the dismissal of the suit and less than 3 years from the date of the decree of the Appellate Court, for partition of the family properties including the outstandings alleged to have been collected by *A*:

Held, (1) that when *A* denied his liability in respect of the outstandings alleged, there was a demand and refusal of the same by him from which time would have begun to run against the plaintiff but for the pendency of the suit; [p. 205, col. 2.]

(2) that during the pendency of the appeal by *N* and the memorandum of objections as to costs by *S* and *V*, the latter were not prosecuting any claims in respect of the outstandings within the meaning of s. 14 of the Limitation Act; [p. 208, col. 1.]

(3) that, therefore, the present suit, so far as the outstandings collected by *A* were concerned, was barred by limitation. [p. 205, col. 2.]

Limitation is not suspended in respect of a plaintiff's claim for the period during which he is engaged in litigation not in respect of the identical claim but about some connected matter. [p. 208, col. 1.]

Yerukola v. *Yerukola*, 71 Ind. Cas. 177; 45 M. 648; (1922) M. W. N. 215; 30 M. L. T. 279; 42 M. L. J. 507; 15 L. W. 595; (1922) A. I. R. (M.) 150, followed.

Nrityamoni Dassi v. *Lakhan Chunder Sen*, 33 Ind. Cas. 452; 43 C. 660; 30 M. L. J. 529; 20 C. W. N. 522; (1916) 1 M.W. N. 332; 3 L. W. 471; 18 Bom.L.R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.) and *Kunhi Kuttiali* v. *Kunhammad*, 73 Ind. Cas. 139; 44 M. L. J. 179; (1923) A. I. R. (M.) 347, distinguished.

Appeal against the decree of the Court of the Additional Subordinate Judge, Guntur, in O. S. No. 16 of 1921.

Mr. *K. Krishnaswamy Iyengar*, for the Appellants.

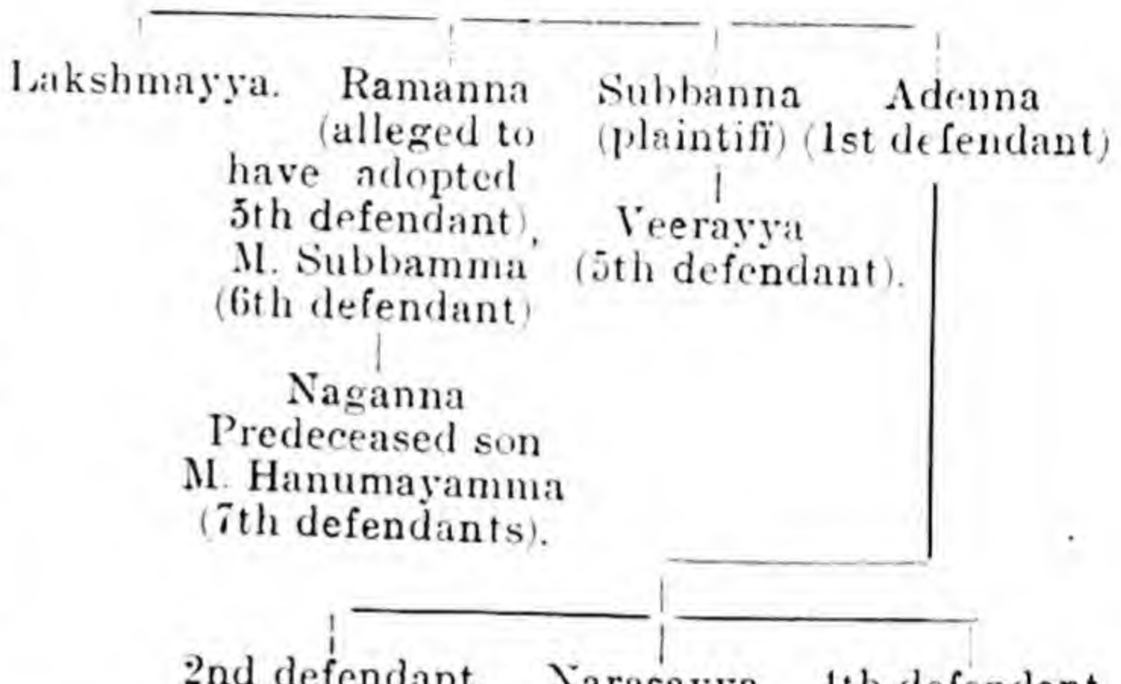
Messrs. *Ch. Raghava Rao* and *T. R. Subramania Iyer*, for the Respondents.

This appeal coming on for hearing on the 27th August 1924, the Court (Ramesam and Reilly, JJ.) delivered on the 23rd September 1924, the following

JUDGMENT.

Ramesam, J.—This appeal arises out of a suit for partition. Defendants Nos. 1, 2 and 4 are the appellants.

The relation between the parties is shown in the following pedigree :—



The parties belong to the Kamma sect of the *Sudra* caste. They belong to a village, Enamadala, in the Narasaraopet *taluk* of the Guntur District. The family is admittedly a rich family. There were originally four brothers. The eldest of them, Lakshmayya, was said to have divided himself from the family long ago. (D. W. -30 years according to Ex. XLVI). It is admitted in the plaint that the other three brothers remained undivided till 1908. The eldest of them, Ramanna, had a son, Naganna, who died in about April 1908 leaving his widow, the 7th defendant. Up to this event, the members of the family were living in the most friendly terms, according to both sides. It is said for the plaintiff that misunderstandings arose on the death of Naganna followed by that of his infant daughter. This is denied by the defendants who say that, up to Ramanna's death, the brothers continued to be on the most amicable terms. Ramanna died on 27th October 1908.

On the 13th November 1908, the village officers sent Ex. II, a *pouthi* report, in which they reported that the deceased Ramanna adopted the son of his brother Subbanna and willed away the whole of

his property to him. It also mentions that the deceased and his brothers were divided. Though the date of the Will is mentioned as 25th October 1908, neither the date of the adoption nor the date of division was mentioned. It may be observed that, if a *pattadar* dies, the village officers have to report the name of the heir of the *pattadar* so that his name may be entered in the revenue accounts. If the deceased left an adopted son, the son stands in the place of his father, whether the family is divided or undivided; there is no purpose in mentioning the division and as all the property is ancestral property, also the Will is redundant to confer title to the son and is void for any other purpose. Exhibit II was received at the Tahsildar's office on the 26th November, and on the 30th the Tahsildar passed an order that the adopted son's name should be included. There is nothing to show that notice was given to the 1st defendant before the report was sent or the order was passed. At the same time it is conceded for the 1st defendant that the adoption of Veerayya (5th defendant) was openly set up on the last day of the funeral ceremonies of the deceased (called *pedda dinam* or big day) (*vide* Ex. XXXV, deposition of 1st defendant) The 1st defendant sent a petition "10 or 15 days afterwards "(see Ex. XXXV). This petition was destroyed in the Kotappakonda riots but it must have been sent prior to 6th January 1909 (Ex. LXII, para. 8). On 2nd April 1909, the 1st defendant sent two petitions, one for himself and the other on behalf of his son Narasayya (now the 3rd defendant) (Ex. IV).

In these petitions, the 1st defendant set up that the deceased Ramanna adopted Narasayya, as a counter blast to the adoption of Veerayya reported by the village officers. The Divisional Officer to whom Ex. IV was sent, called for a report fom the Tahsildar and passed the proceedings, Ex. IV (*a*), recognizing the adoption of Veerayya. Before Ramanna's death all the four brothers filed a suit as reversioners for declaration in respect of some property of their gnatis and got a decree. While the matter was pending in appeal, Ramanna died and the appellant in the case applied for bringing, on record, Veerayya as the legal representative of the deceased (8th March 1909). This was opposed by Narasayya but the Court passed orders bringing Veerayya's name on the record, without expressing any opinion in favour of either adoption on the ground that the appellant chose him and did so at his risk. The order was dated 6th January 1910 (Ex. VI). It may be observed that the right of Ramanna as reversioner survives to his tnree brothers who are in the same degree, and not to a son. The order was unnecessary.

Narasayya immediately filed a suit, O. S. No. 38 of 1910, in the Subordinate Court of Guntur for a declaration of his adoption and partition on that footing. The present plaintiff and his son (the rival adoptee) pleaded the adoption of the latter and issues were framed with reference to both the adoptions. The rank and position of the parties in that suit and in this suit may be shown as follows:—

	O. S. No. 38 of 1910.	*Present suit.*
Narasayya ...	... *Plaintiff* ...	... *3rd defendant.*
Subbanna ...	... *1st defendant* ...	... *Plaintiff.*
Subbanna's sons { ...	... *2nd defendant* ...	... *Now dead.*
{ Veerayya ...	*3rd defendant* ...	... *5th defendant.*
Adenna ...	... *4th defendant* ...	... *1st defendant.*
Adenna's other sons	... { *5th defendant* ...	... *2nd defendant.*
	{ *6th defendant* ...	... *4th defendant.*

The Subordinate Judge who tried that suit found the adoption of Narasayya false. He also found that the Will, adoption and division set up by Subbanna and Veerayya also false. But as a result of the first finding he dismissed the suit. It may be observed that, even if Narasayya's adoption was false, he would be entitled to a share in the family property by reason of his admitted relationship as the son of Adenna, but the Subordinate Judge refused to give a decree for the smaller share (Ex. LXII, dated 11th August 1913). There was an appeal to the District Court of Guntur which was disposed of on 29th November 1919, (LXII(*a*)). The District Court agreed with the Subordinate Court as to the truth of Narasayya's adoption but also refused to grant a decree to Narasayya for the smaller share to which he was entitled. There was no second appeal to the High Court.

If the District Court was willing to grant a decree to the plaintiff for the smaller share to which the plaintiff was certainly entitled, the District Court would have had to express its findings on the truth of the division, adoption and Will set up by Veerayya and his father. In my opinion, the grounds on which the Courts then refused to grant a decree to Narasayya for such share as he was certainly entitled to are unsatisfactory. However this may be, the fact remains, and thereby the District Court was not put to the necessity of expressing findings on the division, adoption and Will relied on by Veerayya. The result is the Subordinate Judge's finding on these matters was set at large and the present litigation became necessary. This suit was filed on 19th August 1920 (O. S. No. 16 of 1921).

The plaintiff claimed a one-third share, making his son 5th defendant and alleging his adoption. If the adoption is false, he is entitled to a half share (along with his son) and naturally they would have had to sue for the half share. By the course he actually took, he was able to raise the issues relating to his son's adoption and Ramanna's division and Will and he was able to sue with a smaller Court-fee. The defendants Nos. 1 to 4 denied the division, adoption and Will, and the 5th defendant supported his father (the plaintiff). The findings on the issues in the former litigation are not *res judicata* because they were set at large by the District Court. When the suit came on for trial, the 5th defendant examined nine witnesses and the 1st defendant one witness. Of the nine witnesses examined by the 5th defendant only four (1 to 4) give evidence on the main issues. The parties agreed that the oral and documentary evidence in the former suit should be treated as evidence in this case and all the depositions and documents were exhibited in this case. Much of the documentary evidence thus consists of the old depositions and is really oral evidence. There is, of course, this difference that, while the former Subordinate Judge had an opportunity of observing the demeanour of the witnesses, the present Subordinate Judge had not, and for this reason the judgment of the present Subordinate Judge has not the weight which it is always usual to attribute to the opinion of the Trial Judge. Another circumstance in favour of the conclusion of the former Subordinate Judge is that it was expressed (in 1913) at a time much nearer to the events that happened and his opinion is entitled to some weight on this ground also. According to the observations of the Privy Council in *Midnapur Zemindari Co., Ltd.*, v. *Naresh Narayan Roy* (1), those who question his conclusion must "displace" his reasons. I do not mean to say that the judgment in O. S. No. 38 of 1910 is *res judicata* and I am not oblivious to the fact that the judgment in O. S. No. 16 of 1921 is the judgment appealed against and the appellant before us has to show that it is erroneous. But, it seems to me that he can well rely on the fact that the former Trial Judge who had the same issues and who saw the demeanour of the witnesses, came to a conclusion in his favour, and urge *his* reasons. However, this may be, we have to go into the whole case fully.

Narasayya's adoption has been found to be false and does not concern us. The points that have to be found now are (1) division, (2) Ramanna's adoption of Veerayya and (3) Ramanna's Will.

[The learned Judge then dealt with these three questions of fact and finding against the division, adoption and Will and proceeded :—]

I have no hesitation in disbelieving the Will and with it the adoption and division. It seems to me that the appreciation of the evidence by the Subordinate Judge who tried in 1913, is preferable to that of the

(1) 64 Ind. Cas. 231; 48 I. A. 49; 48 C. 460 at p. 468; 14 L. W. 265; 30 M. L. T. 279; (1922) A. I. R. (P. C.) 241 (P. C.).

present Subordinate Judge. On the 8th issue the learned Vakil for the respondents repeated the contention in the Court below which was found against them by the Subordinate Judge. The contention is opposed to the pleadings and the footing on which the whole oral evidence on both sides was adduced from 1909 to 1921 [see also *Rangasami Naidu* v. *Sundararajulu Naidu*(2) and *Kaveramma* v. *Vishnu Kunkullayya*, (3).]

The result is that the plaintiff and his son are together entitled only to a decree for half of the suit properties.

The only other point argued before us relates to the plaintiff's claim to the properties in schs. G-1 and G-2. These are debts due to the family and said not to have been accounted for by the 1st defendant. The defendants Nos. 1 to 4 plead that items Nos. 2 and 3 of G-1 were assigned to others and the amounts raised by the assignment were utilized for family purposes. The assignments are true but the evidence adduced by the defendants falls far short of what is required to prove that the proceeds were utilized for the purposes of the family. Their defence fails on the merits.

In para. 8 of the written statement, the defendants pleaded that the claim in respect of schs. G 1 and G-2 was barred by limitation. The plaintiff-respondent urges that the question of limitation is not made the subject of an issue and he will be prejudiced if it is allowed to be raised at this stage. We think that the plea was intended to be considered under the 4th issue. But to avoid any prejudice to the plaintiff, we have exhibited in appeal the plaint, the written statements in O. S. No. 38 of 1910 and the grounds of appeal and the memorandum of objections to the District Court in the appeal against the decree in that suit (Exs. LXXIV series). These are all the papers required by him.

Though, according to our finding arrived at in the earlier part in this judgment the family continued to be undivided till the death of Ramanna, hostilities began immediately afterwards. Exhibit VIII is a registered notice issued by the 5th defendant to Adenna calling on him to account for the debts and other properties (said to be left undivided) but it never reached him. In O. S. No. 38 of 1910 written statements were filed by the present plaintiff and his son in which they plead to division during the lifetime of Ramanna and that they thereafter had lived and messed separately (Ex. LXII). In my opinion, the family became divided in status by 24th August 1910, if not earlier. Exhibit LXIX is the schedule of debts filed by the present plaintiff and his sons (as defendants No. 1 to 3) in O. S. No. 38 of 1910. The items in schs. G-1 and G-2 are included in this list. Adenna denied his liability to account for these debts and the point was considered by the then Subordinate Judge under the 6th issue. More than three years having elapsed since 24th August 1910, the defendants Nos. 1 to 4 contend that the suit in respect of these items is barred by limitation. No such question arises in respect of the rest of the properties which are the subject of this suit as a Receiver was appointed in the former suit and took possession of the lands and realized debts due to the family.

The plaintiff replies that he was litigating in respect of these items *bona fide* in the former suit and the time taken by him in the former suit, namely, 24th August 1910 to 29th November 1919, must be deducted. He relies on *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (4). In that case, the plaintiffs in the later suit had asked for an adjudication of their rights in the earlier proceedings before Mr. Justice Henderson. The learned Judge passed an order in their favour, but it was set aside in appeal. The present case differs from the case just cited as the Subordinate Judge who tried the former suit (O. S. No. 38 of 1910) did not give a decree in favour of defendants Nos. 1 and 3 then (same as plaintiff and 5th defendant), nor did they ask for one, though they had no objection to a division into three shares. The High Court [*Lakhan Chunder Sen* v. *Madhusudan Sen* (5)] excluded the time between the decree of Henderson, J., and its reversal. The Privy Council affirmed the decree of the High Court. It is not clear whether they intended to apply s. 14 of the Limitation Act, or meant to agree with the conclusion of the High Court, that the case fell "within the principle laid down by the Judicial Committee in the cases of *Ranee Surnomoyee* v. *Shooshee Mokhee*

(2) 35 Ind. Cas. 52; 31 M. L. J. 472.

(3) 49 Ind. Cas. 263.

(4) 33 Ind. Cas. 452; 43 C. 660; 30 M. L. J. 529; 20 C. W. N. 522; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.).

(5) 35 C. 209; 7 C. L. J. 59; 3 M. L. T. 90; 12 C. W. N. 326.

Burmonia (6) and *Prannath Roy Chowdry* v. *Rookea Begum* (7)." It is not also clear whether the Judicial Committee would have excluded the period during which the first suit was pending before Henderson, J., if its exclusion also became necessary to save the second suit from being barred by limitation. The case of *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (4) was followed by this Court in *Kunhi Kuttiali* v. *Kunhammad* (8). In this case also the plaintiff, the manager of a mosque in the later suit claimed as 1st defendant to the earlier suit, certain sums due to him from the mosque and obtained a relief on that footing. The order was reversed on appeal. He then filed a later suit and succeeded. The present case differs from *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (4) and *Kunhi Kuttiali* v. *Kunhammad* (8) as no express claim for division was made by plaintiff and his sons in O. S. No. 38 of 1910, nor was a decree made in their favour. The appellant refers to the decision in *Muthu Korakkai Chetty* v. *Mahamad Madar Ammal* (9), but that was not a decision on s. 14 of the Limitation Act. I agree with my learned brother (to whose judgment I am indebted in this matter) in respect of sch. G-1. The claim for G-1 is barred by limitation except as to item No. 1 of sch. G-1. The Subordinate Judge gave a decree in terms that may be characterized as vindictive. The plaintiff claims the amount due in respect of the four items of sch. G-1 after calculating compound interest at 12 per cent. with rests at every three years. There is no justification either for the rate of 12 per cent. or for calculating compound interest. The ends of justice will be satisfied if the principal amounts carry interest at 6 per cent. per annum from 24th August 1910, up to the date of decree of the Court below and at 6 per cent. per annum on the aggregate amount. The plaintiff and his son (5th defendant) are entitled to a half share as to item No. 1 of sch. G-1 so calculated. The defendant's claim to the moneys in sch. 1 fails.

(6) 12 M. I. A. 244; 11 W. R. P. C. 5; 2 B. L. R. (P. C.) 10; 2 Suth. P. C. J. 173; 2 Sar. P. C. J. 424; 20 E. R. 331; 1 Ind. Dec. (N. S.) 489.

(7) 7 M. I. A. 323 at p. 357; 4 W. R. P. C. 37; 1 Suth. P. C. J. 367; 1 Sar. P. C. J. 692; 19 E. R. 331.

(8) 73 Ind. Cas. 139; 44 M. L. J. 179; (1923) A. I. R. (M.) 347.

(9) 54 Ind. Cas. 66; 43 M. 185; 26 M. L. T. 459; 38 M L. J. 1.

The decree of the Court below will be modified accordingly.

The memorandum of objections fails relating to sch. G-2. It fails and is dismissed with costs. It was not even argued on the merits.

The order of the lower Court about costs is set aside and the plaintiff and the 5th defendant will be liable to pay the costs of the defendants Nos. 1 to 4, such costs being calculated on one-sixth of the suit properties in the lower Court. In appeal the appellants will give and pay proportionate costs.

Reilly, J.—I agree that the partition, adoption and Will set up in the plaint have not been proved and that, therefore, Subbanna (plaintiff) and his son Veerayya (defendant No. 5) are together entitled to half of the family property and not each to one-third as found by the Subordinate Judge, and that the preliminary decree made by the Subordinate Judge must be modified accordingly. Regarding the claims of Subbanna and Veerayya to the items in Sch. G-1 of the plaint or to those in Sch. G-2 which are the subject of the memorandum of objections filed in this case by Subbanna, I think it is clear that in respect of all the items but one their claims are time-barred.

In O. S. No. 38 of 1910, Narasayya (the present defendant No. 3) sued for partition asserting that he had been adopted by Ramanna. By their written statements in that suit filed on 25th August 1910, Subbanna and Veerayya set up as in the present case a partition two months before Ramanna's death, the adoption of Veerayya and the Will, Ex. 1, and also alleged that Adenna (the present defendant No. 1) had been collecting family debts transferring some to other persons and getting renewals in favour of himself, his relations and others and that there were 46 items of outstandings which they specified to be brought into the hotchpot by Adenna: they stated that if that were done they had no objection to partition on the principle of one-third to Subbanna, one-third to Veerayya and one-third to Adenna; otherwise they prayed that the suit might be dismissed. On 29th November 1911, Adenna filed a list of 29 outstandings due to the family which included none of the items now in question except Item No. 1 of Sch. G-1 and in effect denied that there were any other outstandings or amounts to be accounted for by him. According to Subbanna and

Veerayya they had been tenants-in-common with Adenna from August 1908, the date of the partition set up by them, and in any case that must have been their position from the date when they put in their written statements in O. S. No. 38 of 1910. When on 29th November 1911, Adenna denied his liability in respect of all the items with which we are concerned except one, we find a "demand and refusal" from which, in accordance with *Yerukola* v. *Yerukola* (10), time would have begun to run against Subbanna and Veerayya but for the fact that O. S No. 38 of 1910 was then pending. On 11th October 1913, O. S. No. 38 of 1910 was dismissed. On Issue No. 6 the Subordinate Judge found that Adenna had to account for Items Nos. 2, 3 and 4 of the present Sch. G-1. But he dismissed the whole suit. Therefore, at least from 11th October 1913, time began to run against Subbanna and Veerayya in respect of the unadmitted items.

3. Narasayya appealed to the District Court in A. S. No. 110 of 1914 against the dismissal of O. S. No. 38 of 1910. Subbanna and Veerayya as respondents in that appeal put in a joint memorandum of objections in which they stated that the Subordinate Judge's findings against Veerayya's adoption, the partition before Ramanna's death and the Will were wrong and unnecessary and that his findings about the liabilities and outstandings of the family were not entirely correct; but they contended that the Subordinate Judge having found against Narasayya's adoption "rightly dismissed plaintiff's suit but erred in disallowing costs to them." Their cross-appeal, therefore, was only in regard to costs—as is shown also by its valuation. Adenna also put in a memorandum of objections in regard to the findings against him about the family's liabilities and outstandings; but that was superfluous as there was no decree nor appeal in respect of them. There was no dispute about these matters between Narasayya and his father Adenna, and the Subordinate Judge was convinced that it was Adenna who got the plaint in O. S. No. 38 of 1910 filed. The appeal and memorandums of objections were dismissed by the District Judge on 29th November 1919. It is contended that while A. S. No. 110 of 1914 was pending, Suhbanna and Veerayya were prosecuting their claims in respect of the unadmitted items now in question within the meaning of s. 14 of the Limitation Act. I do not think they were doing anything of the sort. They were resisting Narasayya's claim to one-third of the family property on the ground of his adoption and they were prosecuting their own claim for costs. In regard to the unadmitted items in dispute between them and Adenna, they had got no decree and they did not pray for one on appeal. They did not even pray for the partition decree to which they were entitled. So far as those proceedings were concerned, they were content, if they got their costs, to leave matters as they were left by the Subordinate Judge's decree dismissing O. S. No. 38 of 1910. They now rely on the judgment of the Privy Council in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (4), as showing that time did not run against them while A. S. No. 110 of 1911, was pending. What happened in the litigation which led to that decision in effect was that *C* sued *B* in ejectment for possession of a share of certain property making *M* also a defendant: *M* supported *C* and also claimed for himself a share of the property an executable decree for possession was made in favour of *C* for his share and in favour of *M* for his share: on appeal the decree, so far as it was in favour of *M*, was reversed on the ground that no such decree could be made in favour of *M* as a defendant in an ejectment suit: *M* then instituted another suit for partition and recovery of his share; unless he could exclude the period from the date of the previous decree in his favour to its reversal on appeal, his suit was out of time and the Trial Judge found that he could not exclude it and that his suit was barred; on appeal from that decision it was decided by the High Court that *M*'s right of action was suspended while the decree in his favour was in force and, therefore, that his suit was in time though it was remarked that it was very doubtful whether the case came within s. 14 of the Limitation Act; their Lordships of the Privy Council on further appeal approved of the appellate decision of the High Court, but expressed no opinion whether the case came within s. 14 of the Limitation Act or not. They said limitation would "without doubt remain in suspense whilst the plaintiffs were *bona fide* litigating for their rights in a Court of

(10) 71 Ind. Cas. 177; 45 M. 648; (1922) M. W. N. 215; 30 M. L. T. 279; 42 M. L. J. 507; 15 L. W. 595; (1922) A. I. R. (M.) 150.

Justice" and they also remarked that the original decree made in favour of *M* was "an effective decree made by a competent Court and was capable of being enforced until set aside." If their Lordships were not of opinion that the case came within s. 14 of the Limitation Act, it is difficult to see under what provision or principle of law applicable to this country they acted. For myself I see no difficulty in bringing the case within s. 14 of the Act. But assuming for the moment that that case was decided on some principle independent of the Limitation Act how does it help Subbanna and Veerayya to exclude the period during which A. S. No. 110 of 1914 was pending? During that time they certainly had no effective decree in their favour. Nor can it be said that they were "*bona fide* litigating for their rights" in respect of the claims now in question. On the contrary they acquiesced in the dismissal of O. S. No. 38 of 1910 and did not ask that anything further should be done in respect of these claims. Moreover, in the litigation ending in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (4), while the original decree in favour of *M* stood he could not have taken any other proceedings for the same relief. But once O. S. No. 38 of 1910 had been dismissed there was nothing at all to prevent Subbanna and Veerayya or either of them suing for their shares in the items now in question. In my opinion it is clear that while A. S. No. 110 of 1914 was pending they were not prosecuting their claims in respect of these items within the meaning of s. 14 of the Limitation Act. If their Lordships of the Privy Council intended in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (4) to apply any principle outside the scope of that section—and they neither say so nor to my mind is it necessary so to interpret their judgment—the position and conduct of the party in whose favour they applied it were so different from those of Subbanna and Veerayya that the decision is of no assistance to them. Their Lordships do not lay down in that decision that limitation is suspended in respect of a plaintiff's claim for the period during which he is engaged in litigation about some connected matter and nothing less would save the claims of Subbanna and Veerayya in respect of the items now in question.

Another case has been referred to, *viz.*, *Kunhikuthali* v. *Kunhammad* (8). In the litigation out of which that case arose two out of six *karnavans* or trustees of a mosque in North Malabar instituted a suit, O. S. No. 579 of 1910, in the District Munif's Court praying that Kunhammad who had been kariasthan or manager of the mosque might be restrained by an injunction from interfering with the affairs of the mosque, that a Receiver might be appointed and that Rs. 1,000 or the amount found due from him by the Court might be recovered from Kuhammad. They made Kunhammad defendant No. 1 in the suit and impleaded the other four *karnavans* also as defendants. The injunction appears to have been made, and a Receiver was appointed. On an issue framed as to whether Kunhammad owed money to the mosque or the mosque to Kunhammad the District Munsif found that, as Kunhammad contended in his written statement, over Rs. 3,000 was due to him. This amount the Receiver was directed to pay to him, and towards it the Receiver actually paid Rs. 1,500. Against the District Munsif's decree two appeals were filed. It has been suggested that Kunhammad himself filed one of the appeals; but from the printed papers in *Kunhi Kutiali* v. *Kunhammad* (8), to which I have referred, it does not appear who the appellants were. At any rate it is clear that Kunhammad did not appeal against the District Munsif's decree so far as it declared that money was due to him, and directed the Receiver to pay it. On the contrary, as appears from the judgment of the learned Chief Justice and Wallace, J., he was prosecuting his claim to the money diligently in the appellate proceedings—that is, he was defending the decree which he had obtained, from attack. But the result of the appeals was that O. S. No. 579 of 1910, was dismissed on the ground that two of the *karnavans* alone could not maintain that suit. Kuhammad then instituted a suit for the balance of the sum already found by the District Munsif to be due to him, giving credit for the amount which had been paid to him by the Receiver. This suit was out of time unless the period occupied by O. S. No. 579 of 1910, and the appeals from it could be excluded. The learned Chief Justice and Wallace, J., decided that the whole of that period could be excluded under s. 14 of the Limitation Act because Kunhammad, though a defendant in O. S. No. 579 of 1910, had been prosecuting his claim to the money in question with due diligence and in good

faith in that litigation. I think that when the facts of that case are examined it becomes quite clear that it does not help Subbanna and Veerayya in the present case. They had got no decree in their favour in O. S. No. 38 of 1910, and they asked for none on appeal in respect of the items now in question. On the contrary they acquiesced in the dismissal of O. S. No. 38 of 1910, and were content to let their claims to the items now in question drop. That having been the attitude they chose to take up with regard to these items, it appears to me impossible to find that they can now successfully contend that time ceased to run against them while A. S. No. 110 of 1914, was pending merely because they were parties to that appeal and it concerned some other matters connected with their family and with the proposed partition with which they did not wish then to proceed. I find that while A. S. No. 110 of 1914 was pending, Subbanna and Veerayya were not prosecuting any claims in respect of the items now in question, that time ran against them continuously from 11th October 1913 and that when the present suit was instituted on 19th August 1920, their claims to share in these items were barred.

In regard to Item No. 1 of Sch. G-1, I agree with the order proposed by my learned brother. In respect of the other items in Sch. G-1 the appeal must, in my opinion, be allowed; and the memorandum of objections in respect of the items in Sch. G-2 must be dismissed.

I agree also with my learned brother in regard to costs.

This appeal having been posted to be spoken to this day, the Court (Ramesam and Venkatasubba Rao, JJ.) added the following to the above

JUDGMENT.—The 6th and 7th defendants will get the rates of maintenance decreed to them in the Court below from the 1st and 5th defendants who will be liable in equal moieties. The room allotted to them in para. 20 of the lower Court's judgment will remain allotted for their residence. But it is not to be understood that the new house fell to the share of Ramanna as the partition has been disbelieved.

Decree modified.

V. N. V.
N. H.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 349 AND 350 OF 1924.

October 15, 1925.

Present:—Mr. Neave, A. J. C.

BHAGWAT PRASHAD—DEFENDANT—APPELLANT

versus

ZAFAR MOHAMMAD—PLAINTIFFS
SITA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Document, execution of—Execution by agent—Authority, proof of—Recital in document—Power-of-attorney to present for registration—Presumption.

The special power-of-attorney required under the Registration Act is merely a power to present a document for registration and has nothing to do with the authority of the agent to execute a document on behalf of the principal. [p. 211, col. 1.]

Recital in the document itself that the executant holds a power-of-attorney to execute it, or the Sub-Registrar's endorsement that a special power-of-attorney to present had been produced, is not sufficient to raise a presumption that the executant had the authority he claimed. [*ibid.*]

Ramchandra Das v. *Farzand Ali Khan*, 13 Ind. Cas. 531; 34 A. 253; 9 A. L. J. 188 and *Chhotey Lal* v. *Collector of Moradabad*, 69 Ind. Cas. 44; 44 A. 514; (1922) A. I. R. (P. C.) 279; 31 M. L. T. 284; 27 C. W. N. 437; 21 A. L. J. 361; 37 C. L. J. 377; 9 O. & A. L. R. 450; 25 Bom. L. R. 655; 18 L. W. 124; (1923) M. W. N. 873; 49 I. A. 375 (P. C.), referred to.

Appeal from a decree of the First Additional Subordinate Judge, Gonda, in C. A. No. 4 of 1924, dated the 28th April 1924, confirming that of the Munsif, Utraula, in Suit No. 1010 of 1922, dated the 30th January 1923.

Mr. *M. Wasim*, for the Appellant.

Mr. *Mohammad Beg*, for the Respondents.

JUDGMENT.—This is one of two appeals which arise out of suits for possession of a 1-anna share.

One Karim Dad owned a 2-annas share in the village and his sons Ram Bahadur and Zafar Mohammad each owned a 1-anna share, the family being thus proprietors between them of 4-annas. On the 30th of November 1898, Karim Dad, on his own behalf and as guardian of his minor son Zafar Mohammad, joined with his other son Ram Bahadur in executing a usufructuary mortgage of the whole 4-annas share in favour of Harcharan and Dalthanman for Rs. 1,800. This mortgage-deed has been marked as Ex. 1.

On the 17th March 1900 Ram Bahadur executed another mortgage-deed in respect of this 4-annas share in favour of Ramcharan. This mortgage too was with possession. The consideration was Rs. 2,700

of which Rs. 1,800 was left for payment to the previous mortgagees. Ram Bahadur purported to act in executing it both on his own behalf and as agent for his father and Zafar Mohammad under a power-of-attorney. This mortgage-deed has been marked Ex. A-1. Both the Courts below have found that the mortgagee Ramcharan actually paid Rs. 1,800 due to the previous mortgagees thus redeeming their mortgage

On the 14th of August 1900 Karim Dad and Ram Bahadur executed another mortgage-deed, the former acting on his own behalf and as guardians of his minor son Zafar Mohammad. This, like the last, was in favour of Ramcharan and is described as a deed of further charge in respect of the mortgage of the 30th of November 1898 (Ex. I). This deed has been marked as Ex. A-2.

On the 17th December 1890 Ram Bahadur purporting to act on his own behalf and as agent for his father executed another deed of further charge for a sum of Rs. 500. This deed has been marked as Ex. A-3.

On the 2nd of September 1907, Karim Dad hypothecated 1-anna out of his own 2-annas share to Jiao Kurmi the grandfather of the appellant for Rs. 1,432 Jiao afterwards brought a suit on foot of this mortgage and obtained a decree. The 1-anna share was sold at auction and purchased by Jiao on the 20th September 1913. Thus 1-anna out of the 4-annas belonging to the family has passed to Jiao.

Partition was effected between Jiao and Ramcharan under which the mortgagee rights under Exs. A-1, A-2 and A-3 were allotted to Jiao.

On the 7th of February 1916, Karim Dad made a gift of his remaining 1-anna share to his wife *Musammat* Waziran.

Two suits out of which these appeals arise were filed, one by Waziran, and the other by Zafar Mohammad, for possession of 1-anna each against the mortgagees. Waziran relied on the gift which gave her a right to redeem. She alleged that the deed of 30th of November 1898 had been paid up, and, describing the defendants as trespassers, sued for possession. In the alternative he prayed that if anything should be found due on the deed she should be held liable to pay only 1/4th of Rs. 1,800 or Rs. 450. She denied that she was bound by either Exs. A-1, A-2 or A-3.

The case on behalf of Zafar Mohammad was similar and similar defences were put forward by the defendants in each. One plea taken that the integrity of the mortgage had not been broken has been expressly left alone by the learned Counsel for the appellant in arguing this appeal.

The main point taken in defence and pressed here is that the plaintiffs are bound by Ex. A-1 and the two later deeds.

The Trial Court held that the mortgage of 1898 (Ex. I) had been redeemed by Ramcharan and that the present appellant Bhagwati holds the property as mortgagee in virtue of his redemption of Harcharan's mortgage. It also held that the plaintiffs were not bound by Exs. A-1, A-2 and A-3 and passed a decree for possession on payment of Rs. 450 in each case.

The appellant appealed to the Subordinate Judge who upheld the findings of the first Court with the exception that he found that Ex. A-2 was binding on *Musammat* Waziran who was accordingly liable to pay Rs. 150 in addition to the Rs. 450 already decreed against her: this representing her share of liability under the deed. The claim made by the appellants for interest under Ex A-2 was, however, disallowed on the ground that this had not been claimed in the memorandum of appeal and no Court-fee had been paid in respect of it.

The main ground on which the Courts below found that the plaintiffs were not bound by Ex. A-1 was that though under it Ram Bahadur purported to act as agent for his father there was no proof that he had authority to do so. The power-of-attorney has not been produced. The learned Counsel for the appellant contends that the existence of such a power-of-attorney can be presumed from the internal evidence of Ex. A-1 itself and from the Sub-Registrar's endorsement on it. He cites *Ramchandra Das* v. *Farzand Ali Khan* (1) and *Chhotey Lal* v. *Collector of Moradabad* (2), where it was held that the endorsement by a Sub-Registrar on a document was *prima facie* evidence that the power-of-attorney under which it was presented was regular in all respects. What, however, the learned Counsel is seeking to establish is a good

(1) 13 Ind. Cas. 531; 34 A. 253; 9 A. L. J. 188.

(2) 69 Ind. Cas. 44; 44 A. 514; (1922) A. I. R. (P. C.) 279; 31 M. L. T. 284; 27 C. W. N. 437; 21 A. L. J. 361; 37 C. L. J. 377; 9 O. & A. L. R. 450; 25 Bom. L. R. 655; 18 L. W. 124; (1923) M. W. N. 873; 49 I. A. 375 (P. C.).

deal more than this. The special power-of-attorney required under the Registration Act is merely a power to present a document for registration and has nothing to do with the authority of the executant to execute it. It cannot be said that either the recital in the document itself that the executant holds a power-of-attorney or the Sub-Registrar's endorsement that a special power-of-attorney to present had been produced is sufficient to raise a presumption that the executant had the authority he claimed.

Another argument employed is that Karim Dad by executing Ex. A-2 by implication accepted and acknowledged the validity of Ex. A-1. As had, however, been mentioned, Ex. A-2 does not refer to Ex. A-1 but only to Ex. 1. The learned Counsel for the appellant maintains that this is a mistake. The definiteness of the language employed, however, in referring to Ex. 1 makes it extremely difficult to believe this and I am of opinion that no mistake was made. It is true that the mortgage under Ex. 1 has been found to have been redeemed by the mortgagee whose title was created by Ex. A-1 and it is argued that it was only by virtue of the rights conferred on him by that deed that he was able to redeem the earlier mortgage. The conclusion which it is sought to draw from this that the plaintiffs are bound by Ex. A-1 does not necessarily follow. The fact that Ex. A-1 has been ignored in Ex. A-2, which apparently deliberately passes it over in going back to Ex. 1, would seem to show that Karim Dad did not recognize the validity of Ex. A-1, but still held himself and his sons liable for the money due to the mortgagees under Ex. 1. I concur with the Court below in holding that Ramcharan was not the subsequent mortgagee of Karim Dad or Zafar Mohammad. It has been argued that the language of Ex. A-2 shows that it is a deed of further charge containing a covenant that the mortgagor shall not be permitted to redeem the later deed without redeeming the earlier one and that this has the effect of consolidating the two deeds. The learned Subordinate Judge has quoted the relevant portion of the deed at length. I agree with him that this contention is well-founded and that *Musammat* Waziran who claims through Karim Dad is bound by Ex. A-2. As, however, there is no evidence to show that the transaction was for the benefit of Zafar Mohammad, who was a minor at the time he is not bound by it.

In executing Ex. A-3 Ram Bahadur did not purport to be acting on the minor's behalf and he is not bound by it.

The claim for interest clearly cannot be supported. It was not asked for in the memorandum of appeal to the lower Court and no Court-fee was paid on the amount claimed as interest.

The cross-objection on behalf of *Musammat* Waziran that she is not liable under Ex. A-2 has already been dealt with.

The appeals and the cross-objection are both dismissed with costs.

N. H. *Appeals dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 35 OF 1925.

May 27, 1925.

Present:—Mr. Justice Adami and Mr. Justice Kulwant Sahay.

GOBIND PRASAD—DECREE-HOLDER—APPELLANT

versus

HRIDAY THAKUR AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 11—Execution of decree—Application presented by Pleader retained in suit, validity of.

Proceedings in execution of a decree are proceedings in continuation of the suit and a fresh authority is not required for a Pleader to appear, act and plead on behalf of the decree-holder in execution proceedings if he was so authorized by a *vakalatnama* in the suit itself. An application for execution filed by such a Pleader on behalf of the decree-holder is a good application in law and can be entertained. [p. 212, col. 2.]

Appeal against an order of the District Judge, Darbhanga, dated the 13th November 1924, reversing that of the Munsif, Second Court, Samastipur, dated the 12th July 1924.

Messrs. *Rai T. N. Sahai* and *Mahesh Ch. Dutt*, for the Appellant.

Mr. *Janak Kishore*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal on behalf of one Gobind Prasad who was the holder of a decree against the respondents. An application for execution was filed on his behalf which was signed and verified by his son Bhola Prasad and

presented by his Pleader who was duly appointed under a *vakalatnama* by Gobind Prasad to appear for him in the original suit. The judgment-debtors objected to the execution on two grounds: first, that Bhola Prasad, the son, had no right and authority to sign and verify the application for execution and that one of the judgment-debtors Daro Thakur was a minor and he had been wrongly described in the application as an adult. The learned Munsif disallowed the objection; but on appeal the learned District Judge has set aside the order of the Munsif and has allowed the objection of the judgment-debtors and ordered the execution to be dismissed.

Against this order the present second appeal has been filed in this Court.

The circumstances under which the objection as regards the authority of the son, Bhola Prasad, to sign and verify the application for execution was raised are these :—

The decree-holder Gobind Prasad was an old man. On the 27th May 1922 he was coming from Barh to Patna in a train, he was seen at Barh getting into the train but since then he has not been heard of and has disappeared. There is no evidence as to whether he is still alive or dead. The objection of the judgment-debtors is that as it is not proved that Gobind Prasad is dead it must be presumed that he is still alive; and as he is still alive his son Bhola Prasad who holds no authority from him and is not a recognized agent with any power-of-attorney from Gobind Prasad has no authority to sign and verify the application for execution which under the provisions of O. XXI, r. 11 (2) has to be signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

The learned Munsif held that the son, Bhola Prasad, was authorized to verify the execution petition under O. XXI, r. 11; that the *vakalatnama* showed that the decree-holder Gobind Prasad had authorized his Pleaders Babu Abinash Chandra Nandi and Babu Bishun Chandra Sen to execute the decree; and that the said Pleaders had taken steps to execute the decree by filing the application for execution. He accordingly held that the application filed by the Pleaders and signed and verified by Bhola Prasad could legally be entertained.

The learned District Judge, however, has held that although Bhola Prasad might have authority to verify the application under O. XXI, r. 11, yet under the provisions of the said rule he was not authorised to sign the application. He further held that the Pleader could not sign and present the application without being instructed by the decree-holder to do so. He has accordingly held that the application for execution could not be entertained under the law. In this view of the case he rejected the application for execution without deciding the other question as regards the minority of one of the judgment-debtors which had been decided in favour of the decree-holder by the Munsif.

Now, as regards the proper presentation of the application the law requires that the application for execution of the decree should be in writing signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. There can be no doubt that the son Bhola Prasad, if he was proved to the satisfaction of the Court to be acquainted with the facts of the case, would be authorised to verify the application. It has, however, been contended that he was not authorised to sign the application under the provisions of O. XXI, r. 11 (2). This question is not free from difficulty ; but, in my opinion, in the present case it is not necessary to decide as to whether an application for execution can be signed by any other person proved to the satisfaction of the Court to be acquainted with the facts of the case although such person may have no authority from the decree-holder to sign it. I am of opinion that the Pleaders who were authorised by their *vakalatnama* filed in the suit to take out execution were authorised to present the application for execution without any fresh authority or instructions from the decree-holder himself. Proceedings in execution are proceedings in continuation of the suit and a fresh authority is not required for a Pleader to appear, act and plead on behalf of the decree-holder in the execution proceedings if he was so authorised by a *vakalatnama* in the suit itself. This view has been taken in a number of cases, and I may only refer to the observation of Mookerjee and Carnduff, JJ., in *Raghubar Dayal Sukul* v. *Jadunandan Missir* (1).

In the case in which the present decree-

(1) 13 Ind. Cas. 365; 16 C. W. N. 736; 15 C. L. J. 89.

holder Gobind Prasad was the decree-holder a similar question arose and a Division Bench of this Court held that the application for execution filed by the Pleader on behalf of Gobind and verified by his son could be entertained in law [see *Gobind Prasad* v. *Jagdip Sahay* (2)]. I am in agreement with the observations of the learned Judges made in that case and as the question raised in this case is exactly similar to that raised in the above case I would decide it in the same manner as that case was decided.

I, therefore, hold that the application for execution in the present case could be entertained by the Court below. The order of the District Judge dismissing the execution is, therefore, set aside. The learned District Judge, however, did not decide the objection of the judgment-debtors as regards the minority of Daro Thakur. He will proceed to decide that objection and dispose of the case according to law. Under the peculiar circumstances of the case there will be no order as to costs in the present appeal.

Adami, J.—I agree.

Z. K. *Order set aside.*

(2) 86 Ind. Cas. 358; (1925) Pat. 57; 3 Pat. L. R. 43; (1925) A. I. R. (Pat.) 339; 4 Pat. 378; 6 P. L. T. 547.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No 1543 OF 19 3.

January 23, 1924.

Present :—Mr. Justice Moti Sagar.

NANAK CHAND AND OTHERS—APPELLANTS

versus

Musammat JAMNA DEVI—DECREE-HOLDER AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104, O. XXI, r. 92—Execution of decree—Sale, confirmation of—Appeal, second, whether lies.

No second appeal lies against an order of an Appellate Court confirming an execution sale or refusing to set it aside under O. XXI, r. 92 of the C. P. C.

Miscellaneous second appeal from an order of the District Judge, Hoshiarpur, dated the 20th March 1923.

Mr. *N. C. Pandit*, for the Appellants.

Lala *Rup Ram* for Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—This is a second appeal rom an order passed by the District Judge, Hoshiarpur, confirming an order passed by the Court of first instance, refusing to set aside a sale in executing a decree.

A preliminary objection is taken that no second appeal lies against an order of an Appellate Court, confirming a sale or refusing to set aside a sale under O. XXI, r. 92 of the C. P. C. and *Nana Kumar Roy* v. *Golam Chunder Dey* (1) and *Tung Nath* v. *Kandhaiya Lal* (2) are relied on in support of this contention. This contention, in my opinion, is well-founded and must prevail. The order is one which falls within the category indicated by cl. (1) of s. 104, sub-s. (1) of the C. P. C. and sub-cl. (2) of this section clearly forbids a second appeal from an order passed on appeal under this section. The preliminary objection prevails and the appeal is accordingly dismissed with costs.

I am not prepared to accede to the prayer that this Court should interfere on the revision side, in view of the fact that the objections now urged as to the sale being invalid under O. XXI, r. 90, C. P. C., were never taken in the grounds of appeal to the lower Appellate Court.

Z. K. *Appeal dismissed.*

(1) 18 C. 422; 9 Ind. Dec. (N. S.) 282.
(2) 41 Ind. Cas. 121; 4 O. L. J. 372.

PATNA HIGH COURT.

CIVIL REVISION No. 173 OF 1924.

November 4, 1924.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Kulwant Sahay.

ADIT PRASAD SINGH—PLAINTIFF—PETITIONER

versus

RAMHARAKH AHIR—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 148, 149, 151, O. VII, r. 11, O. XLVII, r. 1—Order directing payment of deficit Court-fees—Money paid by plaintiff to Pleader's clerk—Failure of clerk to pay Court-fees—Rejection of plaint—Inherent power of Court to restore suit.

Plaintiff was directed to make up the deficiency in Court-fees payable on his plaint within a certain time. He paid the amount representing his deficiency in the Court-fees to his Pleader's clerk for the purchase of the necessary stamps, but the clerk misappropriated the money and failed to pay it into Court. The plaint was eventually rejected for failure of the plaintiff to make up the deficiency in the Court-fees :

Held, that on the true facts being brought to the notice of the Court the Court had inherent power to

set aside its order rejecting the plaint and to restore the case to its original file. [p. 215, col. 2.]

Appeal against an order of the Subordinate Judge, Shahabad, dated the 30th January 1924.

Messrs. *S. P. Varma* and *Sambhu Saran*, for the Petitioner.

Mr. *Dhanindra Nath Varma*, for the Opposite Party.

JUDGMENT.

Jwala Prasad, J.—We have heard both parties. The case appears to be a very serious one involving a serious misdemeanour and misbehaviour on the part of a clerk of a Pleader in the Subordinate Court of Shahbad.

The Pleader's evidence clearly establishes the plaintiff's case that the deficit Court-fee demanded by the Court was paid by the plaintiff to the Pleader who handed it to his clerk to put in Court. The clerk misappropriated the money and filed bogus applications for time to pay the deficit Court-fee with the result that the Court being tired of such applications, ultimately rejected the plaint; the plaintiff coming to know of the result of the suit and the deceitful conduct of the clerk filed an application in Court for revocation of the order rejecting the plaint and for restoration of the suit to its original file.

The Court below seems to have treated this case as a very simple case of default on the part of the plaintiff, holding that the laches on the part of the Pleader's clerk amount to his own laches and that so far as this case is concerned, he is out of Court. I fail to appreciate the contention of the Court below. I am also surprised at the simplicity exhibited by the Court in dealing with such a serious case as an ordinary case of review leaving the aggrieved party to seek his remedy by a suit for compensation against the Pleader's clerk who, perhaps, is a pauper or has absconded. The result of the order of the Court below is to leave the plaintiff practically without any remedy. The Court below has tried to discuss the several provisions in the C. P. C. bearing on the subject and one by one it has disposed of them by holding that the plaintiff's application does not come under any of them.

It seems to me that the case is of such a flagrant nature that it is impossible to conceive that the Code would leave the case without providing any remedy. If the Court below has failed to find out the pertinent provision in the Code, it must have struck him that the Code is defective; but I cannot impute that lack of knowledge or experience on the part of the Legislature and I am fully convinced that the case comes under the purview of the Code. The sections relevant to the point are 148, 149, 151, O. XLVII, r. 1, read with s. 114, and the Chapter relating to appeals from decrees.

The aforesaid provisions of the Code often overlap each other and, therefore, present sometimes difficulty in applying them to the facts of a particular case. The order rejecting a plaint amounts to a decree under the definition of the term in s. 2 of the C. P. C. If the order in question is a decree, it is appealable, and one is apt to ask the question why the plaintiff did not appeal treating the order as a decree. If the question is asked one would find it difficult to answer. Admittedly the plaint was insufficiently stamped and the deficiency had to be made up. Admittedly the deficit Court-fee was not paid within the time fixed by the Court, and in such circumstances the imperative provision in O. VII, r. 11 must apply and the plaint must be rejected. Present this case before a Court of Appeal, and the only order which the party could expect is an order of dismissal. Knowing this why would the plaintiff go to the Appellate Court? His case is that the Court acted fully within the powers vested in it but that the Pleader's clerk who is an officer of the Court, behind the back of the Court and that of the party, acted in a deceitful and dishonest manner and he withheld the payment of the money handed over to him in time to be deposited in Court. The only thing that will strike the plaintiff in such a position is to represent the matter to the Court itself which passed the decree. Therefore, although the order may be technically appealable, it is not practically appealable. Now, how to approach the Court? Ask the Court to review its order under O. XLVII, r. 1, or under the inherent powers of the Court, contained in ss. 148 to 151 referred to above. Then the difficulty arises in finding out proper and sufficient grounds for a petition under O. XLVII, r 1, and, therefore, the legal advisers of the party described the application under the provisions which are supposed to vest the Court with large and unlimited powers. This is the reason for putting the applica-

tion under s. 151. It is not the party which has put it but the legal adviser of the party. Therefore, we have to look to the substance of the petition and the petition discloses the circumstances under which the order rejecting the plaint was passed and the reason for asking the Court to exercise its powers to grant a relief to the plaintiff. It has been pointed out in several cases that the powers vested in s. 151 are indefinite, undetermined, unlimited and large, and it is difficult to define and describe such powers. The circumstances of each case will show whether s. 151 should or should not apply. There are also authorities which in some way limit the scope of s. 151, when there is some other provision in the Code which would give relief to the deserving party. Upon this ground it is often urged that when there is a provision for review and when the case can come under O. XLVII, r. 1, or can be taken in appeal, s. 151 should not apply. I myself would be loath to exercise the power under s. 151 when a party can come under any other provision of the Code. If the Statute says that a thing should not be done, it should not be done, but when and where there is doubt and difficulty in applying the other provisions of the Code to the facts of a particular case, I do not know why s. 151 should not apply. It is in these circumstances that where there is a doubt or dispute as regards there being any other provision in the Code, s. 151 should be invoked. Personally I would apply s. 151 to the facts of the present case although technically speaking, the order rejecting the plaint is a decree. It is possible that O. XLVII, r. 1 also applies to the case. The section clearly gives an option to the party to elect to appeal or apply for review. In this case the party did not appeal but applied for review of judgment.

The plaintiff asks for permission to deposit the deficit Court-fee. Virtually, therefore, the plaintiff asked for extending the time to pay the Court-fee. The Court has power to extend the time to deposit the Court-fee, even though the time originally fixed has expired under ss. 148 and 149.

The only difficulty created is by the final order rejecting the plaint. If that order had not been passed, there certainly would have been no difficulty. In the circumstances I would not let that formal order stand in the way of giving relief to the plaintiff. The Court below held that O. XLVII, r. 1 does not apply and upon that view did not demand that the plaintiff should pay the deficit Court-fee for review. The Subordinate Judge treated this case as one not coming under the review section of the Code. Therefore, there was no fault of the plaintiff if the Court-fee for review was not paid.

In the case of *Rameshwar Mahton* v. *Dwarka Prasad* (1), where a Court wrongly treated an application under O. XLVII, r. 1, as one under s. 151, and set aside an order of dismissal of a suit under its inherent powers, Das and Ross, JJ., held that the order of the Court below was not vitiated by the aforesaid irregularity. The observation in that case to some extent applies in the present case. Therefore, I would hold that the plaintiff was not out of Court and he was fully entitled to ask the Court below to set aside its decree and to restore the case to its original file whether the application be deemed as one under ss. 151, 149, 148 and 147 or under O. XLVII, r. 1.

The question is whether the plaintiff was entitled on the merits to have the decree set aside. The circumstances stated will clearly show that this point need not be laboured hard, for the plaintiff did pay the Court-fee to the properly constituted agent who also is an officer of the Court and upon that payment the plaintiff was entitled to be saved from any further harassment due to non-payment of the Court-fee.

I would, therefore, allow this application, vacate the order rejecting the plaint and restore the case to its original file.

The opposite party is represented by a learned Vakil of this Court whom I have heard on all the points concerned, and I do not think that the case should be delayed in any way by formally asking the opposite party to show cause why the order of the Court below should not be vacated. The case rests entirely upon the unimpeachable evidence of the Pleader, Babu Harnandan Prasad, whose clerk, Babu Badri Prasad, withheld the money paid by the plaintiff to be deposited in Court and misappropriated the same. The said Pleader proves that the money was actually paid by the plaintiff and that the clerk was entrusted with the work of depositing it in Court, but that he misappro-

(1) 84 Ind. Cas. 320; 3 Pat. 778; (1925) A. I. R. (Pat.) 36; 6 P. L. T. 309.

priated it and on false pretext took adjournment after adjournment, and the case was ultimately dismissed for non-payment of the Court fee. The plaintiff all along believed that the money was actually deposited in Court. After having paid the money to the duly constituted agent and an officer of the Court under the Legal Practitioners Act and the rules of the High Court, whose duty it was to deposit in the Court, the responsibility of the plaintiff ceased until he was informed of the default made by the Pleader or his clerk. It is no solace to the plaintiff that he can proceed against the Pleader's clerk in the Civil or Criminal Court. The case was dismissed on account of certain circumstances over which he had no control and for no fault of his. The order of dismissal is set aside and the suit will be restored to its original number on the plaintiff paying the deficit Court-fee within three weeks of the notice of this order given to him by the Court below.

The case, however, should not rest here. An investigation into the conduct of Babu Badri Prasad is necessary.

Let notice issue upon Badri Prasad, clerk of Babu Harnandan Prasad, Pleader, Arrah, to show cause why he should not be properly dealt with for having committed the offences of cheating and misappropriation and for misconduct as a Pleader's clerk in connection with the deposit of the deficit Court-fee in Rent Suit No. 2 of 1923.

Kulwant Sahay, J.—I agree.

Z. K. *Application allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 2 OF 1925.

June 22, 1925.

Present :—Mr. Finlay, Officiating J. C.

ATMARAM—APPLICANT

versus

BHAGWAT—NON-APPLICANT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 29 (b)—Suit by partner to recover his share of assets of partnership, nature of—Jurisdiction of Small Cause Court—Interpretation of Statutes—Retrospective operation.

A suit by a partner to recover from another partner his share of the partnership assets falls within the purview of Art. 29 (*b*) of Sch. II to the Provincial Small Cause Courts Act and is not, therefore, cognizable by a Court of Small Causes. [p. 216, col. 2.]

Vested rights previously acquired cannot be taken away by subsequent legislation unless the latter is expressly retrospective. [p. 217, col. 1]

Application for revision of a decree of the Small Court Court, Gonda, dated the 31st October 1924.

Mr. *M. R. Bobde*, for the Applicant.

Mr. *D. T. Mangalmurti*, for the Non-Applicant.

ORDER.—The non-applicants (plaintiffs) sued the defendants (applicants) in the lower Court for their share of one year's produce (1922-23) of *lac* of certain *palas* trees in their holding, and the lower Court gave a decree for Rs. 19-9-0 being the balance of half the price for which the *lac* was sold. The Small Cause Court Judge held that under s. 96 of the new Tenancy Act the tenant got full rights over the *lac* and that defendants could not fall back on the seven years' deed of agreement dated 14th November 1919 (Ex. D-2).

In the first place; objection has been raised by the applicants to the trial of the suit by the Small Cause Court, the objection put forward being that the present suit falls under Art. 29 (*b*) or (*c*) of the Second Schedule to the Provincial Small Cause Courts Act. It is apparent from the endorsement on the plaint that the suit had originally been filed in the regular Civil Court and was returned, but the reasons why the regular Civil Court did not take up the suit are not available at present.

On the side of the non-applicant it has been suggested that no objection to jurisdiction was taken in the lower Court: *cf.*, *Kamruddin* v. *Indrani* (1). That case was entirely different, it being one in which a suit cognizable by the Small Cause Court was tried to its end in the regular Civil Court. Here the Judge of the lower Court was bound to consider whether or not he had jurisdiction to try the suit. This question again depends on the construction to be put on deed of agreement (Ex. D-2). It is, therefore, necessary for the Judge of the lower Court to decide whether the arrangement in question constitutes a partnership or not. If it does, the case falls under Art. 29 (*b*) of the aforesaid Act and was not cognizable by the Court of Small Causes.

The reasoning of the Judge of the Small Cause Court is not very easy to follow. The language of his judgment suggests

(1) 75 Ind. Cas. 769; 19 N. L R. 179; (1924) A. I. R (N.) 171.

that (Ex. D-2) must be ignored. On the other hand, in this Court the second ground relating to the alleged validity of *krarnama* (Ex. D-1) was not pressed. If Exs. D-1 and 2 are to be left out of account, the judgment is inconsistent and it is difficult to understand how the plaintiffs could have any claim at all. Clearly also the Judge of the lower Court has failed properly to interpret the significance of Ex. D-2 when read with s. 96 of the Tenancy Act of 1920. This latter provision expressly excepts only oral contracts and I know of no authority for the view that if Ex. D-2 be a binding and legal contract, it is superseded by s. 96, for in the present case we have presumably a written and not an oral contract. Vested rights previously acquired cannot be taken away by subsequent legislation unless the latter is expressly retrospective: *cf.*, *Hindusingh* v. *Mangal* (2).

The case, therefore, must go back to the lower Court for a fresh decision on the merits. In the first place, the lower Court will have to determine whether or not it is competent to take cognizance of the suit, having regard to the incidents of the agreement (Ex. D-2), *i. e.*, it has to be determined whether or not this amounts to partnership or not. Secondly, the lower Court will have to consider whether, if Ex. D-2 is a legal contract, s. 96 of the Tenancy Act in any way detracts therefrom, that contract being in writing. As I have already remarked, the present judgment is not very easy to understand, because on what were apparently the findings of the lower Court the logical result would have been to dismiss the plaintiff's suit.

The judgment and decree appealed against are accordingly reversed and the case will go back to the lower Court for re-trial with advertence to the above remarks. The costs of this Court and costs already incurred in the lower Court will abide the result.

Case sent back.

Z. K.

(2) 72 Ind. Cas. 438; 19 N. L. R. 110; (1923) A. I. R. (N.) 227; 6 N. L. J. 227.

PATNA HIGH COURT.

CIVIL REVISION No. 42 OF 1925.

AND

MISCELLANEOUS APPLICATION No. 34 OF 1925.

April 8, 1925.

Present :—Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.

RAGHUNANDAN PANDEY—PETITIONER —APPELLANT

versus

GARJU MANDAL AND ANOTHER—OPPOSITE PARTY—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 174—Civil Procedure Code (Act V of 1908), s. 47—Rent decree—Sale of holding—Deposit of 5 per cent. of purchase-money in Court—Payment to decree-holder out of Court—Sale, setting aside of—Application to set aside sale, dismissal of—Appeal, whether lies.

No appeal lies against an order deciding a question under s. 174 of the Bengal Tenancy Act between the judgment-debtor and the auction-purchaser. [p. 218, col. 1.]

In execution of a decree for rent the tenant's holding was sold and was purchased by a third party. Within 30 days of the sale the tenant made a deposit of 5 per cent. of the purchase-money into Court for payment as compensation to the auction-purchaser and made an application stating that the amount recoverable under the decree had been paid to the decree-holder. The decree-holder himself joined in this application. The judgment-debtor, therefore, prayed under s. 174 of the Bengal Tenancy Act that the sale should be set aside:

Held, that the provisions of s. 174 of the Bengal Tenancy Act had not sufficiently been complied with and that the application, therefore, must be dismissed. [p. 218, col. 2.]

Application for revision of an order of the District Judge, Bhagalpore, dated the 12th January 1925, reversing that of the Munsif, Second Court, Bhagalpore, dated the 21st August 1924.

Mr. *S. Saran*, for the Petitioner.

Mr. *N. C. Roy*, for the Opposite Party.

JUDGMENT.

Ross, J.—This is an application in revision against an order by the learned District Judge of Bhagalpore, reversing an order of the Munsif of Bhagalpore passed under s. 174 of the Bengal Tenancy Act. There is also an appeal for admission.

It appears that in execution of a decree for rent the tenant's holding was sold and was purchased by a third party. Within thirty days of the sale the deposit of 5 per cent. of the purchase money for payment as compensation to the auction-purchaser was made in Court and the deposit was accompanied by a petition stating that the amount recoverable under the decree had been paid to the decree-holder and the decree-holder himself joined in this peti-

tion. The judgment-debtor, therefore, prayed under s. 174 of the Bengal Tenancy Act that the sale should be set aside. The learned Munsif was of opinion that there had been no compliance with the provisions of the section and he declined to set aside the sale. On appeal the learned District Judge thought there had been substantial compliance with the terms of s. 174, inasmuch as after the admission of the decree-holder that he had received the money, nothing more was recoverable under the decree, and only the compensation payable to the auction-purchaser remained to be deposited. He, therefore, set aside the sale.

It is contended on behalf of the auction-purchaser that no appeal lay to the District Judge. It is to be noticed that in this case the decree-holder and the judgment-debtor were at one and there was no question to be decided between them. The question for decision was a question between the judgment-debtor and the auction-purchaser and, therefore, the case did not fall within the provisions of s. 47 of the C. P. C. It was held in *Raziud-din Hossain* v. *Bindeshwari Prasad Singh* (1) that in such a case no appeal lies. In *Akhouri Prem Narain* v. *Fahimunnissa*(2), the question for decision was a question between decree-holder and judgment-debtor and on this ground it was held that an appeal did lie. With reference to the case just cited, it was observed that "all the authorities recognize and decide that in a case where an auction-purchaser is not a party to the suit, then no appeal lies against an order under s. 174, but if he is a party to the suit and is a decree-holder in fact that then s. 47 comes into play and an appeal lies, it being a matter arising between the parties to the suit touching the execution, satisfaction or discharge of the decree." The same view was taken in Miscellaneous Appeal No. 215 of 1924 where it was held that on a question under s. 174 between the judgment-debtor and the auction-purchaser no appeal lay.

The order of the learned District Judge must, therefore, be treated as having been made without jurisdiction. It is, therefore, subject to revision under s. 115 of the C. P. C. The learned Vakil for the opposite party, however, contends that even if the order was without jurisdiction, this Court should not interfere with it in revision if it is substantially a just order. It is, therefore, necessary to consider whether the decision of the learned Munsif or that of the learned Judge was the correct decision. This question is concluded by the decision of the Calcutta High Court in *Kabilaso Koer* v. *Raghu Nath Sakan Singh* (3), where on facts precisely similar to those of the present case it was held that s. 174 had not been sufficiently complied with.

The application in revision must, therefore, be allowed and the order of the learned District Judge must be set aside and the order of the Munsif restored and the sale confirmed.

The petitioner is entitled to the costs of this application ; hearing-fee, one gold *mohur*.

The appeal is dismissed.

Mullick, J.—I agree.

Z. K. *Appeal dismissed.*

(3) 18 C. 481; 9 Ind. Dec. (N. S.) 321.

(1) 36 Ind. Cas. 769.

(2) 40 Ind. Cas. 662; 2 P. L. J. 525; (1917) Pat. 244; 3 P. L. W. 18.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 67 OF 1924.

June 29, 1925.

Present:—Mr. Findlay, Officiating J. C.

KANHAIRAM—DEFENDANT—APPELLANT

versus

KALICHARAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Execution of decree—Application to execute decree against one of several judgment-debtors—Sale of property belonging to other judgment-debtor also, effect of—Suit by other judgment-debtor to recover possession of his share, maintainability of.

A decree was obtained against several persons who were members of a joint Hindu family. In execution of the decree the decree-holder purporting to proceed only against one of the judgment-debtors brought a house to sale which he described as being the sole property of the judgment-debtor against whom execution had been taken out. Before the attachment and sale of the house, however, a suit had been brought by one of the other judgment-debtors for partition of the house and the sale of the house took place during the pendency of that suit The plaintiff in that suit obtained a decree for his share in the house and subsequently brought a suit to recover possession of his share from the auction-purchaser :

Held, that the suit was not barred by the provisions either of s. 47 or of r. 90 of O. XXI of the C. P. C., inasmuch as the execution proceeding in

which the house was brought to sale did not purport to have been taken against the plaintiff at all. [p. 221, col. 1.]

Appeal against a decree of the Subordinate Judge, First Class, Bhandara, dated the 30th May 1924.

Sir *B. K. Bose* and Mr. *Erachshah*, for the Appellant.

Mr. *M. B. Niyogi*, for the Respondent.

JUDGMENT.—The plaintiff (respondent No. 1) Kalicharan sued the defendant (appellant) No. 1 Kanhairam and the defendant-respondent No. 2 Karu in the Court of the Subordinate Judge, First Class, Bhandara, for possession of 4/5ths of a share of a house in *Mauza* Gondia and for damages in respect of the occupation thereof. The plaintiff's case was that the house was his ancestral property and that he had filed a suit for partition of this and other property in which a decree was passed on 23rd October 1922, dividing the property as follows:—

The plaintiff and his brothers Karu and Sukhdeo each one-fifth.

The plaintiff's mother one-fifth.

The plaintiff's four sisters one-fifth.

Subsequently, Sukhdeo, plaintiff's mother and his four sisters sold their 3/5ths share to him by a registered sale-deed, dated 22nd February 1923. The plaintiff thus became owner of the 4/5ths of the house and, relying on this, attempted to take possession on 23rd February 1923, when he was resisted by the first defendant. Defendant No. 1 Kanhairam is said to be in possession since 18th April 1921, having purchased it at an auction-sale held in execution of the decree in Civil Suit No. 69 of 1917, passed in favour of one Jagannath against Karu and others. The plaintiff's case was that the sale took place during the pendency of his partition suit and that the defendant No. 1 is accordingly bound thereby and cannot acquire any title to the house except as regards 1/5th share belonging to Karu.

The suit proceeded *ex parte* against the 2nd defendant Karu. The first defendant Kanhairam took up the following position. He denied that the plaintiff, Karu Sukhdeo and others were members of joint family or that the house in suit was a joint family property. He pleaded that the Suit No. 84 of 1917 was a collusive one between the members of the family, and denied the alleged sale by plaintiff's relations in his favour of the 3/5th house. As regards the defendant No. 1's purchase of the house, this was effected on 18th April 1921 at a price of Rs. 4,500. He further pleaded that the plaintiff's remedy, if any was to have proceeded by an application under s. 47 of the C. P. C. He further alleged that the house belonged to Karu alone.

On these connected pleas the lower Court framed issues and came to the following findings:—

(*a*) That the house was the ancestral property of the plaintiff and defendant No. 2 Karu.

(*b*) That it was duly partitioned by the decree in Suit No. 84 of 1917.

(*c*) That the attachment, sale and purchase of the house by defendant No. 1 occurred during the pendency of the said suit.

(*d*) That Kanhairam by his purchase obtained the right, title and interest in the 1/5th share of the house as allotted by the partition decree to Karu.

(*e*) That the plaintiff failed to prove his purchase on 3/5ths share in the house from his mother, sisters and brother.

(*f*) That there was no room in the previous execution proceedings for the application of r. 89 or 92 of O. XXI, C. P. C. Under that sale Kanhairam only received Karu's 1/5th share, while the plaintiff's suit relates to the remaining 4/5th share.

(*g*) That there was no proof of Karu having been in adverse possession of the entire house for 12 years before the institution of the suit.

(*h*) That for reasons already given action under s. 47 of the C. P. C., was not open to the plaintiff in the execution proceedings and that consequently the present suit lay.

On these and connected findings a decree in respect of 1/5th share of the house and for Rs. 80 damages was passed in favour of the plaintiff, and the first defendant Kanhairam has now appealed to this Court.

The line of attack adopted on behalf of the appellant may shortly be summarised as follows:—

It is alleged that the plaintiff was a judgment-debtor in execution of which the house in suit was attached and sold. This is admittedly so and accordingly the appellant's position is that the remedy for excluding any portion of the property sold from the scope of the sale was by way of

an application to the Court executing the decree. This action, it is argued, could have been taken under s. 47 of the C. P. C., or under r. 90, O. XXI.

So far as s. 47 is concerned, the question involved is whether the auction-purchaser can be deemed to be a representative of the parties to the litigation. In this connection I have been referred to the decision of *Veyindramuthu Pillai* v. *Maya Nadan* (1). It has been plausibly and so far correctly argued that the auction-purchaser was a representative of the decree-holder. He necessarily could not represent the plaintiff Kalicharan as their titles were at variance: *Cf.*, *Sunderbai* v. *Shrikishan Ramdhan* (2). This being so, it has been argued that the plaintiff's interests were affected, he was bound to apply under O. XXI, r. 90. I have been referred in this connection to the decision of their Lordships of the Privy Council in *Ramabhadra Naidu* v. *Kadirisami Naicker* (3). In that case the auction-purchaser had in a sale under a mortgage-decree been given a sale certificate including certain property and had been put in possession thereof. It was held that a subsequent suit by the mortgagor's representative to hold by reference back to the mortgage-deed that the property in question was not sold under the decree did not lie, and it was pointed out that the title of the purchaser could only have been questioned by a petition under s. 47 in the execution proceedings.

In *Gokulsing Bhikaram* v. *Kisansing Guru* (4), it was pointed out that the test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the purchaser affects the parties to the suit and could have as between them been raised and determined under s. 244, and whether the auction-purchaser, though not a party to that suit, is a party interested in the result. On these grounds the appellant's case is that the present suit is barred. It is not denied that the suit, had it been filed within the limitation laid down in Art. 166 of the First Schedule of the Limitation Act could have been treated as such an application. But admittedly the present suit was filed some two years after the auction-purchaser had got possession and, therefore, it is urged that the plaintiff's remedy has gone: *cf.*, *Haripada Haldar* v. *Baradaprosad Roy* (5).

While the statement of law, as made on behalf of the appellant, is, in my opinion, unexceptionable, I find it impossible to give effect to it in the present case, the circumstances of which do not, in my opinion, bring the case within the said principles. A reference to the connected execution application in Suit No. 69 of 1917 will show that execution was expressly taken out against defendant No. 2 Karu alone. Column 10 thereof shows that the whole house was, no doubt, wrongly but expressly represented as belonging to defendant No. 2 alone. No doubt, the decree-holder proceeded under a *bona fide* mistake that the house was Karu's sole property, but both the application and the list of property filed with the said application make it clear that Karu alone was proceeded against in the said execution proceedings. In the list of property sold the name of the other judgment-debtor of Karu did not even appear at all, and even in the present suit the position was maintained that the house was Karu's sole property, *vide* the written statement of defendant No. 1, dated 29th November 1923, para. 6, and has Counsel's statement recorded on 5th December 1923. In these circumstances it seems to me that the position of the respondent No. 1 is undoubtedly correct. The execution proceeding in question was not an execution against him and, in my opinion, therefore, s. 47 had strictly no application as such and he was not bound to apply thereunder even if he had been aware at the time that the whole house, and not Karu's share therein was being attached.

As regards the applicability of r. 90, O. XXI, C. P. C., this provision would, in my opinion, only have applied if the plaintiff-respondent No. 1 were, as a matter of fact, necessarily aggrieved by the execution sale in question at the time it proceeded. But from the execution application and the connected papers it is clear that the decree-holder could validly and legally take only

(1) 54 Ind. Cas. 209; 43 M. 107; (1919) M. W. N. 881; 26 M. L. T. 391; 38 M. L. J. 32.

(2) 79 Ind. Cas. 636; 20 N. L. R. 170 at p. 172; (1924) A. I. R. (N.) 328.

(3) 63 Ind. Cas. 708; 44 M. 483; (1921) M. W. N. 374; 14 L. W. 125; 3 U. P. L. R. (P. C.) 83; 30 M. L. T. 34; 24 Bom. L. R. 692; (1922) A. I. R. (P. C.) 252; 48 I. A. 15 5 (P. C.).

(4) 7 Ind. Cas. 457; 34 B. 546; 12 Bom. L. R. 539.

(5) 82 Ind. Cas. 322; 51 C. 1014; (1925) A. I. R. (C.) 351.

such interest as Karu held in the house. At the time of the execution sale, the shares of the members of the family had not been ascertained and, in these circumstances, it is not easy to see how Kalicharan could have brought a specific objection as to the exact interest, if any, of his which existed in the house.

On these grounds I am of opinion that neither s. 47 nor r. 90, O. XXI, C. P. C., necessarily applies in the peculiar circumstances of the present case. The decree-holder in the execution proceedings in question expressly refrained from even making the plaintiff-respondent Kalicharan a party at all. No notice issued to him in the matter, and the mere fact that decree-holder made a mistake in representing the house as belonging to Karu is not a sufficient ground, in my opinion, for holding that Kalicharan was necessarily bound to intervene at the time in the execution proceedings under the provision of law quoted.

I may further point out that even if Kalicharan had applied under O. XXI, r. 90 in the execution proceedings, the relief he could have obtained would have been a barren and futile one. His share in the property had not even then ascertained; at best all he could have got would have been a mere declaration that he had an unascertained interest in the property.

On these reasons I am of opinion that the case has been rightly decided by the lower Court. The appeal is accordingly dismissed. Appellant must bear the respondent's costs. Costs in the lower Court as already ordered.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

CIVIL REVISION No. 390 OF 1924.

April 6, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Ross.

KHIRODHAR SINGH AND OTHERS—DECREE-HOLDERS—PETITIONERS

versus

GAJADHAR LAL MAHTO AND OTHERS —OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 47, O. XXXIV, r. 4—Mortgage-decree—Order directing mortgaged properties to be sold in certain order—Appeal, whether lies—Purchaser of equity of redemption in one of several mortgaged properties, right of.

An order made in the execution of a mortgage decree settling the order in which the mortgaged properties should be sold is a final order between the parties in a matter relating to the execution, satisfaction and discharge of the decree and is open to appeal. [p. 221, col. 2.]

Ordinarily a mortgagee decree-holder is entitled to sell the properties comprised in his mortgage in any order he pleases and there is no equity in favour of a person who has purchased the equity of redemption in one of the properties comprised in the mortgage entitling him to ask the Court to direct that the property purchased by him should be sold only in the event of the decretal amount not being recovered from the sale of the other properties comprised in the mortgage. [p. 223, cols. 1 & 2.]

Application in revision against an order of the Subordinate Judge, Patna, dated the 19th June 1924.

Mr. *B. C. Sinha* for Mr. *Reyasat Hussain*, for the Petitioners.

Mr. *P. C. Rai* for Mr. *Raghu Nandan Prasad*, for the Opposite Party.

JUDGMENT.

Ross, J.—This is an application in revision by the decree-holder against an order passed by the Subordinate Judge of Patna in execution proceedings.

The petitioner held a mortgage over two properties a *gola* and some *kasht* land. The opposite party is a subsequent purchaser of the *gola*. A decree was passed on the mortgage and the decree-holder applied for sale of both properties. The opposite party claimed that the *gola* should be sold only if the other property did not fetch a sum sufficient for the satisfaction of the decree. The learned Subordinate Judge was of opinion that such an order could be passed and he, therefore, ordered that all the mortgaged properties should be advertised for sale and that at first all except the *gola* should be put up for sale and, if such sale failed to fetch a sufficient sum, then the *gola* should also be sold.

The decree-holder contends that this order is without jurisdiction and that he is entitled to sell the mortgaged properties, in any order he chooses. As it is doubtful whether any question of jurisdiction arises, this application will be treated as an appeal inasmuch as it is a final order between the parties in a matter relating to the execution, satisfaction and discharge of the decree.

The learned Vakil for the opposite party relies on ss. 56 and 81 of the Transfer of Property Act and O. XXXIV, r. 4 of the C. P. C. and upon the decisions in *Rajkeshwar Prashad Narain Singh* v. *Muhammad Khalil-*

ul-Rahman (1), *Appaya* v. *Rangayya* (2) and *Bhagwan Chandra Das* v. *Dharam Narain Das* (3) and contends that the Court is entitled to say in what order the mortgaged properties should be sold having regard to the equities of the case.

It is not easy to reconcile all the decisions on the right of the subsequent purchaser to claim marshalling. See on the one hand *Radhmal* v. *Rambarakh* (4), *Chunilal Vithaldas* v. *Fulchand* (5) and *Magniram* v. *Mehdi Hossein Khan* (6) and on the other hand *Bhikhari Das* v. *Dalip Singh* (7) and *Lala Dilawar Sahai* v. *Dewan Bolakiram* (8).

The subject has been discussed in *Jatadhari Singh* v. *Baldeo Lal* (9), where in the leading judgment the cases are referred to and it is shown that the authorities in the Calcutta High Court are all unanimous in holding that the Executing Court ought not ordinarily to fetter the discretion of the decree-holder to put to sale whatever property he wishes first to sell. Order XXXIV, r. 4 of the C. P. C. is referred to and it is pointed out that, while the Court making the decree has no doubt a right to declare what portion of the mortgaged property should be sold first, that discretion is not to be arbitrarily exercised and is subject to the general principle that the Court cannot prejudice the rights of the mortgagee if he has not himself done any act which prejudices the rights of those having equities against the mortgagor. It is further observed that in the absence of a direction in the decree to the contrary it would seem that this discretion vests in the Execution Court also. *Rajkeshwar Prasad Narain Singh* v. *Muhammad Khalil-ul-Rahman* (1) was a case between a prior and a puisne mortgagee and it was held that the puisne mortgagee was entitled to the benefit of s. 81 although he had purchased the property in execution of his mortgage-decree. But the learned Vakil relied on a passage in the judgment at page 533* where it is said that apart from the question of marshalling it appears that the Court has undoubtedly the right to direct under O. XXXIV, r. 4, that the properties mortgaged should be sold in a particular order. The judgment goes on to say that "ordinarily the right of selling the property in a particular order rests with the decree-holder; and, in the absence of any contract between the parties, the decree-holder may proceed to sell the properties in whatever order he thinks best so as to facilitate the realization of his mortgage debt. But the Court can, in the circumstances of a case and in view of the equities arising in favour of the various parties, direct the order in which the properties should be sold" and, in fact in that case the Court did direct that the properties of the puisne mortgagee should be sold last. In *Appaya* v. *Rangayya* (2), there were two properties, parcel No. 1 and parcel No. 2, that were mortgaged to the plaintiff, and the third defendant subsequently purchased parcel No. 1. It was held in that case that although the third defendant was not entitled to have the property marshalled and to insist that parcel No. 2 should be first sold before recourse was had to parcel No. 1, yet under s. 88 of the Transfer of Property Act (O. XXXIV, r. 4, C. P. C.) the Court might order that a portion sufficient to discharge the plaintiff's debt be sold; and, if parcel No. 2 was sufficient and the plaintiff could not possibly be prejudiced by such sale, it might be open to the Court to direct in the decree itself its sale before the other property.

In *Bhagwan Chandra Das* v. *Dharam Naraia Das* (3), the question was whether the decree-holders were entitled to have all the properties which were mortgaged to themselves sold in execution of their decree. In that case the Subordinate Judge had excluded from the sale properties which had been purchased subsequently to the mortgage. The Court in allowing the appeal decided that all the property must be advertised for sale and when they were actually brought into execution and became subject to sale it would then be for the Court to decide on just and equitable principles which property ought to be sold first.

The rule and its limitations are stated in *Averall* v. *Wade* (10), where Lord St.

(1) 78 Ind. Cas. 796; 3 Pat. 522; 5 P. L. T. 223; (1924) A. I. R. (Pat.) 459.
(2) 31 M. 419; 3 M. L. T. 287; 18 M. L. J. 229.
(3) 84 Ind. Cas. 203; 3 Pat. 962; 2 Pat. L. R. 242; (1924) A. I. R. (Pat.) 802: (1925) Pat. 62; 6 P. L. T. 392.
(4) 7 A. 711; A. W. N. (1885) 198; 4 Ind. Dec. (N. S.) 774.
(5) 18 B. 160; 9 Ind. Dec. (N. S.) 615.
(6) 31 C. 95; 8 C. W. N. 30.
(7) 17 A. 434; A. W. N. (1895) 83; 8 Ind. Dec. (N. S.) 601.
(8) 11 C. 258; 5 Ind. Dec. (N. S.) 931.
(9) 51 Ind. Cas. 444; 4 P. L. J. 207.
(10) (1835) Ll: & G. T. Sugd. 262.

*Page of 3 Pat.—[*Ed.*]

Leonards while stating that where one creditor has a demand against two estates and another against one only, the latter is entitled to throw the former on the fund that is not common to both, added: "This is a narrow doctrine and cannot generally be enforced against an encumbrancer who is a mortgagee. Whatever may be the equity of the creditor with only one security, the mortgagee of both estates has a right to compel the debtor to redeem or he may foreclose." It is further, however, pointed out that whereas in a suit for foreclosure the first mortgagee has a right to foreclose and all that the second mortgagee can do is to redeem him, in the case where the mortgagee is not entitled to anything more than his money, that is, where the decree is for sale, the equity of the creditor with only one security may be easily worked out.

Section 55 (1) (*g*) of the Transfer of Property Act provides that the seller is bound, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing; and, following this principle, s. 56 enacts that "where two properties are subject to a common charge, and one of the properties is, sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend." The matter is put thus by Sir Rashbehary Ghose in his Law of Mortgage, Fifth Edition at page 388: "The question, therefore, is not whether the purchaser takes subject to the mortgage as between himself and the mortgagee, but whether he is bound to discharge the mortgage debt as between himself and the mortgagor. If he is not, he may undoubtedly insist upon marshalling. On the other hand, if the purchaser cannot claim exoneration, the whole burden of the mortgage debt should not, as between him and the mortgagor be thrown on the latter."

The question, therefore, turns on the form of the contract between the vendor and the purchaser, namely, whether the property was sold subject to the encumbrance or not. It is stated in the petitioners' affidavit that in their written statement the opposite party prayed that their purchased property should be ordered to be sold after the other properties, but the learned Subordinate Judge who decreed the suit ordered that no facility should be allowed to the opposite party; and the decree is silent on the subject. The presumption, therefore, is that what the opposite party paid for was the equity of redemption only and there is no equity in his favour There is, therefore, no ground for interfering with the rights of the mortgagee to sell the property in any order he pleases. I would allow this appeal with costs and set aside the order of the learned Subordinate Judge and disallow the objection of the judgment-debtor.

Mullick, J.—I agree.

Z. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 8 OF 1924.

August 13, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

NAND LAL—DEFENDANT—APPELLANT

versus

DEBI DIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Malicious prosecution—Damages, suit for—Reasonable and probable cause—Burden of proof.

In a suit to recover damages for malicious prosecution the plaintiff must prove the absence of reasonable and probable cause. [p. 224, col. 1.]

Radhe Lal v. *Munnoo*, 18 Ind. Cas. 280; 11 A. L. J. 125 and *Hira Lal* v. *Bandhu Bhagat*, A. W. N. (1889) 189, referred to.

Appeal against an order of the Subordinate Judge, Unao, dated the 13th November 1923, reversing that of the Munsif, South Unao, dated the 26th February 1923.

ORDER.—(*January 14, 1925*)—This is the defendant's appeal in a suit brought by the plaintiffs-respondents for damages for malicious prosecution. The suit was dismissed by the Court of first instance but decreed for a sum of Rs. 565 8 0 by the Subordinate Judge of Unao on appeal by the plaintiffs. In deciding the appeal the learned Subordinate Judge held that "in this case there can be no question of reasonable and probable cause. The charges brought by the defendant were either true or false to his knowledge and this is the point for decision [see *Radhe Lal* v. *Munnoo* (1) and *Hira Lal* v. *Bandhu Bhagat* (2)."] He further observes: "I do not go so far as to say that the mere existence of the Criminal Court judgments

(1) 18 Ind. Cas. 280; 11 A. L. J. 125.
(2) A. W. N. (1889) 189.

in favour of the plaintiffs is sufficient to shift the burden to the defendant—though the ruling in *Radhe Lal* v. *Munnoo* (1) would seem to support such a proposition—but I am strongly of opinion that in circumstances like those which exist in the present case, the standard of proof required of the plaintiff is not so strict as in cases in which the question of want of reasonable and probable cause arises." If these rulings lay down the proposition for which the learned Subordinate Judge has cited them I respectfully disagree with them. But I am of opinion that they do not lay down any such proposition. The general rule of law in cases of this nature to the effect that the plaintiff must prove the absence of reasonable and probable cause holds good. I have had occasion to state the law on the subject in the case of *Kazim Husain* v. *Basit Husain* (3) and I still adhere to the opinion expressed therein.

The learned Counsel for the respondents asked me to construe the decision of the learned Subordinate Judge in the sense that the defendant's complaint in the Criminal Court having been found to be false to his knowledge the issue as to the absence of reasonable and probable cause was answered in favour of the plaintiffs. I am unable to take this view. It is more than probable that the erroneous view of law taken by the learned Subordinate Judge has caused injustice to the defendant. I have, therefore, come to the conclusion that the Issue No. 1 must be re-tried by the lower Appellate Court. I accordingly direct that a finding on that issue shall be recorded by that Court after hearing Counsel on both sides but without admitting any additional evidence. The finding should be returned to this Court within thirty days from this date. Ten days from the date of the finding of the Court below will be allowed to the parties for filing objections.

[The case being returned by the lower Court with its findings, the final judgment was delivered on the 13th August 1925.]

Mr. *Ali Zaheer*, for the Appellant.

Mr. *Haider Husain*, for the Respondents.

JUDGMENT.—This is the defendant's appeal. The plaintiffs-respondents brought a suit against the defendant for the recovery of Rs. 1,084-8-0 on account of damages for malicious prosecution. The suit was dismissed by the Trial Court, the Munsif (South) Unao. The plaintiffs appealed to the Court of the Subordinate Judge of Unao. The appeal was allowed and the plaintiffs' suit was decreed for a sum of Rs. 665-8-0. This is the second appeal by the defendant as already mentioned.

In the nature of the case the first and foremost issue was:—

"Were the complaints lodged by the defendant against the plaintiffs before the Sub-Divisional Magistrate and the Tahsildar, and the revision filed before the Deputy Commissioner maliciously and without any reasonable and probable cause?" The finding of the Court of Appeal on that issue was challenged at the first hearing of the appeal before me on the ground that in deciding that issue the learned Subordinate Judge misunderstood the law applicable to it. I upheld this contention and the result was that the issue was remitted for re-trial and decision by my order, dated the 14th January 1925. The learned Subordinate Judge, who had decided the appeal has since left the Court. His successor has now decided the issue against the plaintiffs and in favour of the defendant.

The judgment of the learned Subordinate Judge now under consideration is remarkably clear and I am of opinion, that in deciding that issue he has taken a correct view of the law. So far as the judgments of the Criminal Courts are concerned he has rightly held that they prove no more than this that the plaintiffs were prosecuted by the defendant and that the prosecution ended in favour of the plaintiffs. They do not prove absence of reasonable and probable cause nor do they prove malice. For proof of those facts the learned Subordinate Judge turns to the oral evidence produced in the case. The plaintiffs' witnesses are discredited and this was in agreement with the opinion of the Trial Court. On the other hand the learned Subordinate Judge holds that the affirmative evidence produced by the defendant supports the plea that the defence put forward by him in the Criminal Court was true. On those findings nothing remains in the plaintiffs' case.

The result is that the appeal is allowed, the decree of the lower Appellate Court set aside and the decree of the Court of first instance restored with costs throughout.

G. H. *Appeal allowed.*

(3) 61 Ind. Cas. 970; 8 O. L. J. 147.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 5 OF 1925.

February 25, 1925.

Present:—Justice Sir John Bucknill, KT., and Mr. Justice Kulwant Sahay.

RUPAN SINGH AND OTHERS—ACCUSED —APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 296, 297, 367—Charge to Jury—Heads of charge, record of—Duty of Judge—Formulation of questions for Jury, whether proper.

In a Sessions trial the Judge should charge the Jury as soon as possible after the case for the defence and the prosecutor's reply, if any, are concluded. It is undesirable that the Jury should separate prior to the charge. [p. 229, col. 2.]

Where heads of the Judge's charge to the Jury are written out before the charge is delivered they should be placed on the record by the Judge as soon as he may find it possible to do so and whilst what he said is fresh in his recollection. [*ibid.*]

The record of the heads of charge to the Jury need not be meticulous or lengthy but it must give accurately the substance of what the Judge said to the Jury so that the High Court may, if the occasion arises, be able to ascertain from the record whether the law and the facts relative to the case were fairly and properly put to the Jurors. A charge which states that certain sections of the Penal Code were read over and explained to the Jury is quite unsatisfactory and cannot be approved of. [*ibid.*]

The object of the heads of charge is to inform the High Court, should occasion arise, of what direction the Judge gave in law to the Jury and the nature of his summing up of the evidence not only for the prosecution, but also for the defence. The heads of charge are not intended to be an exhaustive detail of every particular which the Judge may have addressed to the Jury. The Judge is not bound to address himself in every particular and in every detail to every suggestion put forward by the defence. It is the duty of the Judge fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence, respectively. In doing so he is entitled to take into consideration the speeches made upon both sides by the Crown and by the prisoner's Counsel in considering his presentation of the evidence to the Jury. The heads of charge should record in an intelligible form and with sufficient fulness the points of law and the directions given by the Judge to the Jury, and the record should represent with accuracy the substance of the charge by the Judge. [p. 230, col. 1.]

Where a record of the heads of the charge to the Jury shows insufficient material to enable the High Court to judge what the Sessions Judge told the Jury and there are serious omissions in directing the Jury on the facts and the law which may have occasioned a verdict different to that which would have been otherwise given, the verdict cannot be upheld in appeal. [p. 233, col. 1.]

An appellant who seeks to set aside the result of a trial by Jury has a task of considerable magnitude and must, to be successful, present a case of real substance. [p. 229, col. 2; p. 230, col. 1.]

In a complicated case the formulation of specific questions for the Jury's reply at the conclusion of the delivery of the Judge's charge is helpful to the Jury and is useful in deciding the legal effect of the Jury's findings: but the formulation of such questions requires great care and the questions should be confined within the narrowest possible compass: in a large number of cases such procedure is not requisite as a simple finding of guilty or not guilty serves all necessary purposes. [p. 232, col. 2.]

Per *Kulwant Sahay, J.*—In a complicated case the Judge in his charge to the Jury ought not only to explain the law but should also draw the attention of the Jury to the evidence in the case and explain how they should apply the law as explained by him to the particular facts of the case. He should explain to them what are the points which they ought to take into consideration in arriving at their verdict. [p. 233, col. 1.]

Criminal appeal from an order of the Sessions Judge, Patna, dated the 24th December 1924.

Mr. *Manuk* (with him Messrs. *Bimala Charan Sinha* and *B. P. Sinha*), for the Appellants.

Mr. *H. L. Nandkeolyar*, (Assistant Government Advocate), for the Crown.

JUDGMENT.

Bucknill, J.—This was an appeal made by nine men who were charged before the Sessions Judge of Patna sitting with a Jury in December 1924 with various offences. One of the appellants (appellant No. 9), named Bangali Dusadh, was charged under s. 304, Penal Code, with having committed the offence of culpable homicide not amounting to murder by causing the death of one Khedan Goala: the Jury unanimously found him not guilty and he was acquitted on this charge.

All the appellants were charged with an offence under the joint provisions of s. 304 and 149, that is to say, in this case, for being members of an unlawful assembly in prosecution of the common object of which the appellant Bengali Dusadh, who was one of the members of the unlawful assembly, committed the offence of culpable homicide not amounting to murder by causing the death of Khedan Goala, the common object being stated to be the wrongful dispossession of the deceased Khedan from a field of 1 *bigha* and 2 *khatas* in area on which he had been settled by the *malik* after such land had been abandoned by persons named Akloo, Hari and Karu and for which field they (the appellants) mistook the field of Bhaju Goala. It is obvious that the Jury was in a very confused state of mind as to this charge: they first of all, by a majority of 3 to 2, found all the accused guilty under s. 149 alone; but what they meant it is impossible to say; for a

conviction under s. 149 alone cannot be properly recorded as the concurrent finding of the commission of an offence by any member of the unlawful assembly in prosecution of the common unlawful object of the assembly is necessary.

It has been suggested by the learned Assistant Government Advocate that the Jury meant that they thought that all the appellants were guilty under ss. 304 149 although they did not think that the evidence proved which of the appellants caused Khedan Goala's death. But this conjecture will not serve; for, on the learned Sessions Judge pointing out to the Jury that their verdict was an impossible one, the Jury by a majority of 4 to 1 promptly returned a verdict of not guilty against all the appellants under ss. 304 and 149 and the Judge then acquitted all the accused on this charge. So all that can be concluded is that the Jury's minds were not clear about the law at the end of Judge's charge and, assuming that he had explained the law properly to the Jury, it seems certain that the Jury could not have understood his exposition.

All the appellants were also charged under s. 147 with being members of an unlawful assembly and using force with the common wrongful object of taking forcible possession of the field of the deceased Khedan for which they (the appellants) mistook the field of Bhaju Goala.

The Jury, by a majority of 3 to 2, found all the appellants guilty of the charge under s. 147: the Judge accepted this verdict: and on 24th December 1924, he sentenced one of the appellants No. 2 named Gobind Singh to two years' rigorous imprisonment (presumably because he was principally interested in the land in question or was alleged to have taken a very prominent part in the matter) and all the rest of the eight appellants to one year's rigorous imprisonment each. It is from these findings, convictions and sentences that the appellants now appeal.

One is naturally very loath to interfere with a Jury's verdict; but the grounds put forward in this appeal, which are, so the learned Counsel who appears for the appellants has urged, such as show omissions to direct and mis-directions by the learned Judge and which should be regarded under the provisions of s. 537 (*d*) of the Cr. P. C., as having occasioned a failure of justice, are numerous and by no means trivial; and it is necessary, therefore, to give some account of the circumstances which are said to have given rise to Khedan's death. Some of the facts which it is necessary to recite are not in dispute.

There is a *tola* of a village called Kalyanpura known as Bhatbigha: it is not far from Behar. One Jagdeo Bhat was formerly owner of *Touzi* No. 10851 in this Bhatbigha *tola*. It is said that after the survey which took place in 1909 some of the *raiyats* who had previously been on this land abandoned their plots and that Jagdeo settled these derelict lands with fresh people one of whom was the deceased Khedan.

About ten years ago Jagdeo sold the whole *touzi* to one Kailaspati Bhat: this purchaser kept on the old *raiyats* and took over one Mithu Singh, who had been Jagdeo's servant, as his (Kailaspati's) *barahil*: amongst the *raiyats* was the deceased Khedan.

It is said that amongst the *raiyats* who abandoned their land after the survey were three brothers named Aklu, Hari and Karu; they and another man called Lekha (who is also stated to have left his plot) are said to have held together about 5 *bighas* of land: Lekha is said to have cultivated his share separately and the three brothers to have managed 2 *bighas* 17 *kathas*; this latter piece has conveniently been referred to as "Aklu's land." According to the evidence, some 1 *bigha*, 2 *kathas* of Aklu's land was settled with Khedan and one plot (No. 199) out of this area lay, it is said, to the south-east of a larger (but considerably sub-divided) plot, known as plot No. 193, which was the abandoned land of another *raiyat* called Ganga Singh in the south-east corner of this plot No. 193 another small bit of land had been also settled with the deceased.

A large portion of Aklu's land (about 1 *bigha* 1 *katha*) formed a plot No. 192 which lies west of plot No. 193: it is not suggested that any part of plot No. 192 was eversettled with Khedan: nor that any portion of plot No. 193 ever belonged to Aklu nor has it ever been suggested by the prosecution that what is said to have taken place took place on land which ever belonged to Aklu. It was at first, *i. e.*, in the First Information laid by the deceased's son, stated that the appellants had tried to eject and had attacked the deceased from and on his plot in plot

No. 193: but that story was changed and the prosecution account now is that the deceased was assaulted on the eastern ridge of the middle north-western portion of plot No. 193 which is said to have belonged to one Bhaju and for whom the deceased's son cultivated it: Bhaju is quite a youth.

Now there seems no doubt that Aklu, some years agc, sold his land or his rights (whatever they were) in his land to two persons named Somar Mahto and Chatardhari; the latter disposed of *his* share to Somar Mahto; Somar and his son in turn sold to the son of No. 2 appellant Gobind Singh; this last transaction was in July of last year; it was probably a *farzi* transaction.

Now the appellant No. 2 is a *barahil* of one Manna Lal who owns certain properties in a place called Samasti: appellant No. 1 is the manager of this Manna Lal; and he (Rupan Singh) lives at a place called Maraura. Appellant No. 3 is the titular vendee from Somar and his son is the son of appellant No. 1. Appellant No. 4 is a brother of appellant No. 9 who is the field watchman of Samasti: the other four appellants are also men of Samasti: Samasti is only about a mile from Kalyanpur.

Now there is no doubt that an occurrence took place on August 5th 1924, somewhere on or in the neighbourhood of plots Nos. 192 and 193 in the course of which Khedan was speared in the abdomen and died not long afterwards: another man, called Pairoo, who was one of those in company with Khedan, had his left thumb hurt: the deceased's son, Etwari Dusadh, also of course of his father's party, sustained a simple fracture of the left ulna; whilst a fourth man named Hiraman (not one of the appellants' faction) received a *lathi* blow on the right hand.

On the other side, the appellant Gobind had no less than eight injuries including five lacerated wounds on the head none of which, however, were really serious. It seems very likely that all the accused were present at the time when the affair, whatever it was, took place: and this appears to be the fact notwithstanding that all the accused except Gobind and his son (who give their version of the occurrence as an attack upon themselves) deny having been there: but the evidence of their identification at the scene is undoubtedly very voluminous.

Without in any way wishing to criticize any opinion, whatever it was, which was taken by the Jury upon the evidence as to what actually took place, it is necessary here, to state, with the view of considering subsequently the attack made upon the learned Sessions Judge's charge to the Jury, that there were several versions of the affair from which a choice could be made.

There was first of all a story of information received by the *chowkidar* of Bhatibigha named Etwari Dusadh (P. W. No. 9) (not of course, the same person as the informant Etwari Goala) and of what he saw before the occurrence whilst he was going to parade at his *thana* at Bihar very early in the morning of the day of the affair: he reported at the Police station and his report was entered at the station diary: he seems to have been fully—though not entirely accurately—cognizant of the position of affairs and of the parties. He then stated that the appellant No. 1 (Rupan Singh) had bought recently 3 *bighas* of land at Bhatibigha which belonged to a *goala* of Bhatbigha; the land had, however, been cultivated by one Mithoo Singh "from before"; that on that day, "men on behalf of Rupan" were going with ploughs to take possession of the land and that arrangements were being made on behalf of Mithoo for resistance: he added that he himself was sure that as soon as the plough would be at work on Rupan's behalf, Mithoo would resist and that there was every likelihood of a serious breach of the peace. As this report was lodged before anything had happened it seems very strongly to be probable that it represents the true position of matters. The next account of what took place is the First Information given by the deceased's son Etwari Goala: not to be confounded with the *Chowkidar* Etwari Dusadh.

His story then was that 1 *bigha* 2 *kathas* of a field "comprised in three *bandhs*" was settled by the *malik* Jagdeo with the informant's father in 1909 and that since that time the informant's father had been in possession of this field or piece of land. This field, had, once formed part of property belonging to Aklu, Hari and Karu Gope: but that they had left the village not long after the survey although their names continued to be retained in the *khatian*. The *malik*—a new one—to whom Jagdeo had sold about nine years ago, had settled these left lands with new tenants: but Aklu, Hari and Karu had, about the year 1921,

sold the property (which they had abandoned) to one Durga Gope who in 1923 sold it to Dharam Singh Gope of a place called Mahalpur : but neither of these two successive purchasers had ever had actual possession of the land. This Dharam Singh Gope in his turn had sold the land to the 2nd appellant Gobind (or his son the 3rd appellant) a week or so before the occurrence. About one *pahar* after sunrise a mob of 40 or 50 persons including appellants Nos. 1, 2, 4, 5, 6, 7, 8 and 9 came to take possession of this field of 1 *bigha* 2 *kathas* : when the mob reached the field the deceased was working there but they began to uproot his transplanted paddy crop : the deceased remonstrated with the appellants telling them not to do so ; the 2nd appellant then said, "Beat the *betichod*," and the 9th appellant then stabbed the deceased with a spear, the deceased fell down and the assailants ran away.

The informant and Hiraman (his friend) retaliated on the attackers hitting Gobind (appellant No. 2 and Bangli (No. 9) with *lathis* : the assailants had *lathis* swords, *garasas* and spears. The informant did not know the 3rd appellant—Gobind's son—by name or, apparently, by sight.

Now this was an intelligible story ; namely, that Gobind (appellant No. 2) had recently bought a field originally belonging to Aklu and his brothers on which the deceased had been settled by the landlord after Aklu and his brothers had abandoned it ; that thereupon Gobind and his friends came to take possession of it and began to uproot the rice : that the deceased remonstrated and was then stabbed and belaboured as a result of which he soon died.

But this was not the story which was put forward by the prosecution at the hearing of the case nor was it the account of the matter which the informant (Etwari Goala) gave in his evidence in Court : this forms a different and a third account. He now said that a mob of men including all the appellants, came and began to uproot paddy seedlings in a field belonging to a person called Bhaju ; that the deceased interfered with them and got assaulted. The detailed story which the informant now gave portrays that all the mob had *lathis* except appellant No. 9 who had a spear. He deposed that the deceased and appellant No. 2 had a conversation together before the deceased was touched ; when Gobind's men began to uproot the paddy seedlings in Bhaju's field the deceased remonstrated : Gobind then said he had bought this field ; the deceased asked Gobind whose field it was and Gobind replied it was Aklu's, the deceased told Gobind that this field of Bhaju's was not and never had been Aklu's and told Gobind that he was looting ; Gobind then gave orders that the deceased should be beaten. Now it is important to notice here several points : one is that no one has suggested that Bhaju's field belonged to the deceased or that it was ever part of Aklu's or his brother's land or that Gobind had bought it or that the deceased had any call to interfere in what Gobind and his party was doing except that the deceased (or his son) is said to have cultivated Bhaju's land for him as he (Bhaju) was a youth. At any rate it is a different story to that in the First Information and the difficulty is attempted to be avoided by framing the charge in the ingenious phrasing that the accused mistook Bhaju's land for Khedan's.

But it seems not very clear that the affair really took place on Bhaju's land at all ; blood-stained earth was found right away from Bhaju's land and a long way from Khedan's plot at which place Etwari Goala first put the occurrence. Then there is a fourth account which is that given by Gobind and his son : the former who, it will be remembered had received numerous injuries, lodged a first information at the *thana* on August 7th (*i. e.*, two days after the affair had taken place) : he explains the delay by saying that he was too much hurt to walk and could not get bearers to carry him and also that he was rather fearful as he had been accused already by the other side. However, his story is that he had bought land (2 *biahas* 17 *kathas*) which originally belonged to Aklu and his brothers in the name of his son (appellant No. 3) some ten days previously : he had taken possession of it and had been ploughing it : on the day of the occurrence he was ploughing the remaining portion when Khedan, Etwari Goala, Hiraman, Mithu (names with which we are already familiar) and a number of other men—some ten or more (some of whom he named)—came up and Mithu (the new landlord's *barahil*) told him that the *malik* had given instructions that the ploughing should be stopped. Gobind, however, paid no heed and persisted in going on : then he was attacked by Mithu and his party : Gobind's

son (appellant No. 3) was there too: and when Gobind was knocked down his son gave an alarm and called to his aid eight or ten men : what happened then we are not told.

The plot which Gobind says he purchased was 2 *bighas*, 17 *kathas*, in extent: it is not suggested he was ploughing on Khedan's land but it was suggested that he was ploughing plot No. 192 which used to belong to Aklu and his brothers.

So we have four stories, *viz.*,—

(1) The *chowkidar's* which envisages a fight between Mithu and party (representing the new landlord and, perhaps, his new settlers) and Gobind and party;

(2) Etwari Goala's first information account which puts the affair in Khedan's plot No. 193: subsequently changed to.

(3) The trial account: in which the affair is placed in or near Bhaju's land:

(4) Gobind's account which falls in with No. 1 story rather better than with either of Etwari's.

I have thought it necessary to mention these stories *seriatim* because, without knowing of them all, it is impossible to understand clearly all the criticisms levelled against the learned Sessions Judge's summing up: the Jury had ample choice: presumably they thought that the trial account may have been right although it is not clear what they thought was the object of the unlawful assembly.

Now, with the above stories in mind, there has now to be considered the learned Judge's charge.

It is suggested that it is not at all clear what is meant by s. 367 (5) of the Cr. P. C., where, in the proviso, it uses the words "heads of charge to the Jury": and that it is uncertain what is and what is not enough to constitute a fulfilment of this duty imposed upon the Court of Session, *i. e.*, to record the heads of charge. It is asked whether it should be a *verbatim* reproduction of the Judge's observations; whether it must or may be written out beforehand; or written by the Judge from his remembrance of what he actually *did* say to the Jury. The answers to all these questions are really simple. The suggestion that it should be a *verbatim* reproduction of the Judge's words is negatived by the phrasing of the proviso itself in which it is expressly stated that judgment need not be written but merely "heads of the charge": it is in this country not feasible to have a *verbatim* report of every Sessions Judge's charge to a Jury if he delivered it extemporarily as there is no staff of stenographers, as a rule, available for such a purpose.

Nor is there anything in the section which contemplates that the charge must be written out beforehand; and although it is common ground that many Sessions Judges *do* prepare their charges by writing them out prior to their delivery, such a practice would surprise most exprienced Judges of Assize and would and must be a matter at times of considerable delay and inconvenience; and not in the spirit of s. 297 of the Cr. P. C. which contemplates that the Judge shall charge the Jury as soon as possible after the case for the defence and the prosecutor's reply (if any) are concluded, or of s. 296, Cr. P. C., which touches on the undesirability of the separation of Jury prior to the charge.

But it is quite certain that, assuming the heads of charge are written out before delivery or taken down *verbatim*, they should be placed on record by the Judge as soon as he may find it possible to do so and whilst what he said is fresh in his recollection.

Then as to sufficiency: it is certain that the record need not be meticulous or lengthy but it must give accurately the substance of what the Judge said to the Jury so that the High Court may, if occasion arises, be able to ascertain from this record whether the law and the facts relative to the case were fairly and properly put to the Jurors. This is obviously a point which can only be decided by looking at the charge itself in the light of the circumstances of each case.

A Judge's record of his heads of charge is not a matter to be treated cavalierly or lightly thrown aside on the ground of insufficiency or mis-direction: s. 357, Cr. P. C., expressly provides that, in order to justify the alteration or reversal of any finding, sentence or order on account of the faulty nature of a charge to a Jury, the Court must be satisfied that some failure of justice has thereby been occasioned: whilst sub-s. (2) of s. 423 again states that a verdict of a Jury shall not be altered or reversed on appeal unless the Appellate Court regards such verdict as erroneous owing to mis direction by the Trying Judge or to a mis-understanding by the Jurors of the law as expounded to them by him.

It is obvious, therefore, that an appellant

who seeks to set aside the result of a trial by Jury has a task of considerable magnitude and must, to be successful, present a case of real substance.

Now in the appeal under consideration the first objection made against the Judge's record of his charge is that he contents himself when recording how he had laid down the law to the Jury by writing.

"Sections 141 to 149 and 299 to 304 read over and explained."

It is difficult to view so short a summary as this as satisfactory : and so cursory a statement has been directly disapproved of in the case of *Kasimuddin Nasya* v. *Emperor* (1). The nature of what is requisite to be expressed in the record of a Judge's charge is well expressed by our own Court in *Eknath Sahay* v. *Emperor* (2), where it is said by Atkinson, J., that "the object of the heads of charge is to inform the High Court, should occasion arise, of what direction the Judge gave in law to the Jury and the nature of his summing up of the evidence not only for the prosecution, but also for the defence. The heads of charge are not intended to be an exhaustive detail of every particular which the Judge may have addressed to the Jury. The Judge is not bound to address himself in every particular and in every detail to every suggestion put forward by the defence. It is the duty of the Judge fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence, respectively. In doing so he is entitled to take into consideration the speeches made upon both sides by the Crown and by the prisoner's Counsel in considering his presentation of the evidence to the Jury. The heads of charge should record in an intelligible form and with sufficient fulness the points of law and the directions given by the Judge to the Jury, and the record should represent with accuracy the substance of the charge by the Judge."

It is impossible in the present appeal to gather from the words used by the Judge what he did or did not say but the fact that the Jury recorded a majority verdict (as I have mentioned above) of guilty under the provisions of s. 149 of the Indian Penal Code indicates very clearly that they did not understand rightly the Judge's exposition (whatever it was) of the law; assuming, as of course I do that his exposition was correct. Nor, apparently, when the Jury had returned its verdict under s. 149, did the Judge's further exposition clear their minds: his record is,

"I pointed out to the Jury that s. 149 cannot stand without s. 304, *i. e.*, in order to a conviction" (I do not follow this myself unless it means, "in order to base or find a conviction") "under s. 149 it must be found that an offence under s. 304 was committed by *some* members of the assembly in prosecution of the common object."

The Jury were, as is perhaps not surprising, evidently puzzled by the word "some": it is obvious that it might mean "some particular or known members"; in which case, if it was imagined that only in such case was the operation of the section effective, it would have been an incorrect or incomplete statement of the law: or it might mean "some known or unknown," *i. e.*, "*any* member," in which case it would have been right.

What the Jury had in their minds when returning their first verdict of guilty under s. 149 cannot be ascertained; but it certainly looks as if, having not understood the Judge in the first instance, they thought that the word "some" connoted appellant No. 9 (*i. e.*, some particular and known member of the assembly) and they were, having already found him not guilty under s. 304, not prepared to saddle the others with any guilt which was not, as they thought, imputable directly to him. This may as the learned Assistant Government Advocate ruefully points out, well be a matter at which the prosecution might feel aggrieved; but what the Jury really meant is merely a point for conjecture : the only clear inference emerging being that they failed to understand the Judge if he interpreted the law to them correctly.

In circumstances such as the foregoing where it is obvious that the Jury was very much confused, it would perhaps be right to think that their majority verdict of 3 to 2 of guilty against the appellants under s. 147 was also the subject of uncertainty. I am not prepared to say that, simply because they had been at a loss to understand what the Judge had told them about s. 149, they necessarily misunderstood what he stated with regard to s. 147, although there is, it is true, no indication in his record of what he actually did say. But

(1) 57 Ind. Cas. 934; 21 Cr. L. J. 694; 47 C. 795.
(2) 35 Ind. Cas. 657; 1 P. L. J. 317; 17 Cr. L. J. 353; 2 P. L. W. 348.

there are several criticisms which have been directed against the form of the charge in so far as it may be said to relate to the conviction under s. 147: and these criticisms in this case undoubtedly upon examination necessitate very careful consideration.

The first criticism relates to the omission to draw attention to the exact nature of the charge.

The Judge, when referring to the alleged common object of the assembly, observes that it was to take forcible possession of Khedan's land; but he does not say that a basic feature of the charge was the inclusion (to meet the prosecution story) of the words

"for which you mistook the field of Bhaju Goala."

The Judge does not put this to the Jury but merely says that "There is a difficulty about the alleged mistake as to the identity of Khedan's land and the consequent occurrence alleged to have taken place on Bhaju's land."

He does not point out that it is admitted that Gobind had bought land to the west (plot No. 192) which had nothing to do with Khedan; that the prosecution story at the trial did not suggest that the appellants had tried to eject Khedan; that there was no sort of reason shown why Gobind should have mistaken Bhaju's land for Khedan's or for part of the Aklu brothers' old holding; or that it was quite clear that Etwari Goala's story detailed in the First Information and his account detailed in his evidence are quite different and that the venue had obviously been changed. He says that "there is a difficulty" and that if the venue has been changed the true facts are not before the Court and one could not say how precisely the events led up to what he calls "the fight"; he *does* add that if the Jury thought the place of occurrence had been changed the accused would be entitled to the benefit of the doubt but he is in that passage referring to the suggestion that the "fight" took place in plot No. 192. He also *does* indicate that there *was* evidence to show that Aklu and his brothers and other old tenants did not consider that they had altogether thrown up and abandoned their lands and that the sales to Gobind were really *bona fide* transactions which were not liked by the *malik* and the results—if any—of which he was ready to oppose.

But it has been pointed out by the learned Counsel for the appellants (and to my mind correctly) that the learned Judge appears quite to have omitted to explain to the Jury what was the real nature of the "difficulty" or the "doubt" which he incidentally mentioned or to indicate that the result of a change of venue must be most seriously inimical to the prosecution case. Nor does he adequately explain to the Jury the fact that the story in the First Information report and the prosecution story indubitably display a complete change of venue.

The so-called "difficulty" is really a very serious double point which alters the whole complexion and strength of the prosecution case. If Gobind and his party, after having bought the Aklu land, went to take possession of it, there is nothing primarily unlawful in their assembly for that purpose. It is quite necessary to place them, in order to sustain a conviction under s. 147, on land to which they had no sort of claim: the First Information Report describes minutely an affair on land (which was part of Aklu's land) in the occupation of Khedan: but that story is completely altered for two obvious reasons; firstly, because the evidence (*e. g.*, as to signs of disturbance and the presence of blood) would support no such case and, secondly, because, if Gobind's intention was to take possession of what he had bought, Khedan's plot in plot No. 193 was admittedly a bit of it: but so too was plot No. 192 to which Khedan had no sort of claim and which is adjacent to Bhaju's field.

The second point in this connection is that such a direct change in the venue would very greatly if not utterly discredit the whole of the prosecution story; not only of course as to where the affair took place but as to what actually occurred and would throw into prominence and indicate as a much more probable alternative the *chowkidar's* report that there was likely to be a *fight* on account of Mithu, the *barahil* of the new *malik*, intending to resist Gobind's desire to take possession of and plough the lands which he (Gobind), had acquired.

If these results of the alteration in the venue had been explained to the Jury and it had also been pointed out that under such circumstances considerations, quite different to those circumscribed by the provisions of the law relating to unlawful assemblies would arise no opportioning or fixing the culpability (if any) for the death of Khedan on any person or persons, I have a very strong feel-

ing that the Jury would not have returned the verdict which they did. I am satisfied that from what I can gather from the heads of the charge that the position was not sufficiently explained to them or, if there are lacunæ in the record which were in fact filled up verbally by the Judge when delivering his charge, that the Jury failed to understand the import of what he said.

In my opinion the point mentioned above coupled with the confusion shown by the Jury with regard to their verdicts (for there were two) relative to s. 149 makes it obligatory for us to allow this appeal; but there are a few further observations which I should like to make with reference to further criticisms directed by the learned Counsel for the appellants against the Judge's charge.

One of these criticisms is that the learned Judge made some actual and serious mistakes in his summing up; if the record of the heads of the charge is correct.

(A) In his reference to the *chowkidar's* report he says," The *sanha* indicates that the dispute was between Mithu and Gobind."

It must be pointed out, however, that this is incorrect; the *sanha*, as it appears in the papers before this Court, does not even mention Gobind's name.

(B) Again, still referring to the *sanha*, the learned Judge says,

"The substance of this *sanha* is that Rupan Singh (appellant No. 1) was going that day with men and ploughs to take possession of some 4 *bighas* of land which he had purchased from a *goala* of Bhatbhigha this year."

It must, again, be pointed out that this is quite incorrect according to the wording of the *sanha* as it lies before us, Rupan is not personally mentioned at all as going or intending to go to take possession.

(C) Again with regard to the alleged settlement of some of Aklu's land with Khedan Etwari stated in the First Information Report that this settlement was effected in 1316-*F*, after Aklu and others had abandoned their holdings: and that settlement was effected a year after the receipt of the survey *khatian*: and Etwari produced what purported to be genuine receipts for the year 1316*F*. But the Survey Settlement was only published in 1317 and the appellants produced the *khatian* showing that Aklu's name was therein still recorded. This quite disposed of Etwari's date "1316" but the learned Judge did not regard the discrepancy as important because, so he says in his charge, the *attestation would* have taken place in 1316.

It is also now pointed out by the learned Assistant Government Advocate that the date "1316" as given by Etwari Goala was really merely a mistake; as the whole of the rest of the tenour of his evidence was to the effect that the land was settled a year after the survey *khatian* had been received. But it is rather incongruous to brush aside the date of 1316 as a mistake when Etwari Goala produces in proof thereof rent-receipts for that year: what must be the nature of such receipts if 1316 was a mistake of Etwari's and what can be the value of Etwari's evidence if he is prepared thus to bolster up his case with counterfeit receipts? The learned Judge did not point out any of these serious inferences to the Jury but brushed aside the criticism directed against Etwari's story of settlement on reasoning which seems fallacious and misleading.

There were other criticisms of the record of the charge but none so penetrating as the above. Those, however, to which I have drawn specific attention are sufficiently important; and only strengthen the view which I have already expressed that this appeal must be allowed.

The learned Counsel for the appellant has asked us with great earnestness to express some view as to the desirability of a Sessions Judge formulating, at the conclusion of the delivery of his charge, specific questions for the Jury's reply. I do not think that any rule can possibly be laid down on this subject: there is nothing to prevent such questions being formulated and, in cases presenting complication, I used to find when sitting as a Judge of Assize, that such a practice was helpful to the Jury and useful in deciding the legal effect of the Jury's findings; but the formulation of such questions requires great care and queries should be confined within the lowest possible compass; in a very large number of cases such procedure is not requisite as a simple finding of guilty or not guilty serves all necessary purposes.

It must not be thought that I have intended in my remarks to express any view that the summing up by the Judge was an inefficient one taken as a whole: but it was rather a complicated case presented in a

very confused fashion. In many parts of the Judge's record it is clear that he summed up to the Jury with skill and in some portions rather strongly in favour of the accused: but if the record before us really gives a substantially accurate record of what he said to the Jury he obviously omitted much of importance. If on the other hand it does not give a substantinally accurate account of what he said, then we have no means of knowing what he *did* say or how he filled up the important gaps.

I have no hesitation in this case in coming to the conclusion that the record of the heads of charge to the Jury (*a*) shows insufficient material to enable this Court to judge what the learned Judge told the Jury, (*b*) shows that there were serious omissions (and certain actual mistakes) in directing the Jury on the facts and law which in my view did in every probability occasion a verdict different to that which would have been otherwise given.

It is also clear to my mind from the verdicts of the Jury that they did not in the least understand and actually misunderstood the Judge's exposition of the law.

For the above reasons I am of the opinion that the appeal must be allowed; the convictions quashed and the sentences set aside and the appellants set at liberty. There will be no order by this Court for a new trial or expression of opinion as to whether a new trial is desirable or necessary.

Kulwant Sahay, J.—I agree. I only desire to add that in complicated cases the Judge in his charge to the Jury ought not only to explain the law but should also draw their attention to the evidence in the case and to explain as to how they should apply the law as explained by him to the particular facts of the case. In other words where the facts are complicated he should explain to them what are the points which they ought to take into consideration in arriving at their verdict. The observations of Manuk, J., in the case of *Sunder Buksh Singh* v. *Emperor* (3) as regards the duty of Sessions Judges to assist assessors by putting specific questions concerning the facts upon which the law will turn may with advantage be borne in mind by Judges in charging the Jury so that in cases involving complicated questions of fact and law the Jury may have a clear idea of the real questions requiring consideration in order to arrive at a correct verdict. In the present case it is obvious that the Jury were in a hopelessly confused state of mind and had no clear comprehension of the law which they were called upon to apply to the facts of the case.

Z. K. *Convictions quashed.*

(3) 48 Ind. Cas. 163; 3 P. L. J. 653 at p. 655; 19 Cr. L. J. 983; (1918) Pat. 359.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 427 OF 1925.

September 14, 1925.

Present:—Mr. Wazir Hasan, A. J. C., and Mr. Simpson, A. J. C.

BHULAN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 58—Criminal trial—Fact admitted by accused, whether must be proved—Criminal Procedure Code (Act V of 1898), ss. 221, 227—Penal Code (Act XLV of 1860), s. 396—Charge, contents of—Dacoity with murder—Facts to be proved—Sessions Judge, duty of—Amendment of charge—Credibility of witness—Appellate Court.

The question of the credibility of a witness is eminently one for the Court of Trial before whom the witness appears. An Appellate Court is not in an equally good position to pronounce on the matter. [p. 234, col. 2.]

A charge-sheet should never contain more than what it is necessary for the prosecution to prove. [p. 235, col. 2.]

In a case under s. 396 of the Penal Code it is not necessary for the prosecution to prove that the murder was committed jointly by all the accused. It is enough if any one of the accused who are jointly concerned in the committing of the dacoity commits murder in the commission of the dacoity. It is not, therefore, necessary for a charge under this section to state that the murder was committed by all the accused persons jointly. [p. 236, col. 1.]

A Sessions Judge when he receives an indictment should compare the charge-sheet with the language of the section under which the charge has been drawn up and, when necessary, amend the charge-sheet, using so far as possible the words of the section. [*ibid.*]

Section 58 of the Evidence Act applies equally to criminal as well as to civil trials and the Criminal Courts in India as a matter of practice do not insist on every fact which is admitted by the accused being proved by the prosecution. But, under the proviso to the section the practice is to insist on proof of all really essential facts. [*ibid.*]

Appeal against an order of the Additional Sessions Judge, Bahraich, dated the 21st July 1925.

Mr. *Ajit Prasad*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—The appellant, Bhulan Ahir, 21, was tried at one trial along with four Brahmans, Maiku, 23, Rajwant, 22 Swami Dayal, 18, and Samai Din 20. The charge was dacoity with murder punishable under s. 396, Indian Penal Code. All the four Brahmans were acquitted, but Bhulan was convicted and sentenced to death. He has appealed. The sentence is also before us for confirmation.

The evidence in the case is scanty. It is sufficient to prove the following facts:

The deceased, *Musammat* Gainda, is a widow about fifty years old, who has been living for twenty or thirty years with her nephew Chhedi Ram in village Kodahi. Chhedi Ram is *prohit* of all the Hindus of Akberpur, a larger village about two miles from Kodahi. The deceased used to assist him in his duties as *prohit*. In particular she went every Saturday to the house of one Lodhe Singh at Akberpur. There she received a *lota* of water, and went and made offerings of water at the foot of a sacred *pipal* tree, some three hundred yards to the south-west of Akberpur. On Saturday the 21st of March she went as usual to Lodhe Singh and she took the water as usual. Lodhe Singh's *lota* smelt of fish, so she went and borrowed a *lota* from Raghbir Singh next door. She also took another *lota* belonging to another client named Baldeo Singh for the same purpose and set off for the *pipal* tree. Apart from the evidence of the witness Khirati, who has not been believed by the Court of Trial, and the confession of the appellant Bhulan which, as we shall see, is of very doubtful authenticity, there is no evidence that the deceased was ever seen again alive. When she was missed, a search was made, but it was not until Monday morning that the body was found. It was lying in a pit under the *pipal* tree. It had been covered with leaves, and no one had thought of looking there until the Monday morning, although of course they had gone to the tree, because it was known that that was her destination. Until the body was found, it was not known that murder had been committed and the matter was not reported. So the first report was made on Monday the 23rd March at noon. The Sub-Inspector reached the village after 3 P. M. the same day. On the 25th March he recorded the statement of the witness Khairati. If this witness's evidence could be accepted as conclusive, not only Bhulan but the four Brahmans would be guilty of dacoity with murder. He says that he works for the accused Maiku, and that on that day he was cutting the mustard and leaving the wheat in a field belonging to Maiku lying immediately to the east of the *pipal* tree. He saw the deceased pouring water at the foot of the tree. At the same time he saw the five accused coming from the north. They began looting ornaments from the body of the deceased. Maiku had a hatchet while the other four were armed with *lathis*. With the characteristic indifference of the rustic, Khirati asked Maiku to help him in lifting the sheaf of mustard stalks. Maiku would not listen to him and at this point the witness ran away. Maiku and Rajwant came to his house and threatened to kill him if he spoke to any one about their looting the ornaments of the deceased. This witness did not see the murder committed. We need not discuss the reasons which the learned Sessions Judge has given for disbelieving the evidence of this witness. The important fact is that he did disbelieve him. The question of the credibility of a witness is eminently one for the Court of Trial before whom the witness appears. We are not in an equally good position to decide the point, and we are content to accept the finding of the learned Sessions Judge and to discard entirely the evidence of this witness.

But it was in consequence of the statement he made to the Sub-Inspector that the five accused were arrested. Bhulan was arrested on the 26th and taken to the Sub-Inspector. We learn from the *chaukidar* that Bhulan had already been brought before the Sub-Inspector on the 25th. He was one of thirty or forty villagers whom the Sub-Inspector kept with him during the investigation, allowing them to go home for their food, but insisting on their spending the night at the place where he was. On the 26th Bhulan made a statement to the Sub-Inspector which is not admissible in evidence. On the same day he was despatched to the Sub-Divisional Magistrate in order to have his confession recorded. The confession was recorded on the 28th of March under s. 164. In it he said that he had gone to cut grass. He saw the deceased come to the *pipal* tree. Then he heard her cry and he ran up and saw six men. He mentions the four accused, and he adds the names of Bahadur and Sham-

bhoo Dutt. They took the ornaments from the deceased who was lying on the ground. Bhulan said to them, "What are you doing?" They replied, "If you speak out we will kill you," and Maiku ran towards him with an axe. Maiku said to him, "As you will state the fact to every one, so you too pick up some of the articles." Thereupon Bhulan removed the *hansli* or necklace. Rajwant pressed her mouth and Maiku gave her one blow on the neck with the axe. She died. The confession goes on to say that there is a *hata* to the north of the *pipal* tree, and that they threw the corpse into it and covered it with leaves and went away. As the corpse however was found in a pit, the word "*hata*" seems to be a mistake. Bhulan asked for his share of the property. He was told that the property would be sold to a goldsmith and the division made in money. However, they gave him the two *lotas* which he buried in the *arhar* field of Mohan Gararíya. Maiku had taken back the *hansli* from Bhulan. Bhulan also took the Sub-Inspector and witnesses to the field of Mohan Gararíya and there he produced two *lotas* which have been identified by Raghubir Singh and Baldeo Singh as theirs. The Court of Trial accepted the evidence on this point, and we regard it as proved that Bhulan produced the two *lotas*. Before the Committing Magistrate Bhulan adhered to the statement he had already made. He added nothing to it beyond admitting that he had given up the *lotas*. In the Sessions Court he again adhered to his statement.

The learned Sessions Judge has rightly rejected this confession as not being admissible against Bhulan's co-accused. It does not sufficiently implicate himself. He has rejected the evidence of the witness Khairati. There remains, therefore, no evidence to support a conviction of the four Brahmans, and accordingly they were acquitted. But the learned Sessions Judge not only found a lack of evidence, but he appears to have come to a definite conclusion that these Brahmans did not take part in the crime. He says.

"It is in evidence that these accused who are close relations and *pattidars*...are middle class people (neither rich nor poor) and that the *Panditain* belonged to the family of their *prohit*. It is, therefore, rather improbable that these men would have looted and murdered the woman in broad day-light for the sake of ornaments worth Rs. 50 or 60 only."

If this is to be regarded as a definite finding that the Brahmans did not take part in the crime, then Bhulan's confession would be false as regards these four persons. That is the first difficulty we feel with regard to the confession. The second is that the statement is itself improbable. That Maiku should insist upon Bhulan taking the *hansli*, and so making himself a participator in the crime appears to be childish. No one knew whether he had taken the *hansli* or not, except his fellow dacoits, and they could have said he had taken it, whether he had or had not. He was not likely to be deterred from speaking because he had been made to touch it. Nor is there any particular reason to believe a man who says that he took part in a dacoity but that he did it under compulsion. It is in his interest to say that he acted under compulsion. The next point is that there is exceedingly little corroboration of this story. The deposition of Khairati has been discarded. There remain only two circumstances to corroborate the confession. The first is that the corpse of the deceased was found in a pit under the *pipal* tree. Owing to the carelessness of the Courts below, it is impossible to say how far this is corroboration, for the word used in the confession is not "pit" but "*hata*," which does not mean a pit but rather an enclosure. The other fact, and a very important one it is, is the production of the two *lotas* by Bhulan. But when this is taken by itself, it amounts only to the possession of some of the stolen property by the appellant five days after the murder was committed. That is evidence that he either took part in the crime or dishonestly received the stolen property. But it is not evidence that any dacoity was committed at all, or that he had an actual hand in the murder.

Now let us consider the indictment against Bhulan and how far a conviction on that indictment can be supported. The charge sheet framed by the Magistrate sets forth that the five accused committed dacoity "and in the commission of that dacoity the murder of *Musammat* Gainda was committed by you all jointly and thereby committed an offence punishable under s. 391, Indian Penal Code". This charge sheet is erroneous. A charge-sheet should never contain more than what it is necessary for the prosecution to prove. Section 396 sets forth that if *any one* of five or more

persons, who are jointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, etc. . . . It was not necessary for the prosecution to prove that the murder was committed jointly by all the five accused. The defect in the charge-sheet ought to have been removed by the learned Sessions Judge. We presume that he overlooked it. It is much to be desired that Sessions Judges, when they receive an indictment, should compare the charge-sheet with the section, and, when necessary, amend the charge-sheet, using so far as possible the words of the section. This point is not without its importance because Bhulan had consistently pleaded guilty to the charge of dacoity, and with equal persistence has pleaded not guilty to the charge of murder. It may well be that he was not aware of the terms of s. 396, and that if he had been, he would have been constrained to admit that he had taken part in the dacoity, and that Maiku had committed murder. In that case, he would have pleaded guilty to an offence under s. 396, and under s. 412, Cr. P. C., no appeal would have laid at all, except on the matter of sentence. But we are not asked to apply s. 412. He was not convicted on his plea. We do not refuse to hear his appeal.

Now no doubt Bhulan has admitted that there was a dacoity and that he took part in it. The question how far a conviction can be based on the admissions of the accused is one that has never been thoroughly cleared up in Indian practice. In England the rule is clear. The accused may plead guilty and he may be convicted on that plea, but no admission, which falls short of being a plea of guilty, counts against him at all. The rule, that nothing need be proved which is admitted, is in England confined to civil cases. It has no application to criminal trials. But s. 58 of the Indian Evidence Act makes no exception of criminal trials and the Criminal Courts, as a matter of practice, do not insist on every fact which is admitted by the accused being proved by the prosecution. But, under the proviso, the practice is to insist on proof of all really essential facts.

In the present case we do not consider that either the confession of Bhulan, or his plea of guilty in the Court of Session is to be accepted as a substitute for proof that a dacoity did in fact take place. The evidence proves beyond doubt that there was a robbery with murder, but it does not prove that five persons took part in it so as to constitute dacoity. Consequently, Bhulan's conviction under s. 396 cannot stand, nor can he be convicted under s. 395. All that is established against him by the evidence for the prosecution is the production of the *lotas*. That proves either that he took part in the robbery or that he received the stolen goods dishonestly. The dishonesty is plain from the fact that he hid them in another man's field. If he had come by them honestly, he would not have hidden them. Section 412 is not applicable, because we find that it is not proved that there was any dacoity.

We, therefore, allow the appeal, set aside the conviction and sentence of death, and convict Bhulan under s. 411, Indian Penal Code, of dishonestly receiving two *lotas*, which had been obtained by robbery from the deceased. In the circumstances, we impose the maximum sentence, three years' rigorous imprisonment.

Z. K. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 245 OF 1924.

December 19, 1924.

Present :—Mr. Prideaux, A. J. C.

KUDAON—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 201—Causing disappearance of evidence of crime—Criminal himself, whether liable—Evidence Act (I of 1872), s. 27—Several accused in Police custody—Confessional statement by one—Similar statements by others—Discovery of evidence—All statements, whether admissible.

Section 201 of the Penal Code does not apply to a criminal causing evidence of his own offence to disappear, but exclusively to *another* person who screens the actual offender. [p. 237, col. 1.]

Empress v. *Ghasia Kewat*, 12 C. P. L. R. Cr. 17, *Torap Ali* v. *Queen-Empress*, 22 C. 638: 11 Ind. Dec. (N. S.) 425, *Reg.* v. *Kashinath Dinkar*, 8 B. H. C. R. Cr. 126, relied on.

When a person is said or believed to have himself committed an offence, he cannot be convicted of causing disappearance of the evidence of that offence, even though he cannot be convicted of the principal offence as well for want of sufficient evidence. [p. 237, cols. 1 & 2.]

Section 27 of the Evidence Act must be very strictly construed. [p. 237, col. 2.]

Where one of several accused in Police custody has agreed to point out a place, where a fact would be discovered in pursuance of his statement to point

out that place, the section does not cover similar statements of the other accused in Police custody. [*ibid.*]

Appeal against an order of the Sessions Judge, Saugor, dated the 18th September 1924.

Mr. *G. L. Subhedar*, for the Appellant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—This judgment disposes of Criminal Appeals Nos. 245 to 249 of 1924, the appellants being Kudaon *walad* Gariba, Nirpatia *walad* Ganesh, Halka *walad* Dhansingh, Girdhari *walad* Behari and Mujia *walad* Param, all residents of *Mouza* Hura in the Saugor District. They were committed to the Sessions Court, Saugor, on a charge of murder for killing one Damroo *Chamar*, on the evening of the 26th June last.

The learned Sessions Judge, when the case reached him, added a charge against each accused under s. 201 of the Indian Penal Code. The Judge finds that the evidence as regards the offence of murder was insufficinet to warrant the conviction of the present five appellants. But he has convicted them under s. 201 of the Indian Penal Code and sentenced each accused to four years' rigorous imprisonment.

I am of opinion that these convictions cannot stand. It has to be remembered that the present appellants were said or believed to have committed this murder and there is authority that in such a case the accused cannot be convicted under s. 201 of the Indian Penal Code. In *Empress* v. *Ghasia Kewat* (1), Sir Stanley Ismay, J. C., held that "s. 201 of the Indian Penal Code does not apply to a criminal causing evidence of his own crime to disappear but to a person who screens the actual offender and no question of abetment can possibly arise". The section itself seems to me to make it clear that the above is the correct interpretation of the law. As stated in *Torap Ali* v. *Queen-Empress* (2) quoting *Reg.* v *Kashinath Dinkar* (3) "Section 201 and the two following sections commence with precisely the same words thus : 'Whoever knowing or having reason to believe that an offence has been committed.' Now, as there is no law which obliges a criminal to give information which would convict himself, it is evident that ss. 202 and 203 could not apply to the person who committed that offence, *i. e.*, 'the offence which he knew had been committed; and s. 201 should be construed in a similar manner. And looking at the only illustration which follows s. 201, it would appear that the law was intended to apply exclusively to 'another' ..... and that the conviction of the accused as accessories to an offence, known or believed to have been committed by themselves, is illegal." The learned Judges who disposed of *Torap Ali* v. *Queen-Empress* (2) referred to five separate rulings in support of their opinion, and their view has been followed in this Court in the case in *Empress* v. *Ghasia Kewat* (1) already referred to.

Even if I held a contrary opinion, I do not think that in the present case the convictions under s. 201 could stand. The evidence in the case certainly does not establish that Damroo was killed, and the learned Standing Counsel for the Crown admits that on the evidence on record he cannot say that Damroo was killed. Again there is no reliable evidence that Damroo's body was carried to the spot said to have been pointed out by the five accused and cremated there. Here we have a case of five accused. Kudaon is first said to have confessed to the Police and to have agreed to point out the place where the body was burnt. Then the other accused did the same thing, and all five are said to have pointed out the exact spot. Now, in my opinion, s. 27 of the Evidence Act has to be very strictly construed. In a case like the present, where one accused has agreed to point out a place where a fact would be discovered in pursuance of his statement to point out that place, the section does not cover similar statements of the other accused in Police custody. Ashes and minute fragments of bones were found on the spot pointed out. But the Chemical Examiner's report states that the fragment of bones were too small to be identified as human. Therefore, strictly speaking, it cannot be said that the pointing out of the burning place by any of the accused would establish 'that a human corpse had been burnt at the spot. It is unnecessary to go into the matter further, for I am distinctly of opinion that the conviction of the five appellants is not warranted either by law or by the evidence against them.

The result is that I set aside the conviction and sentence in the case of each of the five appellants and direct that, unless

(1) 12 C. P. L. R. Cr. 17.
(2) 22 C. 638; 11 Ind. Dec. (N. S.) 425.
(3) 8 B. H. C. R. Cr. 126.

any of them are being detained for other offences, they be set at liberty.

N. H. *Conviction set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 422 OF 1925.

September 15, 1925.

Present:—Mr. Simpson, A. J. C.

SHEO SHANKAR AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 221—Charge, form of—Murder, charge of—Penal Code (Act XLV of 1860), ss. 34, 325—Assault with lathis*—Common intention—Grievous hurt.*

The charge-sheet corresponds to the English indictment, and it is very much more than a mere form. An accused person is entitled to be informed with the greatest precision what acts he is said to have committed, and under what sections of the Penal Code those acts fall. [p. 239, col. 1.]

A charge of murder should set forth whether the blows inflicted were inflicted with the intention of causing death, or they were sufficient in the ordinary course of nature to cause death and were intentionally inflicted. A charge under s. 302, Penal Code, should follow the language of s. 300 of the Code, which contains the definition of murder. [*ibid.*]

Section 300, Penal Code, says nothing about deliberation or previous preparation. It speaks only of intention and knowledge. If the act by which death is caused is done with the intention of causing death, the offence is murder, unless it falls within the exceptions. [p. 240, col. 1.]

The causing of grievous hurt must be regarded as the intention of those who use *lathis* for the purposes of s. 34, Penal Code. [p. 239, col. 2.]

Criminal appeal against an order of the Second Additional Sessions Judge, Lucknow at Unao, dated the 13th July 1925.

Mr. *G. H. Thomas*, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.—Fourteen persons were tried at one trial on a charge under s. 147 and s. 302-149, Indian Penal Code. There was also a charge of grievous hurt, although the section was not quoted. Twelve of them were acquitted by the learned Sessions Judge, but the two appellants were convicted. One of them, Sheo Shankar, was convicted under s. 304, and sentenced to five years' rigorous imprisonment. The other, Ganga Din, was convicted under s. 325, and sentenced to three years' rigorous imprisonment. They have appealed.

There was a dispute about a matter of 25 or 30 *bighas* of land, the property of Raghubar Kurmi of village Rojhai, who died on 24th October 1924. Two people claimed this land. One was Khushal the complainant in this case. It is his son Permeshwar who has been killed and it is his other son Baij Nath who has sustained grievous hurt. The other claimant is Jagannath, the father of Sheo Shankar the first appellant. They are all Brahmans. The second appellant, Ganga Din, is a barber by caste. He was one of the labourers who were cutting the crop on behalf of Sheo Shankar on part of the disputed land.

The prosecution story is that Jagannath and Sheo Shankar, with eight or nine labourers, were cutting this crop early on the morning of the 20th March 1925. Khushal and his two sons Parmeshwar and Baij Nath came upon them accidentally, and protested, whereupon Sheo Shankar and his friends called out a concealed party armed with *lathis*, and assaulted Khushal and his sons. The earliest report was made by Sheo Shankar appellant himself. This was about 10 A. M. Khushal and his sons, who had been rather knocked about, never went to the *thana* at all. It was only when the Sub-Inspector got news that Parmeshwar was dying that he went to the spot, and obtained a report of the occurrence from Baij Nath. By the time he got there Parmeshwar was dead.

For the defence it was admitted that Sheo Shankar and Jagannath were cutting a crop with a number of labourers when Khushal and his sons came up. But they denied that there was any party in ambush, and they said that they struck Khushal and his sons in exercise of the right of private defence, the crop which they were cutting being their own.

The learned Sessions Judge came to the conculsion that no unlawful assembly and no riot was proved. He held that Sheo Shankar was within his rights in cutting the crop, so that he and his party could not constitute an unlawful assembly, as he disbelieved the prosecution evidence that Sheo Shankar's party comprised nineteen persons. He further found that it was not proved that it comprised the five necessary to constitute an unlawful assembly. He said:—

"All that can be taken to have been proved is that Khushal and his two sons on one side, and Sheo Shankar and Jagan-

nath with some of the labourers on the other side, happened to meet in the field and fell into a fight in which Ganga Din accused took part on the side of Sheo Shankar."

On the finding he acquitted all the accused on the charge under s. 147. Consequently the charge under s. 302/149 fell to the ground.

But he came to the conclusion that Sheo Shankar had struck the fatal blow, and he convicted him of culpable homicide with respect to the killing of Parmeshwar. Baij Nath had a tooth dislocated, which reckons as grievous hurt. The learned Sessions Judge convicted Ganga Din in respect of this injury. From these convictions Sheo Shankar and Ganga Din appeal.

Both the Magistrate and the Sessions Judge have been careless with regard to the charge-sheet. I desire to call the attention of Criminal Courts to the importance of drawing up a charge-sheet properly. The charge-sheet corresponds to the English indictment, and it is very much more than a mere form. An accused person is entitled to be informed with the greatest precision what acts he is said to have committed, and under what sections of the Penal Code these acts fall. In the present case, the Magistrate drew up a charge-sheet in which he set forth sufficiently the object of the lawful assembly. It was an adequate charge under s. 147 of the Indian Penal Code. But when he came to the killing of Parmeshwar, and the causing of grievous hurt to Baij Nath, all that he said was,

"In persuation (pursuance ?) of the common object, administered *lathi* blows to Khushal, Parmeshwar and Baij Nath, resulting in the death of Parmeshwar and grievous injury to Baij Nath."

This was not a proper charge of murder, which should have set forth whether the blows inflicted on Parmeshwar were inflicted with the intention of causing his death, or that they were sufficient in the ordinary course of nature to cause death and were intentionally inflicted. A charge under s. 302, Indian Penal Code, should follow the language of s. 300, Indian Penal Code, which contains the definition of murder. The charge sheet also omits to quote s. 325 of the Code.

The learned Sessions Judge did not amend this charge-sheet as he ought to have done, and when he acquitted under s. 147, he omitted to frame a fresh charge under ss. 304 and 325 against Sheo Shankar and Ganga Din respectively. This error, however, is not fatal. It is the practice of Courts, where there has been a riot and where there are charges of other offences under s. 149, Indian Penal Code, to convict of those other offences even where s. 149 is discarded.

I pass now to the convictions themselves. The conviction of Sheo Shankar proceeds largely on his own admission that it was he who struck the blow which killed Parmeshwar. That statement was made before the Committing Magistrate in these words:

"When I turned towards them Parmeshwar struck a *lathi* on my head, and that Khushal struck another *lathi* on my back. I also struck a *lathi* on Parmeshwar."

The medical evidence shows that Parmeshwar had only two injuries, one on the head and one on the back of the right side. Death was caused by the blow on the head. The admission, therefore, is sufficient proof that Sheo Shankar caused the death of Parmeshwar.

There is no actual finding that Ganga Din struck the blow that dislocated the tooth of Baij Nath. The reasoning of the judgment is confused at this point. Apparently s. 149 was still in the mind of the learned Sessions Judge.

His findings of fact are actually these. Sheo Shankar struck the blow that caused death. It is not proved who struck the blow that caused grievous hurt, but Ganga Din took part in the fight, and must be held responsible for that blow.

This is wrong. There is no presumption that Ganga Din struck that blow. But the conviction stands. Ganga Din is liable under s. 34 for all that was done in furtherance of the common intention of all, and grievous hurt, as has frequently been held, must be regarded as the intention of those who use *lathis*. Ganga Din is just as responsible for the injury which killed Parmeshwar as he is for the injury which caused grievous hurt to Baij Nath. But for both of these, the proper conviction is under s. 325, and this is the section under which he has been convicted. The sentence is not too severe. I dismiss Ganga Din's appeal.

As regards Sheo Shankar, the offence committed was *prima facie* murder. The learned Judge has held otherwise on the ground that no deliberation and pre-

vious preparation by the accused persons for committing the act has been even attempted to be proved. But s. 300, Indian Penal Code, says nothing about deliberation or previous preparation. It speaks only of intention and knowledge. The learned Judge goes on,

"The question then narrows itself to this whether in the quarrel shown to have arisen only on the spur of moment, Sheo Shankar and Ganga Din intended by their acts to cause the death of Parmeshwar."

This shows how far astray the learned Judge has gone by omitting to refer to s. 300. If the act by which death is caused is done with the intention of causing death the offence is murder, unless it falls within the exceptions. He then goes on to say, and rightly, that the intention must be gathered from the nature of the physical act committed, that is to say, that, whoever struck this blow must be taken to have intended the injury which he actually inflicted. This is correct. The case is one similar to Illustration C of s. 300. Even if there was no intention to cause death, the killing of Parmeshwar is still murder, unless it falls within one of the exceptions. The learned Sessions Judge then refers to *Emperor* v. *Mahabir* (1). That case is authority for saying that if there is a joint assault by two or more persons using *lathis*, in which a fatal blow is struck, but it is not proved who struck it, all the persons concerned can be convicted of culpable homicide on the ground that they knew that their act was likely to cause death, but not of murder. As regards Sheo Shankar, therefore, that section has no application and unless he comes under some exception he ought to have been convicted of murder. But there is no appeal on behalf of Government. The case may fairly be said to fall under Exception (4), and the coviction may be accepted.

It has been urged on behalf of both appellants, indeed this was the main defence taken, that they had a right of private defence, and there are remarks in the judgment which would support such a view. But my finding is that they had no such right. Sheo Shankar on one side set up a Will by Raghubar. Khushal, on the other side, set up another Will. The case is before the Revenue Courts in a mutation proceeding. It may be that the appellant's Will is registered while Khushal's Will is not. It may be that the appellant is a nearer relation to Raghubar. I have nothing to do with all that. These are matters for the Civil Court. The point is that neither party was in possession. Consequently when the appellant, Sheo Shankar, went to cut the crop in Raghubar's field he was taking possession. If the other party to the controversy tried to prevent him doing so, the two parties were on a level. There was no right of private defence on either side. For these reasons I dismiss both appeals.

N. H. *Appeals dismissed.*

(1) 19 Ind. Cas. 497; 16 O. C. 19; 14 Cr. L. J. 241.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 330 OF 1923.

November 12, 1923.

Present :—Mr. Justice Scott-Smith.

SAMUNDAR AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 71, 363, 364, 365—Criminal Procedure Code (Act V of 1898), s. 35—Kidnapping in order to hold kidnapped person to ransom—Offence—Two persons kidnapped in course of same transaction—Separate offences—Separate sentences, legality of.

Section 364 of the Penal Code provides for the case of a kidnapper whose object is that the person kidnapped may be murdered or may be so disposed of as to be put in danger of being murdered. The section is not applicable where the object of the kidnapper is to hold the kidnapped person to ransom. In such a case the kidnapper can be convicted properly either under s. 363 or s. 365 of the Penal Code. [p. 211, col. 1.]

Where two persons are kidnapped in the course of the same transaction, there are two distinct offences of kidnapping and it is lawful to award separate sentences for each offence although it is not necessary that the sentences should run consecutively. [*ibid.*]

Criminal appeal from an order of the Magistrate First Class, exercising enhanced powers under section 30, Criminal Procedure Code, Mianwali, dated the 12th February 1923.

Mr. *M. S. Bhagat*, for the Appellants.

The Government Advocate, for the Respondent.

JUDGMENT.—The appellants along with three other persons of whom one Sadhu Khan was represented at the hearing by Mr. Shamair Chand and the two others Salim Khan and Khan Mir have appealed through Jail, have been con-

victed by a Magistrate invested with s. 30 powers, at a joint trial, of kidnapping Nihal Chand and Jiwan Das under s. 364 of the Indian Penal Code. All the appellants have been sentenced to seven years' rigorous imprisonment for each offence and the sentences of all of them except Muhammed Khan have been ordered to run consecutively. In the case of Muhammed Khan the Magistrate has on account of his youth ordered that the sentences should run concurrently. The appellants have also been sentenced to fine.

Mr. M. S. Bhagat who appeared for the appellants in Criminal Appeal No. 330 of 1923, has discussed the evidence at length and has urged that it is insufficient for the purposes of proving that his clients took part in the kidnapping of the aforesaid two persons.

I have carefully considered the evidence and, in my opinion, there can be no doubt that all the six appellants have been rightly found guilty of these offences. The only other matters which call for consideration are (1) whether they can be convicted separately of two distinct offences committed in the same transaction; (2) whether the convictions should be under s. 364 or some other sections of the Code; and (3) whether the sentences passed are appropriate.

Section 364 of the Indian Penal Code provides for the case of a kidnapper whose object is that the person kidnapped may be murdered or may be so disposed of as to be put in danger of being murdered. The learned Government Advocate frankly admits that the object of the kidnappers in the present case was to hold the kidnapped person to ransom. Under similar circumstances the Chief Court, Lower Burma, held in the case of *Po Lan* v. *Emperor* (1) conviction under s. 364 of the Indian Penal Code was not justified. It is clear, however, that the appellants can properly be convicted either under s. 363 or s. 365 of the Code. As regards the first point I am of opinion that the offences of kidnapping Nihal Chand and Jiwan Das were distinct and that it is lawful to award separate sentences for each offence. At the same time the offences were committed in the same transaction and, therefore, I do not think it was necessary to order that the sentences should run consecutively. Muhammad Khan, appellant, is a boy of only 16 years of age and I think that some reduction in his sentence is necessary.

I accept the appeal so far as to order that the sentences in the case of each of the appellants shall run concurrently and as regards Muhammad Khan I reduce the sentence to one of four years' rigorous imprisonment. The fines as imposed are maintained except in the case of Muhammad Khan where it is remitted.

Z. K. *Appeal partly accepted.*

(1) 19 Ind. Cas. 167; 6 L. B. R. 160; 14 Cr. L. J. 167; 6 Bur. L. T. 77.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 437 OF 1924.

September 18, 1925.

Present :—Mr. Simpson, A. J. C.

CHAINU—PRISONER—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 300, Excep. 1, 302—Wife found by husband sitting with lover—Death caused by husband—Grave and sudden provocation—Offence.

Accused's wife left her house after giving the accused his mid-day meal. She went to a grove and there met her lover. The accused after finishing his meal took up a *banka* and went in search of his wife. He found her sitting with her lover and killed her with the *banka* :

Held, that the provocation although grave was not sudden so as to deprive the accused of his self-control and that Excep. 1 to s. 300 of the Penal Code did not, therefore, apply and the accused was guilty of murder. [p. 242, col. 1.]

Criminal appeal against an order of the Sessions Judge, Hardoi, dated the 21st July 1925.

The Government Pleader, for the Respondent.

JUDGMENT.—Chainu, 24, appeals from a conviction under s. 302, Indian Penal Code, of murder and a sentence of transportation for life. The deceased is his wife *Musammat* Mula. She had a lover named Kanhai Brahman. She left the house on the 15th of April after giving her husband his mid-day meal. She went to a grove and there she met her lover Kanhai. The accused finished his meal, took up a *banka* and went in search of his wife. He found her sitting with Kanhai and he killed her with the *banka*. He says that they were actually having sexual intercourse but there is no evidence of this. It is denied by Kanhai, and what is more to the point, it

is denied by Mula's daughter Ketakia, a girl of nine years old. She was believed by the Court of Trial. It is also to be noted that the woman had her infant daughter with her, which makes it less likely that sexual intercourse took place. The accused also at one time made a suggestion that he took the *banka* with him for the purpose of cutting wheat, but he did not take the trouble to repeat this in the Sessions Court. There seems to be no doubt that he took it for the purpose of murdering his wife. I agree with the learned Sessions Judge that the provocation was not grave and sudden so as to deprive the accused of his self-control, and that Excep. 1 of s. 300 does not apply. I, therefore. dismiss the appeal and uphold the conviction and sentence. Transportation, however, is a severe punishment in a case of this kind. It appears that the wife was caught in the act with Kanhai more than once before, and that the accused had had to pay a fine to the caste. When he found her with her lover after all this, the provocation was certainly grave. The exception does not apply, but I direct that the record be sent to Government with a recommendation that the sentence be reduced.

Z. K. *Sentence reduced.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 183 OF 1925.

September 11, 1925.

Present:—Mr. Findlay, Officiating J. C.

MAHADEOSINGH—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused, object of—Cross-examination of accused, legality of—Consultation between several accused, whether permissible—Penal Code (Act XLV of 1860), s. 228—Interruption to judicial proceeding, what amounts to.

There is no provision of law under which two persons who are being tried jointly for the same offence are debarred from making a consulted statement in their examination under s. 342 of the Cr. P. C. [p. 243, col. 1]

The object of the examination of an accused person under the provisions of s. 342 of the Cr. P. C. is to enable the accused in his own interests to give an explanation of the circumstances appearing in the evidence against him. It is not open to the Court to examine an accused person for the purpose of filling up gaps in the evidence for the prosecution. An examination of an inquisitorial nature is both improper and illegal. The examination of the accused must not be conducted in the manner of cross-examination of an adverse witness by Counsel. Such examination seriously prejudices the accused in his defence and vitiates the trial. [p. 243, col. 2.]

Obiter dictum:—For a conviction under s. 228 of the Penal Code there must be intentional interruption to the Court. The mere fact that two persons who are being jointly tried for the same offence consult together in Court before making their statement in Court does not amount to an interruption in the proceedings of the Court and is not, therefore, an offence under s. 228 of the Code. [p. 243, col. 1.]

Application for revision against an order of the Additional Sessions Judge, Nagpur.

Mr. *S. Y. Deshmukh*, for the Applicant.

ORDER.—The applicant Mahadeo Singh was convicted of an offence under s. 500 of the Indian Penal Code and sentenced to one year's simple imprisonment and a fine of Rs. 100 or in default to undergo simple imprisonment for three months, by the First Class Magistrate, Nagpur. The co-accused of his, Chhitthan, was similarly convicted in the same trial and sentenced only to a fine of Rs. 200 or in default six months' rigorous imprisonment. The present applicant appealed to the Court of the Additional Sessions Judge, Nagpur, and the Additional Sessions Judge maintained the conviction but reduced the sentenced to one of four months' simple imprisonment only.

The case against the applicant, as also against the co-accused Chhitthan, was that a caste *panchayat* was held at Powni on the 13th of August 1924 and they had defamed the complainant P. W. No. 1 Sukhdayya, a widow of 40 years of age, by alleging and taking an oath to the effect that they had seen her having intercourse with one Chacha in a certain *nala*. The defence of the present applicant in the Magistrate's Court was that the incident was true, and he admitted further having made the statement before the *panchayat*. Apparently, Exception (8) of s. 499, Indian Penal Code, was the main stay of defence.

The first point urged on behalf of the applicant is that the Magistrate's examination of the accused was an illegal and improper one. In the initial portion of his judgment, which portion I may say incidently contained much irrelevant matter, which should not have found place therein, the Magistrate states that when he was examining the first accused he found that the two accused were exchanging remarks.

He accordingly removed the second accused from the Court and examined the first accused in his absence. I may say that I am aware of no authority for such an exceptional curious method or procedure. The report the Sub-Divisional Magistrate has submitted showing cause against the present application for the conviction being upheld, suggests that the removal of the co-accused from the dock in the circumstances alleged was justified, as the conduct of the two accused clearly amounted to an offence under s. 228, Indian Penal Code, and the course which the Magistrate took of removing one of the accused while the other was examined, was a more simple and correct one.

Now in the first place, I am not aware of any provision of law under which two co-accused on trial for the same crime are debarred from giving a consulted statement in their examination. It would have been equally open to each of the accused to say "I decline to make any statement; my Counsel will make an oral statement, or file a written statement on behalf of us jointly." Such a course of action would undoubtedly have been lawful on the part of the accused and I fail to see that the course the accused attempted to follow, was in reality an illegal and improper one. In this connection the essential purpose of s. 342 of the Cr. P. C. must be kept in mind. The vital principle underlying it is that the accused is only examined in order to enable him to explain any circumstances appearing against him. I may add incidently that there is no reason to believe that either of the accused could possibly have been convicted of an offence under s. 228, Indian Penal Code. For a conviction under that same provision of law there should be an intentional interruption to the Court, and the action of the accused in the Magistrate's Court does not reasonably suggest such intention and would appear undoubtedly to have been taken in good faith in their own interests, *cf. In re Surendra Nath Banerjea* (1).

I now come to the actual nature of the examination of the accused No. 1, that is the present applicant, in the absence of his co-accused. He was subjected by the Magistrate to a detailed and searching examination as regards the act of fornication which he alleged he had witnessed. As a glance at the said examination will show, it was conducted in the way in which the cross-examination of a hostile witness might conceivably be carried through. The purport and the matter of the examination were only too obviously in direct conflict with the letter and the spirit of s. 342, Cr. P. C. It seems necessary even at this time of day to emphasise the underlying purpose of an examination of an accused under s. 342; that purpose should be sufficiently clear from the wording of the section itself yet many Magistrates seem unable to appreciate it. The object of the provision is to enable the accused in his own interests to give an explanation of the circumstances appearing in the evidence against him. It is not competent for the Court to examine the accused for the purpose of filling up gaps in the evidence for the prosecution, *cf. Yasin* v. *Emperor* (2) and *Basanta Kumar Ghattak* v. *Empress* (3). An examination of an inquisitorial nature such as occurred in this case is undoubtedly both improper and illegal. It has again and again been pointed out that an examination of an accused under this section cannot, and must not, be conducted in the manner of cross-examination of adverse witness by a Counsel, *cf. Hurry Churn Chuckerbutty* v. *Empress* (4). Thus the law does not contemplate that the examination of the accused should be in the way it was in the present case.

In the present case the Magistrate doubtlessly acted with the best of motives, but this procedure showed a total disregard of the provision of the Cr. P. C. referred to. It is perfectly obvious that, in arriving at the conclusion he did, he was largely influenced by the discrepancies and contradictions, which he extracted from the examination of the two accused in the way he indicated. Not only so, but it is clear from his judgment that he made the accused demonstrate the alleged position of the guilty couple who were said to have been observed in the act of fornication. This procedure of the Magistrate has, needless to say, vitiated the whole trial. It was so diametrically opposed to the words and spirit of s. 342, Cr. P. C., that it cannot by any stretch of reasoning, be regarded as a mere irregularity, it was on the contrary

(1) 10 C. W. N. 1062 at p. 1065; 4 Cr. L. J. 210; 4 C. L. J. 415.

(2) 28 C. 689; 5 C. W. N. 670.
(3) 26 C. 49; 13 Ind. Dec. (N. S.) 635.
(4) 10 Cal. 140; 13 C. L. R. 358; 5 Ind. Dec. (N. S.) 96.

an illegality which cut at the very basis of the trial.

There is a further reason why this present trial was also an illegal one. On the 29th of April 1925 three witnesses who, the accused hoped, would be present without taking out process against them, were absent and an application was made for them to be summoned at this late stage. It was, undoubtedly, open to the Magistrate to have refused a further adjournment, but instead of doing this he proceeded to examine the two accused further as to what these witnesses would be likely to state and the like. Such an examination of the accused once more, was wholly opposed to the provisions contained in s. 342, Cr. P. C., *cf. Emperor* v. *Bhut Nath Ghose* (5).

It cannot be too clearly understood by Magistrates that it is not permissible for them to conduct an examination of the accused in the way which was followed in the present case. I may add that the evidence of some of the three witnesses whom the accused desired to have summoned, would appear to have been highly pertinent. One of these Ramnarayan Kalar (D. W. No. 1) in the first trial of the case then gave evidence that the complainant had admitted the allegations against her. The present trial was, therefore, undoubtedly an illegal one and the only question which remains is whether I should order a re-trial.

After examining the evidence in the case it seems to me one in which matters are very evenly balanced, and I have come to the conclusion that the interests of justice do not call for a re-trial. The conviction and sentence appealed against are accordingly reversed and the applicant is acquitted.

Z. K. *Application accepted.*

(5) 7 C. W. N. 345.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 92 OF 1925.

July 6, 1925.

Present:—Mr. Findlay, Officiating J. C.

NAGO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ATMARAM—DEFENDANT—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 145 (1), (4)—Preliminary order—Dispossession for more than two months—Presumption, whether can be extended—Magistrates, duty of, before passing preliminary order.

Section 145 (4) of the Cr. P. C. makes it incumbent on the Magistrate to decide which of the parties was in possession on the date of the preliminary order and the proviso only applies if any other party had been forcibly dispossessed within two months thereof. [p. 244, col. 2.]

The presumption of possession in favour of a particular party raised under the proviso of s. 145 (1) does not arise if the party has been out of possession for more than two months previous to the date of the preliminary order. [p. 245, col. 1.]

The fact that proceedings were first started under s. 107, Cr. P C. and the Magistrate came to the conclusion that proceedings under s. 145 would be more suitable after a long time, would not extend the time under the proviso. [*ibid.*]

Though it is competent to a Magistrate to rely on mere Police report in order to pass a preliminary order under s. 145, Cr. P. C., if he came to the conclusion that there is an imminent danger of a breach of the peace, it is advisable that the Magistrate should have and carefully scrutinize other evidence before passing an order under the section, as the misuse of provisions of ss. 107 and 145 of the Cr. P. C. requires to be discouraged. [*ibid.*]

Application for revision of an order of the Sub-Divisional Magistrate at Kamptee, dated the 25th March 1925, in Criminal Case No. 205 of 1925.

Mr. *P. Lobo*, for the Appellants.

Mr. *A. V. Wazalwar*, for the Respondent.

ORDER.—The applicants, Nago, Pama and *Musammat* Janki apply for revision of an order under s. 145, Cr. P. C., passed in favour of the non-applicant by the Sub-Divisional Magistrate, Kamptee.

I have heard Counsel for the non-applicant in the first instance, and do not find it necessary to call on Counsel for the applicants to reply. *Prima facie* I am in full agreement with the order, dated the 6th of May 1925, of Hallifax, A. J. C., passed when he admitted the present application. Admittedly, Atmaram had been in possession of the house in question since the 31st of October 1924. The preliminary order under s. 145 was passed on the 4th of February 1925, or more than three months later, and it seems to me *prima facie*, therefore, that that order was wrong and illegal. Sub-s. (4) of s. 145, Cr. P. C., makes it incumbent on the Magistrate to decide which of the parties was in possession on the day the preliminary order was passed and the proviso only applies if any other party had been forcibly dispossessed within two months thereof. The decision in *Sheoraj Singh* v. *Emperor* (1) in reality

(1) 19 Ind. Cas. 319; 11 A. L. J. 305; 14 Cr. L. J. 223.

gives the non-applicant no help whatever.

I have also been referred to the decision of Kotwal, A. J. C., in *Sesharao Nagorao Patil* v. *Emperor* (2). That decision merely laid down that the condition precedent authorizing a Magistrate to issue an order under s. 145 (1), Cr. P. C., is that he should be satisfied that a dispute likely to cause a breach of the peace exists, and the fact that the complaint shows that the complainant was out of possession for over two months does not vitiate the proceedings under s. 145. I so far concur with the said decision that the proviso merely recites a circumstance under which a presumption of possession may be made in favour of the disputants. This presumption, however, could not clearly arise in the present case, as over three months had elapsed on the day the preliminary order was passed. On the evidence on record and indeed on the very case on which the non-applicant came to Court, the Magistrate was bound to hold that the applicants were in possession and the whole order was wrong and illegal and in contravention of the provisions of s. 145 (4), Cr. P. C.

I need hardly point out that the fact that the Magistrate took some 2½ months to discover that the case could more suitably be dealt under s. 145 than under s 107, Cr. P. C., cannot in any way lead to an extension of time under the proviso to the sub-section quoted. I may add that I concur with Hallifax, A. J. C., in thinking that in any event there was a failure to prove that there was an imminent danger of a breach of the peace. I am aware of the decision in *Khosh Muhammad Sirkar* v. *Nazir Mahomed* (3), where it was held that the Magistrate could rely on the Police report in this connection, but ordinarily it would be well for Magistrates to carefully scrutinise the evidence in this connection in this class of cases. There is far too great a tendency amongst private individuals to file applications under s. 145, or under s. 107, Cr. P. C., simply as a first move which they imagine may put them in an advantageous position in the subsequent civil litigation as against the party with whom they are at loggerheads. This misuse of these provisions of law requires to be discouraged, and I certainly think that the present case is one of the kind in question.

The order, in short, of which revision is sought, was not only illegal but was, in my opinion, uncalled for in the circumstances of the case. The said order is, therefore, set aside and the application of the non-applicant Atmaram dated the 8th of November 1924 is dismissed.

G. R. D. *Application dismissed.*

(2) 44 Ind. Cas. 972; 19 Cr. L. J. 444.
(3) 33 C. 352; 9 C. W. N. 1065; 2 C. L. J. 259; 2 Cr. L. J. 637.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 304 OF 1924.

February 11, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

In re BHAU VYANKATESH CHAKORKAR—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 195 (c), 476—Penal Code (Act XLV of 1860), ss. 465, 467—Document produced in proceeding—Forgery—Complaint by Court, whether necessary.

The language of s. 195 (c) of the Cr. P. C. is wide enough to include any document produced or given in evidence in the course of a proceeding, whether produced or given in evidence by the party who is alleged to have committed the offence or by any one else. The intention of the Legislature in the framing of the section was to give authority only to the Court in which a proceeding was pending to file a complaint in respect of documents which were produced or given in evidence before it. [p. 247, col. 1.]

Criminal application against an order of the First Class Magistrate, Pandharpur, confirmed on appeal by the Additional Sessions Judge, Sholapur.

Mr. *P. B. Shingne*, for the Petitioners.

Mr. *D. R. Manerikar*, for the Complainant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Macleod, C. J.—The four petitioners apply to this Court for revision of an order passed on April 23, 1924, by the First Class Magistrate of Pandharpur holding that it was competent to him, on the complaint of the opponent, Shahabuddin Babaji, to take cognizance of some of the offences referred to in s. 195 (c) of the Cr. P. C., and that a complaint in writing under s. 476 was unnecessary. The Additional Sessions Judge rejected the petitioners' application for revision on October 13, 1924.

The second petitioner owned a house at Pandharpur which was sold by a registered sale-deed on October 28, 1920, to one Ibrahim Babaji, younger brother of the complainant. On March 28, 1921, Ibrahim Babaji brought a suit (No. 295 of 1921) against the second petitioner in the Court of the Subordinate Judge at Pandharpur, for possession of a portion of the house. The second petitioner put in a written statement, stating that the house was given by him to his wife, Chandrabhagabai for maintenance during her life time by a *kararnama* dated December 11, 1919. The *kararnama* was written by the petitioner No. 1, and was attested by petitioners Nos. 3 and 4. In the same proceeding Chandrabhagabai appeared by a Pleader and applied that she should be made a party to the suit. The petitioners contend that the effect of what then happened was that the *kararnama* was produced in these proceedings by Chandrabhagabai's Pleader and shown to the Presiding Judge. Sometime thereafter proceedings were instituted against petitioner No. 1 under s. 110, Cr. P. C., in the Court of the Sub-Divisional Magistrate at Pandharpur; the *kararnama* was produced there and marked as Ex. 18 in the case. In Suit No. 295 of 1921, a summons was issued by the Subordinate Judge at Pandharpur to the Sub-Divisional Magistrate to produce the *kararnama* in Court on December 7, 1922; it was accordingly sent with a clerk to the Subordinate Judge's Court on January 22, 1923; and it bears an endorsement of the clerk. In obedience to another summons of the Subordinate Judge's Court the Sub-Divisional Magistrate again sent the *kararnama* to that Court on July 26, 1923, and the Court subsequently ordered it to be exhibited. On July 18, 1923, Shahabudin Babaji filed a complaint in the Court of the First Class Magistrate at Pandharpur, and charged the petitioners with offences under ss. 465 and 467, Indian Penal Code, alleging that the *kararnama* was forged. The petitioners thereafter presented an application to the First Class Magistrate contending in effect that the case was governed by s. 195, Cr. P. C., and that he could not take cognizance of the alleged offences in the absence of a complaint in writing under s. 476. The application was dismissed. The learned Additional Sessions Judge was thereupon moved by two separate petitions; he dismissed one of them for default, and decided the other on the merits, holding that a complaint under s. 476 was not necessary.

The main ground on which the petitioners' Pleader argued the case before us was that the *kararnama* was produced in the proceedings under s. 110, Cr. P. C., and consequently, the first petitioner, who was a party to that proceeding, could not be prosecuted for having forged the document except on the complaint of the Sub-Divisional Magistrate. We agree with the Additional Sessions Judge that the document was not "produced or given in evidence" within the meaning of the terms of s. 195 (*c*), Cr. P. C., in Suit No. 295 of 1921. But we do not agree with him that the document was not "produced" in the proceedings under s. 100, Cr. P. C. The *kararnama* was produced and marked there as Ex. 18, and was, therefore, given in evidence in those proceedings. Section 195 (1) (*c*) is as follows:—

"No Court shall take cognizance of any offence described in s. 463 or punishable under s. 471, s. 475 or s. 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate."

The Government Pleader would have us read into the section some such words as "by such party or by a witness on his behalf." On this point the Additional Sessions Judge said:—

"This brings me to the necessity of investigating how the *kararpatra* found its way on the record of the Sub-Divisional Magistrate in the enquiry held under s. 100, Cr. P. C., and how it came to be marked as Ex. 18. The evidence of the above-mentioned Pleader (Mr. Dharurkar) makes the situation quite clear. It is an undisputable fact that Ex. 18 was not produced by any of the applicants. By a process almost similar to the one mentioned in *Janardhan Thakur* v. *Baldeo Prasad Singh* (1), Ex. 18 came on the file of the Court of the Sub-Divisional Magistrate, Pandharpur. And the aforesaid ruling lays down that a document so coming into Court is not one produced under. s. 195 and hence no sanction under cl. (*c*) is necessary."

In the case of *Janardhan Thakur* v. *Baldeo Prasad Singh* (1) there was a dispute

(1). 55 Ind. Cas. 288; 5 P. L. J. 135; 1 P. L. T. 129; (1920) Pat. 137; 21 Cr. L. J. 272.

as to the possession of immoveable property between an auction-purchaser and another claimant to the land. The latter produced a certain document before the Police Officer who was inquiring into the dispute. The officer filed it with his report and subsequently referred to it in his deposition. The party who had produced the document withdrew from the proceedings and the Magistrate, without referring to the document, recorded a finding that the possession was with the auction-purchaser. The latter moved the Magistrate to impound the document and to sanction the prosecution of his opponent. The opponent resisted the application on the ground that sanction was not necessary. The auction-purchaser thereupon filed a complaint against him under ss. 463, 471 and 476, Indian Penal Code. The accused pleaded that sanction was necessary, but process was issued. The accused moved the High Court without having moved the Sessions Court, when it was held that it would be a strain of ordinary language to say that the document, which came into Court merely because it was attached to the Police report prior to the proceedings was "produced" in the proceeding. Assuming, however, that it was "produced," the prosecution of the accused, who had no hand in its production, was not barred by reason of the absence of sanction. Mr. Justice Foster said (page 138*):—

"I do not see how the prosecution of a party who had no hand in its production, is barred by the absence of the sanction of the Court. We have been taken through a number of authorities, but in every case the party was criminally implicated, directly or by abetment, in the production."

Further on he says (page 139*):—

"In the present case the Court had no grievance against the petitioner. He neither produced the false document, nor abetted its production. So in no way did he abuse the authority of the Court."

The Additional Sessions Judge then refers to *In re Parameswara Nambudri* (2). where Mr. Justice Tyabji said (page 681†):

"Clauses (*b*) and (*c*) agree in some respects, but differ in this—that the offence is identified in cl. (*b*) by reference to the fact that it has a direct connection with some proceedings in Court, *viz.*, having, been (*i*) committed in or (*ii*) in relation to the proceedings; whereas in cl. (*c*) the offence has to be connected not with the proceeding, but (*i*) with a document produced or given in evidence in the proceeding; and (*ii*) by the fact that the document has been produced or given in evidence by a party to the proceeding."

We think that s. 195 (*c*) is wide enough to include any document produced or given in evidence in the course of a proceeding whether produced or given in evidence by the party who is alleged to have committed the offence or by any one else, and that the intention of the Legislature in the framing of the section, as it stands now, was to give authority only to the Court in which a proceeding was pending to file a complaint in respect of documents which were produced or given in evidence before it. If there had been any intention to limit the provisions of the section to a document produced or given in evidence by a party to the proceeding, then it would have been a simple matter to insert words to make that intention clear. These words are not there. We can only construe the section as it stands. We think the Additional Sessions Judge was wrong in holding that the *kararnama* had not been produced or given in evidence in the proceedings before the Sub-Divisional Magistrate within the meaning of s. 195 (*c*), so that it was not necessary that he should make a complaint under s. 476 before a Court could take cognizance of the offence charged against the petitioners. The Rule is made absolute by setting aside the order of the lower Court.

Coyajee, J.—I agree in holding that neither the language of s. 195, Cr. P. C., nor the object of that enactment, requires us to restrict its operation in the manner contended for by the opponents in this case.

Z. K. *Rule made absolute.*

(2) 31 Ind. Cas. 161; 39 M. 677; 18 M. L. T. 322; 16 Cr. L. J. 721.

*Pages of 5 P. L. J.—[*Ed.*]
†Page of 39 M.—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 98 OF 1925.
August 11, 1925.
Present:—Mr. Findlay, Officiating J. C.
BAJIRAO—ACCUSED—APPLICANT
versus
Musammat DADIBHAI AND ANOTHER
—NON-APPLICANTS.
Criminal Procedure Code (Act V of 1898), ss. 435

Cr. P. C., ss. 435—Revision petitions—Sessions Court—High Court—Exceptions.

Unless special grounds exist which justify an immediate resort to the High Court, all revision applications should ordinarily be made to the Sessions Judge who has under ss. 435 to 438 of the Cr. P. C. jurisdiction concurrent with the High Court to entertain them.

The mere fact that the case is one in which the Sessions Judge has no power to pass final orders but will have to refer the case to the High Court for such orders, should he see cause to do so, does not furnish any sufficient reason for departing from this rule of practice.

Emperor v. *Abdus Sobhan*, 2 Ind. Cas. 846; 36 C. 643; 13 C. W. N. 753; 10 Cr. L. J 190, *Rash Behari Saha* v *Phani Bhusan Haldar*, 63 Ind. Cas. 410; 48 C. 534; 22 Cr. L. J. 650, and *Bipin Bihari Mukherji* v. *Emperor*, 45 Ind. Cas. 397; 3 P. L. J. 302; 4 P. L. W. 327; 19 Cr. L. J. 589, followed.

Application for revision of an order of the Sub-Divisional Magistrate, Gondia, dated the 15th April 1925, in Appeal No. 300 of 1924.

Mr. *M. V. Abhyankar*, for the Applicant.

Messrs. *V. M. Bose* and *Y. V. Jakatdar*, for the Non-Applicants.

ORDER.—The present application has been filed against an order, dated the 15th April 1925, of the Sub-Divisional Magistrate, Gondia (Bhandara), declaring the non-applicants Dadibai and Kamabai to be in possession of certain *sir* fields in *Mouza* Gangla of the Gondia Tahsil. On the application coming on for hearing Counsel for the non-applicants raised a preliminary objection to the effect that this Court should not entertain the application on the merits, as the Sessions Judge had, under ss 435 to 438 of the Cr. P. C., concurrent jurisdiction in the matter, and it was accordingly urged that the application should have been first made in the Court of the Sessions Judge, Bhandara. In this connection the following decisions have been quoted:—(*i*) *Emperor* v. *Abdus Sbbhan* (1), (*ii*) *Rash Behari Saha* v. *Phani Bhusan Haldar* (2) and (*iii*) *Bipin Bihari Mukherji* v. *Emperor* (3). The first of these cases was distinctly analogous in its circumstances to those of the present one. There it was sought to attack a conviction by a Magistrate of the First Class, which was non appealable. At the most, all the Sessions Judge could have done would have been to have referred the case for final orders to the High Courts, yet Caspersz and Ryves, JJ., held that unless special grounds were shown, the application should ordinarily be first of all made to the Sessions Judge. In *Rash Behari Saha* v. *Phani Bhusan Haldar* (2) a similar view was taken. In that case, even although the Sessions Judge could not be said to have concurrent and final jurisdiction with the High Court, inasmuch as all he could was to report the case under s. 438, Cr. P. C., to the High Court, it was held that the ordinary practice should be adhered to of first moving the Sessions Judge in the matter. A similar view was taken by Jwala Prasad and Imam, JJ., in *Bipin Bihari Mukherji* v. *Emperor* (3) and this rule of practice is followed by the majority of the High Courts in India. For my own part, I can see no reason for differing from the view in question.

As regards the mere entertaining of the application for revision, it is undoubtedly true that the Sessions Court has concurrent jurisdiction with the High Court, and the fact that the Sessions Judge may not be able to pass final orders in the matter and, should he see cause to do so, have to refer the case for such final orders to the High Court, does not see *per se* any sufficient reason for departing from a rule of practice which is not only administratively convenient but is also, from a purely judicial point of view, a salutary one.

While this Court, therefore, will not ordinarily entertain applications like the present one unless the lower Court has been moved in the first instance, it will always be prepared to do so if extraordinary and special circumstances are shown which justify immediate resort to this course. In the present case the learned Counsel for the applicant has suggested that these special circumstances consist of the fact that there is the danger of a breach of the peace and that immediate action is necessary. In addition, he has referred to some inevitable delay which has occurred in the disposal of the present application. So far as the latter point is concerned, it seems to me extremely probable that had the application been made to the Sessions Judge, the case might have been fully gone into in that Court with more expedition than is possible in the circumstances prevailing in this Court.

As regards the danger of a breach of the peace and the necessity of immediate action, these two considerations could,

(1) 2 Ind. Cas. 846; 36 C. 643; 13 C. W. N. 753; 10 Cr. L. J. 190.
(2) 63 Ind. Cas. 410; 48 C. 534; 22 Cr. L. J. 650.
(3) 45 Ind. Cas. 397; 3 P. L. J. 302; 4 P. L. W. 327; 19 Cr. L. J. 589.

with equal truth, be postulated of practically each and every case under s. 145 of the Cr. P. C. and I am unable to admit that these considerations are so wholly exceptional ones as to justify this Court departing from the established rule of practice that applications of the present nature should first of all be made in the Sessions Court.

In the present case, howerer, a Rule has issued, rightly or wrongly, from the Court and it seems to me that in the circumstances I should accordingly dispose of it on the merits: *cf. Abdul Matlab* v. *Nanda Lal Khatel* (4). I will accordingly proceed to do so.

Order accordingly.

G. R. D.

(4) 77 Ind. Cas. 990; 50 C. 423; (1923) A. I. R. (C.) 674; 25 Cr. L. J. 526.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1172 OF 1923.

November 19, 1923.

Present :—Sir Shadi Lal, KT., Chief Justice.

ABDULLAH *alias* KALLAN—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 103—House search—Failure to invite respectable witnesses, effect of—Search conducted by responsible officers, legality of.

The object of the Legislature in requiring the presence of two or more respectable witnesses of the locality at a house search is to guard against possible chicanery and unfair dealing on the part of the officers entrusted with the execution of the search warrant and to ensure that anything incriminating which may be said to have been found in the premises searched was really found there and was not introduced by the members of the search party. The failure to call persons of the locality as witnesses to the search does not, however, render the search illegal, especially where the search is conducted by responsible and respectable officers in the presence of a Magistrate and there is an explanation forthcoming of the failure to invite the neighbours to witness the search. [p. 249, col. 2; p. 250, col. 1.]

Petition for revision of an order of the Sessions Judge, Delhi, dated the 11th June 1923.

Sheikh *Niaz Ali*, for the Petitioner.

Mr. *C. H. Carden Noad*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—On the morning of the 14th September 1923, at about 6 A. M. the house of the prisoner Abdullah was raided by a party consisting of a Magistrate and several Police Officers. A small room in the upper story of the house was searched, and a tin box containing cocaine was found in that room between two *charpoys* which were lying one on the top of the other. The learned Sessions Judge concurring with the Trial Court has convicted the prisoner for being in unlawful possession of cocaine, an offence punishable under s. 61 (1) of the Punjab Excise Act, 1914.

The raiding party comprised Khan Bahadur Chaudhri Nabi Ahmad, a Magistrate of the First Class; Khan Sahib Shabbir Hussain Khan, Superintendent of Police; Khan Sahib Ikramul Haq, Deputy Superintendent of Police; M. Surkhru Khan, Sub-Inspector of Police, Zahir-ud-din, Head Constable; and two European Police Inspectors and all of them with the exception of the European Inspectors have been examined as witnesses, and have deposed to the recovery of cocaine from the house of the accused. In view of the reliable evidence it is futile to contend that cocaine was surreptitiously introduced into the house by an enemy of the convict. It is, however, urged that respectable inhabitants of the locality, in which the house is situated, were not asked to attend and witness the search as required by s. 103 of the Cr. P. C. But the failure to call inhabitants of the locality as witnesses to the search does not render it illegal. A satifactory explanation for not inviting the neighbours to witness the search at that early hour of the morning has been furnished, and I am unable to hold that the irregularity makes the search illegal. I am supported in this view by the judgment of the Madras High Court in *Satagopala Charlu* v. *Satrughna Behara* (1). To the same effect are the observations in *Queen-Empress* v. *Raman* (2). It will be observed that the object of the Legislature in requiring the presence of two or more respectable witnesses of the locality is to guard against possible chicanery and unfair dealings on the part of the officers entrusted with search warrants, and to ensure that anything incriminating which may be said to have been found in the premises search-

(1) 17 Ind. Cas. 75; 23 M. L. J. 445 at p. 446; (1912) M. W. N. 1111; 13 Cr. L. J. 763.

(2) 21 M. 83; 2 Weir 46, 374 & 503; 7 Ind. Dec. (N. S.) 415.

ed, was really found there and was not introduced by the members of the search party. In view of the responsible and respectable officers who conducted the search, and considering that a Magistrate of the First Class was also present at that time, I have no hesitation in holding that the search was properly made and that the incrimating article was found in the house.

It is further clear that the petitioner was sitting just in front of the *chobara* in which the cocaine was found, and that search must, therefore, be deemed to have been conducted in his presence.

For the aforesaid reasons I am of opinion that the guilt of the petitioner has been established. It appears that he has already been convicted of an offence in respect of cocaine, and the imprisonment for six weeks which he has now undergone, cannot, therefore, be regarded as an adequate punishment. The application for revision is accordingly rejected. The convict must surrender to his bail.

Z. K. *Revision rejected.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 136 OF 1925.

July 11, 1925.

Present :—Mr. Findlay, Officiating J. C.

Musammat RITHA AND ANOTHER—ACCUSED —APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 494—Bigamy—Second marriage by woman abandoned by husband—Sentence—Criminal Procedure Code (Act V of 1898), s. 439—Revision—Findings of fact, interference with.

In a criminal revision the High Court will not interfere with a finding of fact arrived at by the lower Courts. [p. 251, col. 1.]

Where a woman who had been left largely to her fate by her husband and had been living in adultery with a paramour marries that paramour, she is guilty only of a technical offence under s. 494 of the Penal Code and should be awarded only nominal punishment. [p. 251, col. 2.]

Application for revision of the order of conviction and sentence passed by the Sessions Judge, Bhandara.

Mr. *P. C. Dutt*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—The applicant *Musammat* Ritha has been convicted of an offence under s. 494, Indian Penal Code, and sentenced to two years' rigorous imprisonment while her co-accused Rajaram has been convicted of abetment of the same offence and sentenced to a similar punishment by the First Class Magistrate, Balaghat. The appeals of both the accused to the Sessions Judge, Bhandara, were dismissed.

The facts of the case have been stated at great length in the judgments of the two lower Courts and it is unnecessary to repeat them here. As regards *Musammat* Ritha the first point urged is that the alleged marriage to Mahangu was not a valid one as he was not present at the initial ceremonies of the marriage of Mahangu with a Rui plant. I am unable to find any sufficient evidence on record that this factor necessarily in any way, invalidated the marriage with Mahangu and I can see no reason for differing from the careful findings of fact in this connection which have been arrived at both by the Magistrate and by the Sessions Judge. It has been suggested in this connection that *Musammat* Ritha herself may have in good faith believed that she was not legally or validly married to Mahangu. This supposition seems to me a very far fetched one in the circumstances of the case. I have been referred to the power-of-attorney dated 30th May 1923 (Ex. D. 1) in which *Musammat* Ritha and her step-mother described herself before the Sub-Registrar as the widow of Chaitram but it seems to me very obvious that this power was executed after the marriage of Ritha with the intention of creating evidence to show that Ritha had not been married to Mahangu. This was in reality an admission in their own favour made by the parties concerned and is, in my opinion, of no evidential value. The circumstances of the case all suggest to me that *Musammat* Ritha knew she had been validly married to Mahangu.

It has also been suggested that the complainant had abandoned *Musammat* Ritha to her fate and the *ikrarnama* (Ex. P. 1) has been referred to in this connection. The circumstances surrounding the execution of this *ikrarnama* have been very fully dealt with by both the Courts below. Their finding that the *ikrarnama* was voluntarily executed by *Musammat* Ritha is one which on the evidence the Courts below were entitled to arrive at although for my own part I regard the circumstances surrounding its execution as obscure and as suggesting that undue influence was brought to bear on *Musammat* Ritha at the

time it was executed. On revision, however, I do not think I would be entitled to interfere in this connection with the finding of fact arrived at by the lower Courts. The evidence in question may be considered to be of a marginal nature in the interpretation of which individual Judges might differ.

The next point urged is that the complainant admits that he has now married another woman and it has been suggested that this in effect implied on his part that the marriage with *Musammat* Ritha was ended with his consent. This contention was not offered in the appeal before the Sessions Judge and its consideration would involve an examination of question of fact as regards the caste custom which it does not seem to me should be gone into at this stage. In my opinion, therefore, no sufficient grounds have been shown in revision which would entitle *Musammat* Ritha to an acquittal.

As regards Rajaram it has been suggested that he at least had good reason to believe that *Musammat* Ritha was not lawfully married to Mahangu. In view of the part Rajaram has played in this affair any such supposition seems to me to be absolutely impossible. If he had married *Musammat* Ritha in innocence is it conceivable that he would have gone on for many months afterwards to pass himself off merely as her servant and would have made every endeavour to conceal the fact of the marriage? The whole history of this case in short forbids the theory that Rajaram was innocent of *mens rea* in marrying *Musammat* Ritha. The convictions, therefore, in this case will also be sustained.

Coming to the question of sentence, however, it seems to me that the circumstances of the case did not, from any point of view, call for the infliction of any such sentence as that imposed. The standing Counsel frankly admitted that in the case of at least *Musammat* Ritha he was wholly unable to support the sentence imposed. The offence in the present case committed by either applicant was little more than a technical one. It would seem only too obvious that the real crux of contention between the parties arises from the fact that *Musammat* Ritha is entitled to property. Not only so but for long *Musammat* Ritha would appear to have been living in adultery with Rajaram, and the complainant remained quiescent. If there was not technical abandoment of his wife by the complainant, he at least showed by his conduct that he was very much prepared to leave the woman largely to her fate. Not only so but it is clear that the complainant has since married another woman. In all these circumstances it seems to me that the offence committed by either applicant became in effect largely a technical one and I am unable to understand how both the lower Courts came to the conclusion that it was necessary in the interest of justice to send a young girl of *Musammat* Ritha's age to Jail for a period of two years. She has been much more sinned against than sinning and if she committed a technical criminal offence, this was done largely under the influence of her mother and others who should have known better. In Rajaram's case also a very similar set of considerations applies and it seems to me that a nominal sentence was also called for in his case. This prosecution has obviously arisen purely out of vindictive motives and this consideration cannot be lost sight of in the infliction of punishment.

I may add that under the new Cr. P. C. the offence under s. 494, Indian Penal Code, is one which is compoundable with the permission of the Court. In *Musammat* Ritha's case I do not think any substantive sentence was called and the sentence of two years' rigorous imprisonment is set aside. She will be called on to enter into a bond in her own recognizance for Rs. 500 with one surety of the like amount to appear and receive sentence when called upon during the period of one year and in the meantime to keep the peace and to be of good behaviour. In the case of Rajaram the sentence of imprisonment will be reduced to that already undergone, *viz.*, two days and he will in addition pay a fine of Rs. 500 or in default he will suffer six months' rigorous imprisonment.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1528 OF 1923.

November 28, 1923.

Present:—Mr. Justice Moti Sagar.

JAWALA SINGH—COMPLAINANT—PETITIONER

versus

MADAN GOPAL—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—

Sanction to prosecute granted by Munsif—Appeal, forum of.

For the purposes of s. 195 of the Cr. P. C., a Munsif is subordinate only to the Senior Sub-Judge and an appeal from an order of a Munsif refusing or granting a sanction lies to the Senior Subordinate Judge and not to the District Judge.

Petition for revision of an order of the Senior Subordinate Judge, Lyallpur, dated the 16th June 1923.

Mr. *F. A. Cooper*, for the Petitioner.

Mr. *B. R. Puri*, for the Respondent.

JUDGMENT.—In this case sanction for the prosecution of one Madan Gopal for an offence under s. 210 of the Indian Penal Code was granted by the Munsif of Layallpur under s. 195 of the Cr. P. C. An appeal was preferred against this order in the Court of the Senior Subordinate Judge who set aside the order of the Munsif and revoked the sanction.

Jawala Singh, the opposite party, has now come up in revision to this Court, and it is contended on his behalf that the order passed by the Senior Subordinate Judge was without jurisdiction and that he had no power to hear an appeal from the order of the Munsif granting sanction. Reliance is placed in support of this contention on cls. (6) and (7) of s. 195 of the Cr. P. C. and on the case of *Sunder Singh* v. *Phuman Singh* (1). Section 195, cl. (6) of the Cr. P. C. lays down that any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and sub-s. (7) lays down that for the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie. In *Sunder Singh* v. *Phuman Singh* (1) it was held that as appeals from the order of decree of a Munsif ordinarily lie to the District Court and only in special cases to the Senior Subordinate Judge, the Munsif is subordinate to the District Court within the meaning of s. 195, cl. (6) of the Cr. P. C. and that consequently the Senior Subordinate Judge has no power to hear the appeal from an order of the Munsif granting or refusing to grant sanction. Now, the rule laid down in this case has been expressly dissented from in a later ruling of this Court reported as *Dina Nath Gautam* v. *Muhammad Abdulla* (2) in which it has been held that for the purposes of s. 195 the Court of inferior jurisdiction, namely, the Subordinate Judge, is the Court to which the Munsif shall be deemed to be subordinate. Reference may also be made in this connection to sub-cl. (*a*) to sub-s. (7) of s. 195 which in the Code of 1898 has been added by way of explanation of the expression "ordinarily". This clause lays down that the Appellate Court of inferior jurisdiction should be the Court to which the Original Court should be deemed to be subordinate.

It is clear in these circumstances that for the purposes of s. 195 of the Cr. P. C. the Munsif was subordinate only to the Senior Subordinate Judge and that the appeal was, therefore, rightly decided. I do not see any force in the petition and I accordingly reject it.

Z. K. *Petition rejected.*

(1) 56 Ind. Cas. 591; 21 Cr. L. J. 495; 122 P. L. R. 1920; 2 L. L. J. 415.

(2) 61 Ind. Cas. 53; 22 Cr. L. J. 325; 2 L. 57.

MADRAS HIGH COURT.

CRIMINL REVISION CASE NO. 687 OF 1924.
(CRIMINAL REVISION PETITION NO. 578 OF 1924.)

March 20, 1925.

Present:—Mr. Justice Devadoss.

SELVAMUTHU—ACCUSED NO. 3—PETITIONER

versus

P. K. CHINNAPPAN CHETTIAR—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 244 (2)—Witness, refusal of, to appear, effect of—Magistrate, power of, to compel attendance.

Under sub-s. (2) of s. 244 of the Cr. P. C. the Court cannot compel a witness to appear before it, if the witness refuses to appear. In such a case, the witness may be liable for disobedience of the summons, but a complainant or accused is not entitled to ask the Court, as a matter of right, to compel attendance of a witness, who does not care to attend in obedience to a summons.

A Magistrate, therefore, is not bound to re-issue the summons in such a case. It is in his discretion to issue a fresh summons if he likes, but the Code does not compel him to do so.

Daulat Singh v. *Brinda Belder*, 30 C. 121, distinguished.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the First Class Bench of Magistrates, Palghat, in Summary Case No. 395 of 1924.

Mr. *T. M. Krishna Nambiar*, for the Petitioner.

ORDER.—This is an application to revise the order of the First Class Bench of Magistrates, Palghat. The point raised by Mr. Nambiar is that the Bench of Magistrates ought to have sent fresh summonses to the witnesses cited by the petitioner. The petitioners cited the Extra Assistant Conservator of Forests and a Forester as two of his witnesses to prove the evidence of *alibi* set up by him. The Bench Magistrate did issue sommonses to them, but they refused to accept service, as the summonses had not been sent through their superior officer. The petitioner applied to the Bench at a late stage for issuing fresh summonses but the Bench refused the request. It is contended before me, that the Bench had no discretion to refuse to issue fresh summonses. for the witnesses. Reliance is placed upon a decision in *Daulat Singh* v. *Brinda Belder* (1). There, the learned Judges held, that if a Magistrate sent summonses to the witnesses in a summons case the Magistrate had no discretion afterwards to refuse to issue fresh summons if the witnesses did not appear in obedience to the summons. This decision was based under the old Code. In the old Code the words were :—

"The Magistrate may, if he thinks fit, on the application of the plaintiff or the accused issue process to compel the attendance of any witness or the production of any document or other thing."

There has been a change in this paragraph in the new Code which reads thus :—

"The Magistrate may, if he thinks fit, on the application of the plaintiff or the accused, issue summons to any witness directing him to attend or produce any document or other thing."

Under the old Code there was the phrase "Compel the attendance of any witness or the production of any document", but, in the present Code, the words used are "Summon any witness directing him to attend or produce any document". Under the present Code evidently, the Court cannot compel a witness to appear before it, if the witness refuses to appear. If the witness refuses to appear, probably, he may be liable for disobedience of summons, but the question is whether a party, complainant or accused, is entitled to ask the Court as a matter of right, to compel attendance of any witness, who does not care to attend in obedience to a summons. In the Calcutta case the witnesses summoned had received the summonses and failed to appear and the learned Judges held that the Court had no discretion under s. 244 to refuse to compel attendance of a witness to whom the Court had already issued process It cannot be said that under the present Code, the Magistrate is bound to compel the attendance of a witness who has received the summons. Considering the change in the wording of sub-s. (2) of s. 244, I think, the present case is distinguishable from the Calcutta decision. I hold that the Magistrate is not bound to re-issue the summons if a witness summoned by him does not care to appear. It is in the discretion of the Magistrate to issue fresh summons if he likes, but the Code does not compel him to issue fresh summonses to the witnesses to whom summons have once been sent.

The petitioners must have known that the officers to whom he wanted summons were subordinate to some other officer and it was his duty to have informed the Magistrate of that fact when he asked for summonses for the two witnesses. He not having done so, the Magistrate declining to grant time and convicting him is correct.

The petition is dismissed.

V. N. V. *Petition dismissed.*

(1) 30 C. 121.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 950 OF 1923.

December 12, 1923.

Present :—Mr. Justice Scott-Smith and Mr. Justice Zafar Ali.

AHMED—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 337—Approver—Discrepancies introduced into statement intentionally—Pardon, forfeiture of.

When a pardon has been tendered to any person under s. 337 of the Cr. P. C. he should not be tried for the offence in respect of which the pardon has been tendered unless the prosecution establishes a breach of the condition on which the pardon was tendered and there is proof that the accused has either wilfully concealed material facts or given false evidence Mere trifling discrepancies elicited in cross-examination are not sufficient to justify the forfeiture

of the pardon tendered and accepted. Where, however, the person to whom the pardon has been tendered purposely introduces discrepancies into his statement in order that the Court might hold that he is not a reliable witness he forfeits his pardon and is liable to be prosecuted for the offence in respect of which the pardon was granted. [p. 254, col. 2.]

Appeal from an order of the Sessions Judge, Rawalpindi, dated the 20th August 1923.

Mr. *B. A. Cooper* and Lala *Joti Sarup*, for the Appellant.

Mr. *J. M. Mackay*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Sessions Judge of Rawalpindi convicting Ahmed of the murder of Kahan Singh on the 16th of August 1922 and sentencing him to death. Mr. Cooper, Advocate, has argued the case on behalf of the appellant and we also have to consider the question of confirmation of the sentence under section 374, Cr. P. C. The judgment of the learned Sessions Judge is a very detailed one and it is, therefore, unnecessary for us to repeat the facts at any great length.

During the investigation a conditional pardon was tendered to Ahmed under the orders of the District Magistrate under s. 337, Cr. P. C., on the 3rd of October 1922. The Magistrate's order tendering the pardon is printed at page 15 of the paper-book. The condition on which the pardon was tendered was that he would make a full and true disclosure of the whole of the circumstances within his knowledge relating to the murder of Kahan Singh of Raja, Tehsil and *Thana* Fatehjang and to every person concerned, whether as principal or abettor, in the commission thereof and that he would not wilfully conceal anything essential by giving false evidence. He was told that in case he did not comply with the above condition the pardon would be liable to forfeiture and that he might be tried for the offence in respect of which the pardon was given to him or for any other offence of which he might appear to be guilty in connection with the same matter.

As a result of the enquiry Gupha Singh, the first cousin of the murdered man (see pedigree-table at page 25 of the paper-book), Ilahiya and Ali, the cousin and nephew respectively of Ahmed, appellant, were tried for the murder. Ahmed being examined as an approver. The accused persons were acquitted on the 31st January 1923 and the approver was formally discharged.

On the 10th April 1923, the District Magistrate, under s. 339, Cr. P. C., passed an order purporting to forfeit the pardon of Ahmed and directing that he be tried and the Sessions Judge has found :—

(1) that he has forfeited the conditional pardon, and

(2) that he is guilty of the murder.

Arguments have been addressed to us on both points.

The first question is whether Ahmed has in fact forfeited the pardon by not complying with the condition on which it was granted to him. In *Kanwar Singh* v. *Emperor* (1) it was laid down that when a pardon has been tendered to any person he should not be tried for that offence unless the prosecution established a breach of condition, and there was proof that the accused had either wilfully concealed material facts, or given false evidence, and that mere trifling discrepancies elicited in cross-examination were not sufficient to justify the forfeiture of the pardon tendered and accepted. The learned Sessions Judge has examined carefully and compared the statements made by Ahmed when the pardon was first tendered to him and when he was examined before the Committing Magistrate and the statement made by him before the Sessions Judge during the previous trial. He has found great discrepancies which he has fully detailed between the statements and has come to the conclusion that these discrepancies were purposely introduced by Ahmed in order that the Sessions Judge might hold that he was not a reliable witness, and that he did this with the intention of benefiting his relations, Ilahiya and Ali. The discrepancies which are five in number are detailed in the judgment at pages 27 and 28 of the paper book. They are fully detailed and we need not repeat them at length.

The first discrepancy related to the payment of blood money. In his original statement Ahmed said that Gupha Singh had paid him Rs. 100. In the presence of Ilahiya Rs. 100 was actually found in Ilahiya's house during the Police investigation. At the previous trial Ahmed stated that in point of fact no money had been paid to him at all but merely a promise had been made to him by Gupha Singh. Mr. Cooper urges that this discrepancy makes no difference in the case against

(1) 34 P. R. 1902 Cr.; 126 P. L. R. 1902.

Ilahiya but we are unable to agree with him. The object of Ahmed in his statement at the trial was to benefit Ilahiya in whose house Rs. 100 had been found.

The second discrepancy was as to the weapons which were respectively in the hands of Ilahiya and Ali at the time of the murder. In his previous statements he stated that Ilahiya had an axe and Ali a stick but before the Sessions Judge he said that Ilahiya had a stick and Ali an axe. This difference might no doubt be due to forgetfulness but it is a curious fact that a *lathi* was actually found in the house of Ali during the Police enquiry and the reason for the change of statement at the trial might have been to show that the finding of this *lathi* had no significance.

The third discrepancy related to the disposal of the dead body. In his original statements the witness said that the hands and feet were severed by Gupha Singh and were tied up in a bundle while the trunk was left on the spot. Before the Sessions Judge at the trial he said that the trunk as well as the hands and feet were tied up in a bundle and were removed to another place.

The fourth discrepancy related to the revolver. In his original statements he stated that he had seen a man burying it near Thatha Rachhanwala 8 or 10 years ago and that he had then taken possession of it one month before the occurrence. This is a discrepancy which, in our opinion, must have been purposely introduced by the witness.

The fifth discrepancy related to the description of the actual murder. Before the Committing Magistrate Ahmed said that Ilahiya struck the deceased on the back with a hatchet whereas before the Sessions Judge he made merely a doubtful statement to the effect that Ilahiya also might have hit him.

We fully agree with the learned Sessions Judge that all these discrepancies show that Ahmed wilfully introduced them at the time of the trial and thus gave false evidence, his object being to make the Sessions Judge and the assessors hold that he was telling lies and that his evidence could in no sense be relied upon. We, therefore, hold that he has forfeited the pardon which was granted to him by giving false evidence.

As regards the question whether Ahmed joined in the murder of Kahan Singh, the main evidence against him consists of his various statements to the effect that he and others conspired together and actually committed the murder. His statements are very detailed and there is absolutely no reason for holding that they were not made voluntarily. They were made because he was promised a pardon if he made a full disclosure of all the circumstances within his knowledge and not because he was ill-treated by the Police. This is not the case of a man who has made a confession and he has subsequently retracted it at the trial and, therefore, *Jawan* v. *Emperor* (2) is not an authority applicable. There would be nothing illegal in convicting Ahmed on his own uncorroborated statements but corroboration is found in various matters as pointed out in the learned Sessions Judge's judgment at page 30 of the paper-book. The main corroboration is his production of the severed limbs and head of the deceased. No doubt it was impossible to identify these remains as those of Kahan Singh but certain clothes which were found with them have been identified. Now, it might perhaps have been difficult to hold, had any one other than Ahmed been on his trial, that the identification of these clothes was by itself sufficient evidence on which to hold that the remains were those of Kahan Singh, but Ahmed himself is on his trial and we have his own repeated statements that he took part in the murder of Kahan Singh. Under these circumstances we hold that Kahan Singh has been murdered and that the remains pointed out by Ahmed are his remains.

The production by Ahmed of a revolver from a place where it was hidden is also a corroboration of his statements to the effect that a revolver was used in the murder. In our opinion the guilt of Ahmed is fully proved by the evidence.

The question of sentence remains. We take into consideration the followiug facts:

(1) The appellant was actually given a conditional pardon. In all his statements he fully implicated himself as well as the persons previously tried, but he introduced discrepancies into the statements in order to make the Court hold that he was not a creditable witness. He did not go back upon his original statement and try in that way to exonerate his relations.

(2) 25 Ind. Cas. 634; 30 P. R. 1914 Cr.; 264 P. L. R. 1914; 50 P. W. R. 1914 Cr.; 15 Cr. L. J. 626.

(2) He was tried a year after the murder.

In the circumstances we do not consider it necessary to impose the capital sentence and we, therefore, allow the appeal so far as to reduce the punishment to one of transportation for life.

Z. K. *Appeal partly accepted.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 282 OF 1925.

June 19, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

HAMID ALI BEPARI *alias* ABDUL HAMID BEPARI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 379—Theft, what constitutes—Bona fide *belief of legal right.*

The essence of the offence of theft is the dishonest taking of moveable property out of the possession of some person. In the absence of dishonest intention a charge of theft cannot be sustained.

Where a person removes property under a mistaken notion of law that the property is his and that he is entitled to retain it, he cannot be held to have committed theft of the property.

Babu *Suresh Chandra Talukdar*, for the Petitioner.

JUDGMENT.

Cuming, J.—This is a Rule granted against the order of the learned Additional District Magistrate of Bakerganj upholding the conviction of the appellant but reducing the sentence to a fine of Rs. 100. The Rule was an open Rule. The learned Vakil who appears for the petitioner has argued that the facts disclosed do not constitute any criminal offence. The facts of the case are as follows:—One Sona Mia, who is the complainant, was taking 2 cart-loads of hide to Daulat Khan Bander when the petitioner seized the hides and took *them* to his own godown. The complainant's case is that he purchased these hides from one Abdul Aziz. The petitioner's case was that he had kept certain hides in Syedpore in charge of Abdul Aziz and Abdul Gani in collusion with Abdul Aziz with whom the petitioner had partnership business has disposed of these hides to Sona Mia. The Appellate Court found that the hides which were sold to Sona Mia and which Sona Mia was taking to Daulat Khan Bander when they were seized by the petitioner were the property of Abdul Aziz and that he sold them to Sona Mia and he held that the petitioner was not justified in removing the goods on the ground that he believed that Abdul Aziz owed him some money. He, therefore, upheld the conviction under s. 379, Indian Penal Code. On these facts found I do not think that any charge of theft can be sustained against the petitioner. The essence of the offence of theft is dishonest taking of moveable property out of possession of some person; "dishonesty" has been defined in s. 24 of the Indian Penal Code. A person is said to do an act dishonestly when he does it with the intention of causing wrongful gain to one person or wrongful loss to another person. But in the present case the facts will not go to show that the appellants intended to cause any wrongful gain to himself or any wrongful loss to the complainant. He apparently acted perfectly straightforwardly throughout the transaction by keeping the goods in his own godown and did not make any attempt to dispose of them. It seems to us that the petitioner was acting under a mistaken notion of law believing that the property was his and that he had the right to take the goods until the balance of the money was paid. In the absence of any dishonest intention we do not think that the charge of theft can be sustained.

We, therefore, make the Rule absolute and set aside the conviction of and the sentence passed upon the petitioner. The fine, if paid, will be refunded.

Suhrawardy, J.—I agree.

Z. K. *Rule made absolute.*

MADRAS HIGH COURT.

C. C. C. APPEAL No. 60 OF 1922.

February 19, 1925.

Present:—Mr. Justice Phillips.

BALARAM PARAMSUKDASS FIRM—
—DEFENDANTS—APPELLANTS

versus

GUDIYATAM GOVINDA CHETTY
—PLAINTIFF—RESPONDENT.

Vendor and purchaser—Purchase of silver—Time, whether of essence of contract—Custom at variance with terms of contract——Pournami *day fixed for delivery—Delivery when to be made.*

In contracts for the purchase of silver, an article the price of which varies not only from day to day, but from hour to hour, time is of the essence of the contract. [p. 257, col. 2.]

Where an alleged custom put forward by a party is a custom at variance with the actual terms of a contract, the custom must be definitely pleaded and proved. [*ibid.*]

There is no custom in the Madras market that when the date fixed for delivery under a contract for the purchase of silver is the *pournami* day, delivery need not be made until some days subsequently. [p. 257, col. 2; p. 258, col. 1.]

Appeal against the decree of the Court of the City Civil Judge, Madras, in O. S. No. 41 of 1921.

Messrs. *S. G. Rangaramanujam* and *S. G. Sadagopa Mudaliar*, for the Appellants

Mr. *V. Radhakrishnayya*, for the Respondent.

JUDGMENT.—In this case the respondent entered into a contract with the defendants for the purchase of silver to be delivered at Bombay on the 25th of February 1918. The plaintiff did not apply for delivery on that date and accordingly on the 28th of February the defendants wrote Ex. B in which they stated that the respondent, having been unable to pay the money due under the contract, had offered to pay interest at 9 per cent and had failed to take delivery in spite of repeated requests. The respondent was, therefore, asked to take delivery and pay the money. The last sentence in the letter is "Failing immediate payment of the said amount and obtaining delivery of the goods, my clients will institute a suit against you". A reply to this letter was sent on the 2nd of March, Ex. D, in which the respondent pleaded a custom according to which he was not bound to take delivery until eight days after the contract date *i. e.*, *pournami* day. The defendants then treated the contract as at an end and sold the silver. On the 4th of March the plaintiff wrote and said that he was applying for delivery, and it would appear from a telegram filed as Ex. F that delivery was then refused.

The real question at issue here is whether there is a custom that, when the date fixed for delivery is the *pournami* day, delivery need not be made until some days subsequently. The custom pleaded is one said to be prevalent in the Bombay market and whether it is applicable to a contract entered into by Madras merchants is somewhat doubtful, unless these merchants intended to be guided by the Bombay custom; but, as this point has not been taken by the appellants at the trial and there is really insufficient evidence to decide it, we have to consider whether the custom pleaded exists in the Bombay market. The contract being for the purchase of silver, whose price, according to the evidence, varies not only from day to day, but from hour to hour, it would appear that time is of the essence of the contract, for, when a time is fixed for the delivery, that time might be very advantageous to one party whereas a day later or earlier might be very disadvantageous. As pointed out in *Doloret* v. *Rothschild* (1), in such contracts time undoubtedly is of the essence of the contract. That being so, the alleged custom put forward by the respondent is a custom which is at variance with the actual term of the contract, *viz.*, the custom alters the date fixed for performance; and in such a case it seems to me essential that there must be a definite custom pleaded and proved. In the plaint the plaintiff alleges that the custom is to extend the time by eight days. In his evidence as P. W. No. 1 he states that delivery may be taken either on the 8th or the 10th day after *pournami*. This is not the same custom as appears in the plaint. Prosecutor witness No. 2 says that delivery can be taken for ten days after *pournami*, and P. W. No. 3 also says the same. Prosecutor witness No. 4 says that delivery can be taken in 8, 9 or 10 days. If the custom pleaded had been for ten days, it might perhaps be said that there was a certain amount of unanimity in the evidence, but the plea being that eight days' grace are customary it is not at all supported by evidence that there is such a custom for ten days. When the price is fluctuating from day to day, there may be a very considerable difference in the prices on the 8th and the 10th day

(1) (1824) 57 E. R. 233; 1 Sim. & St. 590; 2 L. J. Ch. (o. s.) 125; 24 R. R. 213.

respectively. The evidence goes to establish a custom which is not pleaded in the plaint. Apart from that, the witnesses who speak to the custom are all apparently big merchants who deal in silver, but they all admit that their account-books will not show any evidence of this custom. They have had contracts for *pournami* day and it should not be difficult to show that in the case of some of these contracts at any rate advantage was taken of the alleged custom to give delivery after the due date. There is not a scrap of documentary evidence to prove the custom which rests on this oral evidence alone. As against this, a witness examined in Bombay on commission states that there is not this custom and he produces accounts which show damages on bars of silver for the "*mahasudaha*" settlement. It is not quite clear what this witness exactly means, but it would appear that there is an entry of damages in respect of one of these contracts. No doubt, the defendant's agent as P. W. No. 2 states that the plaintiff can take delivery four or five days later, and we see that in Ex. B he does give the plaintiff an opportunity of taking delivery after the due date ; but as that notice demanded immediate payment, it cannot be said to have extended the time up to the date on which the plaintiff applied for delivery. I cannot agree with the learned Judge that this custom which is at variance with a very important term of the contract has been made out. If it has not been made out, the defendants have committed no breach. Consequently the plaintiffs' suit must fail and is dismissed with costs throughout.

V. N. V.

Z. K. *Suit dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 523 OF 1924.

September 8, 1925.

Present:—Mr. Simpson, A. J. C.

Sir *Saiyid* ABU JAFAR—PLAINTIFF—APPELLANT

versus

Babu RAGHOINDRA PARTAB SAHAI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 7—Suit for redemption—Amount declared due by preliminary decree—Mesne profits accruing after date of payment made according to decree—Separate suit, whether maintainable - English practice how far to be followed in India.

Mesne profits accruing after the date of payment made according to a decree passed under O. XXXIV, r. 7, C. P. C., can be the subject of a separate suit. [p. 263, col. 2; p. 264, col. 1.]

Sakari Datta v. *Ainuddy*, 6 Ind. Cas. 336; 14 C. W. N. 1001; 12 C. L. J. 620, *Tara Chand Marwari* v. *Brojo Gopal Mukharji*, 58 Ind. Cas. 180; 5 P. L. J. 595; 1 P. L. T. 614, *Vairappa Thevan* v. *Subbiah Thevan*, 44 Ind. Cas. 251; 23 M. L. T. 158; 7 L. W. 269; (1918) M. W. N. 207, followed.

Vinayak Shivarao Dighe v. *Dattatraya Gopal*, 26 B. 661; 4 Bom. L. R. 492, *Rukhminibai* v. *Venkatesh*, 31 B. 527; 9 Bom. L. R. 527, *Ram Din* v. *Bhup Singh*, 30 A. 225; 5 A. L. J. 192; A. W. N. (1908) 96 and *Satyabadi Behara* v. *Harabati*, 34 C. 223; 5 C. L. J. 192, distinguished.

A mortgagor suing for redemption must bring into account all the monies due to either party in connection with the mortgage up to the day fixed under r. 7 of O. XXXIV of the C. P. C., though he is neither obliged, nor is he entitled, to have any items of later date brought into account. The date so fixed is superseded by the actual payment if there is any payment. The day fixed is what is called in English Law the date of default. Either there is payment, which may be on that date or earlier, or there is default. In either case the relation of the parties is changed, in the one direction by payment, the plaintiff being then entitled to possession or at least to a final decree for possession, in the other direction by default, the plaintiff being then deprived of his right to redeem. [p. 259, col. 2; p. 260, col. 1.]

Therefore, a separate suit lies for any items which are received after the mortgagor has paid into Court the full amount declared due by the preliminary decree. [p. 260, col. 1.]

In India the Courts are to be guided by the C. P. C. and not by the English practice. [p. 259, col. 2.]

Second appeal against the decree of the District Judge, Fyzabad, dated the 1st October 1924, reversing that of the Additional Subordinate Judge, Sultanpur, dated the 2nd August 1924.

Mr. *Ali Mohammad*, for the Appellant.

Messrs. *Bisheshar Nath* and *Bishambhar Nath Srivastava*, for the Respondent.

JUDGMENT.—The appellant is the plaintiff. The suit was one for mesne profits. One Babu Sheodat Bahadur Singh was owner of the property. On 11th January 1904 he mortgaged it with possession to the father of the defendant. On 15th April 1905 he granted a second mortgage, of course without possession, to one Raj Bibi. On 2nd September 1905 he executed a deed of further charge which became part of the first mortgage. Raj Bibi, the second mortgagee, brought the property to sale and bought it herself, and sold it to

the plaintiff. Thus the plaintiff was now mortgagor, and the defendant a mortgagee in possession. Plaintiff brought a suit for redemption. He obtained a preliminary decree in the usual terms on 23rd August 1920. The date fixed up to which accounts were to be taken, and up to which he could redeem was 23rd February 1921. He paid the whole amount due under the decree on 31st January 1921. It amounted to Rs. 44,360 6 3. It is important to note that this was the correct amount. There was an appeal but it was dismissed. Both parties appealed from this decree, and the final decree was not passed till 25th February 1922. Plaintiff obtained possession on 23rd March 1922. He then filed a separate suit, which is the present suit, for mesne profits for the period 31st January 1921 to 23rd March 1922. He was met with a plea of *res judicata*, on the ground that he ought to have asked for these mesne profits in the final decree itself. The learned Munsif rejected this plea, and gave plaintiff a decree.

On appeal, the learned District Judge, although in his opinion the equities of the case were clearly on the side of the plaintiff, felt constrained, following certain rulings of this Court, to dismiss the suit as barred under s. 30 and s. 43 of the C. P. C. Other issues were raised in the appeal but they were not decided. It was dismissed on this preliminary ground.

Plaintiff comes here on second appeal. The appeal succeeds. A great many cases were cited at the Bar and I propose to review them all, but before doing so I will consider the Statute.

Order XXXIV, r. 7, provides for a preliminary decree in suits for redemption. In this decree a date must be fixed, and that date must be within six months of the date of the preliminary decree. If accounts are necessary, accounts are to be taken upto that date. There is no provision for any subsequent accounting. If accounts are not necessary, the Court declares the amount due. In either case, the decree is to the effect that the mortgagor can redeem by paying the full amount of the decree money on or before the date fixed, and that if he fails to do so he loses his right of redemption altogether. Rule 8 (1) runs:—

"Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in r. 10, the Court shall pass a decree."

It will be noted that the terms of r. 8 are mandatory. If the plaintiff has made a payment sufficient to cover the two items mentioned in the rule, namely, the amount already declared to be due in the preliminary decree and the costs awarded under r. 10, the Court has no option in the matter but must pass a final decree. It is true that r. 10 speaks of finally adjusting the amount to be paid, but as r. 10 makes allowance for nothing except costs, and r. 8 is mandatory in its terms, it does not appear that this is intended to make provision for any accounting except with regard to costs. It would appear, therefore, that if either party claimed to have a fresh account taken at that stage the Court would refuse to take it. If, for example, the mortgagee had a claim against the mortgagor, and demanded more money than had been declared due, it would not be within the power of the Court to refuse to pass a final decree. The mortgagor would point out that he had complied with the provisions of r. 8, and that he was entitled to claim a decree as of right. This is the view of the procedure which was taken by the learned Munsif. No doubt the English practice is different. Even in England it is considered desirable, after the amount due has been ascertained and certified, that the mortgagee in possession should abstain from receiving the profits, for if he does so, the accounts must be carried on and a new day, usually a month later than the date originally fixed, must be fixed for redemption. [*Jenner Fust* v. *Needham* (1)] But in India we are guided by the C. P. C. and not by the English practice.

The proposition of law, therefore, applicable to the present case, which would be derived from the Statute is this. A mortgagor suing for redemption must bring into account all monies due to either party in connection with the mortgage up to the day fixed under r. 7. But he is neither obliged, nor is he entitled to have any items of later date brought into account. The second proposition is this. That the date so fixed is superseded by the date of actual payment if there is any payment The day fixed is what is called in English law the

(1) (1886) 32 Ch. D. 582; 55 L. J. Ch. 629; 55 L. T. 37; 34 W. R. 709.

date of default. Either there is payment, which may be on that date or earlier, or there is default. In either case the relation of the parties is changed, in the one direction by payment, the plaintiff being then entitled to possession or at least to a final decree for possession, in the other direction by default, the plaintiff being then deprived of his right to redeem.

Therefere, a separate suit lies for any items which were received after the mortgagor has paid into Court the full amount declared due by the preliminary decree.

I am aware of only one decision which is contrary to this doctrine, namely, *Papla Chakrapani Chettiar* v. *Ramaswamy Thenkondan* (2). That case will be considered in due course. There is direct authority for the doctrine in *Sakari Datta* v. *Ainuddy* (3). That was a suit for redemption and the preliminary decree was made on 15th September 1905. On appeal the decree was modified. The Appellate Court's decree was dated 19th July 1906 and the date fixed for payment was 19th September 1906. The full amount was paid into Court on 14th September 1906, but the mortgagor failed to get possession till 3rd October 1907. He brought a suit for mesne profits from 14th September 1906 to 3rd October 1907. The Court below dismissed the suit as barred by *res judicata*, but a Bench of the Calcutta High Court allowed the appeal, and decreed the suit on a finding that the mortgagor could not have obtained a decree for profits accruing after the date fixed for redemption in the preliminary decree. It was also held in that suit that as soon as the mortgage money has been paid in full, the relation of mortgagor and mortgagee ceases, and the mortgagee becomes a trespasser. I do not think it is necessary to decide that point. There is authority for the opposite view, namely, that the mortgagee when he holds on, after being paid, is still a mortgagee, although not entitled to possession. It is unnecessary to decide the point, because in either case he is liable to the mortgagor for profits, and if these profits could not have been included in the final decree, then a separate suit must lie.

That case was followed in *Tara Chand Marwari* v. *Brojo Gopal Mukharji* (4). That was a decision of a Bench of the Patna High Court. In that case there was a mortgage, apparently without possession, executed in May 1902. Then in July there was an agreement by which the mortgagee was to be in possession on payment of rent of Rs. 50 which was to be set off against the interest on the loan. The report is not altogether clear but it would appear that the two deeds taken together were considered to constitute a possessory mortgage. A suit was brought by the mortgagee for foreclosure, and a preliminary decree was passed under which the date fixed for accounts and redemption was 23rd March 1913. An account was accordingly taken up to that date, and on 24th September 1915, a final decree was passed. The mortgagor then brought a separate suit, claiming rent from the mortgagee for some period, which is not specified, but it was subsequent to 23rd March 1913. The First Court decreed the suit. The lower Appellate Court dismissed it on the ground that the mortgagor should have claimed the rent at the time of the passing of the final decree. On second appeal, this decision was set aside on the ground that there is no provision by which a separate suit is forbidden for an amount which became due after the date fixed. It was said in that case that the only decision to the contrary was *Kashi* v. *Bajrang Prasad* (5). The learned Judges may be right in saying so. The report is not very full. But so far as I can see *Kashi* v. *Bajrang Prasad*, (5) is not an authority to the contrary. That was a suit for redemption. The preliminary decree was passed on 17th December 1902. On appeal the amount was increased, but the decree was confirmed on 3rd February 1903. The plaintiff paid what was due and got possession, sometime in the earlier part of the year 1903. Then he instituted a separate suit to recover money received by the mortgagee from August 1902 to March 1903. As the date of possession is not set forth it is possible that some part of these profits were collected after the payment of the mortgage money, but it is not stated, and indeed it does not appear to be likely. If the date of the decree was 3rd February the payment must have been later than that, and may very well have been later than the last date of the alleged receipt of profits.

The next case is *Vairappa Thevan* v.

(2) 42 Ind. Cas. 230.
(3) 6 Ind. Cas. 336; 11 C. W. N. 1001; 12 C. L. J. 620.
(4) 58 Ind. Cas. 180; 5 P. L. J. 595; 1 P. L. T. 614.
(5) 30 A. 36; 4 A. L. J. 763; A. W. N. (1907) 281.

Subbiah Thevan (6). In that case the payment was made on 29th October and the suit was for profits after that date. The importance of this case is that the solitary case to the contrary was cited and it was said:

"The learned Judges held in that case that the Court had power, even after the preliminary decree, to adjust the rights of the parties. It was neither argued nor decided that the mortgagor is bound to claim this adjustment and that if he did not do so his rights to mesne profits will be barred as *res judicata*". The three cases cited, therefore, are direct authority for my finding.

I have now to see whether there are any authorities to the contrary. I will begin with the decisions of this Court, because the Court below felt constrained to pass an unjust decree feeling bound by certain decisions of this Court. The case referred to in the judgment is *Umrai* v. *Gulzari Lal* (7). In that case, however, the profits sued for were from 12th May 1904 to 30th July 1905. Now 30th July 1905 was the actual date on which the mortgagor redeemed and took possession. It is quite true that the date, 12th May 1904, was the date upon which the plaintiffs deposited the mortgage money under s. 83 of the Transfer of Property Act and on which notice was issued. But a distinction must be drawn between a deposit of the mortgage money under s. 83 of the Transfer of Property Act, without any decree of the Court, and a deposit of the amount declared due under O. XXXIV, r. 7. In the case of a deposit under s. 83 there has been no adjudication by the Court of the amount of mortgage money due. The account has still to be taken. If the mortgagee refuses to accept the money, whether properly or improperly, the mortgagor comes into Court under O. XXXIV, r. 7, asking to have an account taken and the amount due declared. When he does this, he may reasonably be expected to include in his claim anything which will be due to him up to the date fixed for redemption. His account still falls within the account contemplated in O. XXXIV, r. 7, and not under the final decree. That decision, therefore, is not contrary to the proposition of law which we are considering. It was said in that case that the point was concluded by the ruling in *Sheo Nath* v. *Gaya Prasad* (8). Now in that case the separate suit was for profits for the year 1308 *F*. That year ended either on the 13th June 1901, or on the 28th September 1901. The mortgagor obtained a decree for redemption. He paid in the amount, and obtained possession on 29th June 1901, but on appeal the amount which the mortgagor was to pay was increased. This decree is dated 28th April 1903, so that the profits sued for were realized long before the real preliminary decree, which was the decree of the Appellate Court. The reasons given are in favour of our proposition of law. It was said,

"Under s. 92 of the Transfer of Property Act, in a suit for redemption the Court is bound to pass a decree ordering, that an account be taken of what will be due to the defendant for the mortgage money, etc., awarded to him on a subsequent date which the Court fixes for payment. It must be presumed that the decree for redemption was passed in accordance with law. If the First Court did not in the suit for redemption consider profits of the mortgaged property for the year 1308 *F*. in calculating the amount payable by the mortgagor, the respondent's remedy was by review of judgment or by appeal and not by separate suit. He had a right to, and should have insisted on, the decree being in accordance with law. Furthermore, on the present appellant's appeal to this Court the respondent could have had and should have had an account taken, of the amount payable by him on the date fixed by this Court for payment, that is, on the 28th July 1903".

What the learned Judge lays down is that the account which is to be taken under s. 92 of the Transfer of Property Act, that is to say, under O. XXXIV, r. 7, ought to include all monies due under the mortgage. He says nothing about the final decree.

There is only one other decision of this Court, namely, *Mansab Ali* v. *Sakhawat Hasain* (9). In that case the preliminary decree of the Court of trial was passed on 31st March 1914, and the amount fixed by that decree was Rs. 1,046-0-4. There was an appeal to the District Judge, and his decree dated 26th February 1915 reduced this amount to Rs. 952-8. The plaintiff deposited this amount on 26th April 1915. There was a second appeal to this Court,

(6) 44 Ind. Cas. 251; 23 M. L. T. 158; 7 L. W. 269; (1918) M. W. N. 207.
(7) 2 Ind. Cas. 834; 12 O. C. 152.
(8) 8 O. C. 302.
(9) 55 Ind. Cas. 503; 7 O. L. J. 24; 2 U. P. L. R. (O.) 33.

and this Court directed that a further sum was due to the mortgagee in respect of the payment of certain Government revenue. An order was accordingly sent to the Court of first instance to determine what this amount was, and to prepare a final decree. Accordingly, an enquiry was held and on 5th September 1917 the Munsif held that the amount so payable amounted to Rs. 198-7-6. This additional sum was paid into Court by the plaintiff. Thereupon the final decree in the redemption suit was drawn up on the 15th of September 1917, and the plaintiff got possession. A separate suit was brought against the mortgagees for mesne profits for the period between the 26th April 1915, the date on which the plaintiff deposited the sum which was afterwards found to be inadequate, and the date upon which he obtained possession. The Courts below dismissed the suit on the ground that no mesne profits can be sought unless it can be shown that the mortgagees wrongfully withheld possession. The appeal was decided on the same ground, namely, that the mortgagee is not obliged to vacate possession until he has received the full mortgage money, and that the full mortgage money was not paid until September 1917. The facts of this decision, therefore, do not touch the question at all. The only difficulty is created by these words.

"If there was any accounting to be done between the parties in respect of this mortgage transaction, whether on account of receipt of profits in lieu of interest or on any other account arising out of the mortgage relation between the parties, that ought to have been done before the final decree was passed. The plaintiff cannot now after redemption bring a suit for mesne profits for the period prior to the date of the final decree in the redemption suit."

These words are *obiter*. The profits which were the subject of the suit had been realised prior to the date up to which accounts were taken. It was open to the plaintiff, while accounts were being taken, to bring these items into account. A very short interval elapsed between the true preliminary decree of the 5th September 1917 and the final decree of the 15th September 1917. Apparently no interval at all elapsed between the actual payment and the date of the final decree. So when the learned Judge was speaking of the final decree he was also speaking of the date of payment. This was not one of those cases in which, owing to appeals, a period elapsed between the payment of the full amount declared due under O. XXXIV, r. 7, and the obtaining of possession by the mortgagee. There is, therefore, no decision of this Court contrary to the proposition of law enunciated.

I turn now to the Bombay decisions, of which I propose to consider two only. They are the strongest cases against the appellant. First comes the well-known case *Vinayak Shivarao Dighe* v. *Dattatraya Gopal* (10). This may be considered to be the leading case for the proposition that separate suits must not be brought with regard to accounts arising out of the mortgage relation. There had been a suit for redemption, with a preliminary decree dated 25th September 1893. It directed the mortgagors to pay Rs. 8,200 and costs within six months. The plaintiffs paid the whole amount decreed on 4th December 1893, and obtained possession in March 1894. In the meantime, the defendant preferred an appeal, and the judgment in appeal dated 2nd September 1895, varied the decree by substituting Rs. 9,809 9-9 for Rs. 8,200 and directed that the six months time should run from 2nd September 1895. The balance of Rs. 1,609-9 9 was paid in March 1896. Subsequently the mortgagee brought a separate suit to recover profits of the mortgaged property for the period between March 1894 and March 1896, on the ground that he was entitled to keep possession until the true amount due under the mortgage was paid, and, therefore, the mortgagors having obtained possession without making full payment, ought to account for the profits during the interval. He was held to be barred by *res judicata*. There is nothing in this judgment contrary to our principle. The profits claimed related to a period before the date of payment, because the earlier payment turned out to be inadequate. It was also said in the judgment:

"The claim on which we are now asked to adjudicate is one that could and ought to have been advanced in the former suit. .....It furnished, if well founded, a good ground of defence to the claim of redemption, and so must be deemed to have been a matter, directly and substantially in

(10) 26 B. 661; 4 Bom. L. R. 492.

issue in such suit (s. 13 Explanation II C. P. C.)"

Now no such remark can be made in the present suit Plaintiff could not have set up this claim as in any way strengthening his claim for redemption. Whether he was entitled to mesne profits, or whether he was not, he was equally entitled to redemption. It is evidently a different matter when a mortgagee possesses some claim under which he can resist redemption.

The other Bombay case is *Rukhminibai* v. *Venkatesh Bab Prabhu* (11). In that case there was a tender out of Court which was not accepted. Consequently the mortgagor filed a suit, and at the same time made a deposit under s. 83. The suit was decreed with costs on 27th May 1903, and on 15th July 1903, the plaintiffs got possession. They filed a suit to recover mesne profits from 24th June 1901 to 15th July 1903. The interval between the decree for possession, 27th May 1903, and the actual obtaining of possession, 15th July 1903, was very short. As is pointed out in *Sahari Dutt* v. *Sheikh Ainuddy* (3) in so far as the suit was held barred for that short period, it may be an authority against the appellant, but it is not an express authority, for the point was not discussed. The greater part of the profits sued for would be held barred by *res judicata* under our principle.

I have already discussed the case *Kashi* v. *Bajrang Prasad* (5). I propose to consider one other Allahabad case, namely, *Ram Din* v. *Bhup Singh* (12). There was a suit for redemption of a usufructuary mortgage. The mortgagors obtained a decree, and were put in possession on 13th March 1906. They brought a separate suit to recover Rs. 5,000 on account of surplus collection alleged to have been received since 1874, when the mortgage was discharged by the usufruct of the property. They were held to be barred by s. 43 of the C. P. C. Their suit was for a period before redemption. It was a case in which there was no payment. If the plaintiffs' allegations were correct there ought to have been a payment by the mortgagee to the mortgagor. Clearly this account ought to have been settled in the preliminary decree according to our principle.

Passing to the Calcutta High Court I have already considered *Sahari Dutt* v. *Sheikk Ainuddy* (3). The next case is *Satyabadi Behara* v. *Harabati* (13). That was a case similar to *Rukhminibai* v. *Venkatash Bab Prabhu* (11). There was a tender out of Court, improperly refused by the mortgagee, followed by a suit for redemption, which was decreed in the usual terms. The amount was deposited and the mortgagor was put in possession. A separate suit was brought for the period between the date of tender and the date of delivery of possession. It was held to be barred by *res judicata*. This is not contrary to our principle.

As regards Madras, I have already discussed *Vairappa Thevan* v. *Subiah Thevan* (6). In that *Papla Chakrapani Chatiar* v. *Ramaswamy Thenkondan* (2) was referred to. The facts were that the plaintiff obtained a preliminary decree in a redemption suit under O. XXXIV, r. 7. The plaintiff paid the amount into Court, but the defendants retained possession of the property, and the passing of a final decree in the suit was delayed for a considerable period owing to unsuccessful appeals by the defendants. It is not quite clear what happened, but, so far as I can judge, the plaintiff demanded mesne profits for this period at the time when he asked for his final decree, and the Court awarded them on the ground that such matters could be dealt with in the final decree. The learned Judge admitted that r. 8 contains no provision as to rents and profits received by the defendant after the preliminary decree. It was said, however, that r. 10 and the proviso to sub-r. 4 of r. 8, showed that the Court can take into consideration events which have happened subsequently to the date of the preliminary decree, and that for certain purposes the suit still remains pending. This decision is in conflict with the decision of the Calcutta High Court, and even of the Madras High Court already quoted. But, as was pointed out by another Bench of the Madras High Court, it is not a decision that a subsequent suit would be barred. Justice had been done in the final decree, and an Appellate Court might very well abstain from interfering with it. The decision is certainly against the appellant as far as it goes, but it does not go very far.

I have now reviewed all the cases which were cited at the Bar, and I have shown that none of them is really contrary to the principle, that mesne profits accruing after

(11) 31 B. 527; 9 Bom. L. R. 527.
(12) 30 A. 225; 5 A. L. J. 192; A. W. N. (1908) 96.
(13) 34 C. 223; 5 C. L. J. 192.

the date of payment made according to a decree passed under O. XXXIV, r. 7, can be the subject of a separate suit, while three of them are directly in favour of that proposition, which was itself derived from a consideration of the language of the Statute. I therefore, allow the appeal, and set aside the judgment and decree of the lower Appellate Court. As that judgment proceeded on a preliminary point, I remand the case to the lower Appellate Court for decision on the merits. The appellant will get his costs of this appeal from the respondent.

G. H. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 495 OF 1923.

July 13, 1925.

Present:—Mr. Justice Phillips.

PAPAKANNU ERRAPPA REDDI AND OTHERS—DEFENDANTS NOS. 3 TO 6—APPELLANTS

versus

MUTCHELI PEDDAMUNI SWAMI SETTI AND OTHERS—PLAINTIFFS NOS. 2 TO 5 AND L. R. OF THE 1ST PLAINTIFF—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 131, 189—Landlord and tenant—Sale for arrears of rent—Fraud—Suit to set aside sale—Jurisdiction of Civil Courts.

The right to set aside a revenue sale held under the provisions of the Madras Estates Land Act conferred by s. 131 of that Act does not take away the right of suit in the ordinary Civil Courts to set aside the sale on the ground of fraud. A suit, therefore, by a tenant to set aside a sale of his holding held under the provisions of the Madras Estates Land Act for arrears of rent, on the ground that the sale was brought about by fraud, is maintainable.

Second appeal against a decree of the Court of the Subordinate Judge, Chittor, in A. S. No. 373 of 1921, (A. S. No. 317 of 1921 on the file of the District Court, Chittor), preferred against a decree of the Court of the District Munsif, Midnapalli, in O. S. No. 296 of 1920.

Mr. *A. Ramaswami Iyer*, for the Appellants.

Mr. *N. Chandra Sekhara Iyer*, for the Respondents.

JUDGMENT.—The facts found in this case, which I must accept, are as follows: The appellants were tenants under the plaintiffs of the suit lands. During the tenancy, they defaulted in the payment of the *kist* due to the superior landlord and the lands were brought to sale and purchased, some by the 6th defendant himself and some by the 6th defendant's father in-law Lakshmana Reddi. Both the lower Courts have found that these sales were brought about by the fraud of the defendants and have accordingly given a decree for recovery of the lands from the defendants with arrears of rent.

In appeal here it is argued that this suit should have been brought in a Revenue Court, inasmuch as it was necessary for the plaintiffs to set aside the revenue sale. Reliance is placed on the ruling in *Ramanathan Chetty* v. *Ramasami Chetty* (1). That ruling, however, very clearly and carefully differentiates the case reported in *Gouse Moideen Saib* v *Muthialu Chettiar* (2) where it was held that the right to set aside a sale conferred by s. 131 of the Estates Land Act does not take away the right of suit in the ordinary Civil Courts to set aside the sale on the ground of fraud. Here we are concerned with fraud, consequently in accordance with the principle laid down in *Gouse Moideen Saib* v. *Muthialu Chettiar* (2), I hold that it is not necessary to bring this suit in a Revenue Court. If the defendants (appellants) were allowed to take advantage of this sale which they brought about solely to defraud the plaintiffs of their rights, it would be giving them the advantage of their own fraud. That is a course which no Court would deliberately pursue. This objection, therefore, fails.

It is also argued that Lakshmana Reddi should have been made a party to this suit. The plaintiffs did not choose to make him a party and of course the decree will not be binding upon him. He is a very close relation of the defendants. He actually came to Court and produced documents on their behalf; but he did not ask to be impleaded, nor did he give evidence, nor did the defendants ask that he should be impleaded as a party. Sixth defendant merely said that the suit should be dismissed because he was not a party. I agree with the learned Subordinate Judge and the District Munsif that it was not necessary for the plaintiffs to make him a party, provided that the plaintiffs are

(1) 27 Ind. Cas. 409; 39 M. 60.

(2) 21 Ind. Cas. 762; 26 M. L. J. 36; 14 M. L. T. 523; (1914) M. W. N. 55.

satisfied with a decree which is judicially not binding upon him. This objection also fails.

In view of the concurrent findings of facts of both the lower Courts the decree appealed against is right. The second appeal is dismissed with costs

V. N. V. *Appeal dismissed.*

Z. K.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 553 OF 1922.

August 28, 1924.

Present :—Mr. Justice Marten and Mr. Justice Fawcett.

AMARSANGJI INDRASANGJI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RANCHHOD JETHABHAI—DEFENDANT—RESPONDENT.

Bombay Land Revenue Code (Act V of 1879), ss 83, 84—Landlord and tenant—Tenancy originating with foundation of village—Antiquity—Presumption of permanence—Notice to quit, contents of—Notice requiring tenant to vacate within ten days, legality of.

The presumption laid down in s. 83 of the Bombay Land Revenue Code would not arise in a case in which the Court is able to find a definite and recent date when the actual tenancy began. Where, however, the tenants trace their origin and connection with the lands of the tenancy back to the foundation of the village, over 250 years ago, it does not follow that their particular tenancy or that of their ancestors began on that particular definite date. On the contrary in such a case there is the requisite antiquity contemplated by s. 83 of the Code and the presumption laid down therein may validly be raised. [p. 267, col. 1.]

Where a landlord requires a tenant to go out of possession of the lands of his tenancy at a particular date, the specific date on which the tenant is required to quit the property should be specified in the notice, otherwise the tenant would be left in a state of embarrassing uncertainty as to what arrangements he should make for his future home, for the removal of his furniture and other matters or else in default of complying with some ambiguous notice he might be exposed to the nuisance or annoyance of a law suit. [p. 268, col. 1.]

A notice to quit given by a landlord to a tenant ran as follows: "You are hereby given notice that within ten days from the date of receipt hereof you should pay over to us rent of the last year and you should give in writing a *kabuliyat* to pay rent for the lands you cultivate, failing which you should hand over to us the lands which you cultivate and in default steps will be taken against you to take over possession from you or obtain any other remedy according to law:"

Held, that under this notice the tenant was required either to pay the arrears of rent and pass a lease within ten days or in default to hand over possession on the expiry of ten days and that the period of three months required under s. 84 of the Bombay Land Revenue Code was not given and the notice was consequently defective. [p. 268, col. 1.]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 77 of 1920, reversing that of the Subordinate Judge, Nadiad, in Civil Suit No. 288 of 1918.

Mr. *G. N. Thakor*, (with him Mr. *M. K. Thakore*), for the Appellants.

Mr. *H. C. Coyajee* (with him Mr. *H. A. Diratia*), for the Respondents.

JUDGMENT.

Marten, J.—These are some thirty-three appeals from the judgment of the District Judge of Ahmedabad reversing the decision of the Subordinate Judge and dismissing the plaintiffs' suits with costs. The suits all raise the same point. They are brought by the plaintiffs as the Thakors of Mohogar claiming that they hold in joint ownership the *wanta* of the village of Mehmadpura. This *wanta* consists in all of 104 acres, of which 94 acres are in dispute in this and the companion suits, so the learned District Judge tells us.

The principal point in dispute is as to whether the defendants are annual tenants as the plaintiffs contend, or whether they are permanent tenants as the defendants contend. There is a subsidiary point as to whether, even if the defendants are annual tenants, the plaintiffs are entitled to enhance the rent. It appears that by an alleged notice to quit, dated February 5, 1916, the plaintiffs called on the defendants to pay an increased rent and to sign a writing to that effect, and that in default they were to give up possession. This was to be done within ten days. The defendants replied repudiating the right of the plaintiffs to give this notice and claiming that they were permanent tenants. Consequently in the same year 1916, Suit No. 136 of 1916 was brought by the plaintiffs but was subsequently withdrawn with permission to bring another suit. Thereafter, namely, on November 26, 1918, this present Suit No. 288 of 1918 and its companion suits were brought.

Now in this case we have the advantage of a particularly clear judgment of the learned District Judge, which relieves me from the necessity of setting out the facts or the reasons for our judgment in any great detail. The case largely turns upon s. 83 of the Bombay Land Revenue Code, which provides that:—

"Where, by reason of the antiquity of a

tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him."

The defendant's case is that this village of Mehmadpura was founded about 1655 A. D. and they trace their connection with this village back to that date. It would appear that the first appearance of the defendants' names or their ancestors in the plaintiffs' books is in 1876. But it would also appear from some of the earlier books produced by the parties that prior to that date, *viz*, in 1869, the defendants' names or those of their predecessors appear amongst the *patels* who were then cultivating this land according to the plaintiffs' accounts. What the learned District Judge says is this: "This statement of the defendants derives corroboration from the fact that in the account books for the previous years commencing from the *Samvat* year 1905 produced by the plaintiffs, the lands are shown as being cultivated by *patel samasth i. e.*, body of *patels*, without mentioning individual names."

Following that out when one turns to certain accounts produced by the defendants, that shows how these *patels* dealt with the produce of the rent or the produce of the land, and the defendants' ancestors are shown in that account as getting share of these rents. So that takes us back a little earlier, *viz.*, to 1869. And there is one further point, *viz.*, that the lower Appellate Court has found that the plaintiffs have not produced all the books which one would expect them to produce.

Then comes the question of the rent or *salami* or *giras*, whatever may be the true expression. The finding of the lower Appellate Court is: "In the present case I think the evidence taken as a whole leads to the conclusion that the defendants have been paying rent at a uniform rate." "Then lower down the same judgment runs: 'Taking the evidence as a whole, I think the reasonable conclusion is that the defendants have been paying a uniform rate of rent to the plaintiffs." Then so far as the evidence of the plaintiffs is concerned the learned District Judge summarizes on page 4 the evidence of the plaintiffs themselves. Shortly stated, they said they did not know when the ancestors of the defendants were let into possession or on what terms. As regards the plaintiffs' Karbhari, Ex. 104, he states that so far as his knowledge goes, the defendants have been paying a fixed rent, but he knows nothing about the origin of the tenancy or about the *quantum* of rent. He only repeats the report that he has heard that certain Muhammadan cultivators were in possession of the land to a certain date.

After a consideration then of the whole facts of the case, the learned District Judge came to the conclusion that the facts fell within s. 83 of the Bombay Land Revenue Code, and that the Court was entitled to presume this tenancy to be a permanent tenancy. It has been argued before us strenuously by the appellants that this was an error of law on the part of the District Judge inasmuch as the defendants' own case stated what the commencement of the tenancy was; and that on the rulings of this Court where once you find a definite commencement of a tenancy, then there is no room for the presumption to be raised under s. 83. As far as the authorities of this Court are concerned they are naturally binding on us, and one can quite understand that if you find a definite and recent date when an actual tenancy began, it would be wrong in such a case to raise a presumption under s. 83. Similarly, under English Law my brother Fawcett has in *Narayan* v. *Pandurang* (1) pointed out that in England a plea based on immemorial custom might be defeated by proof that it began within legal memory, *viz*, after 1189 (see Halsbury's Laws of England Volume X, page 283) and the same might apply as regards certain claims based on prescription at Common Law. (See Halsbury's Laws of England Volume XI, pages. 260 61).

But, on the facts of this particular case, I entirely agree with the learned District Judge that the commencement of this tenancy is not definitely shown. No doubt the witnesses have put forward the origin of it to the foundation of the village. But, if one follows that argument out, one might say that a tenancy in a particular case must have begun by say the year 1200 in a particular town because one knows that

(1) 76 Ind. Cas. 71; 24 Bom. L. R. 831; at p. 835; (1922) A. I. R. (B.) 402; 47 B. 4.

prior to that date no such town or village existed whatever. It seems to me that it does not follow that because the defendants trace their origin and connection with this land back to the foundation of the village, that it necessarily follows that their particular tenancy or that of their ancestors began on that particular definite date. On the contrary when one goes back, as in the present case, to such a distant date as over 250 years ago, one certainly gets the antiquity contemplated by s. 83. And I think on the facts of the present case there is quite enough uncertainly as to the commencement of the tenancy, and also as to its terms, to justify the presumption under s. 83.

Nor can I accept the argument that was put forward in the alternative, *viz.*, that if you do not fix the commencement of the tenancy definitely at the foundation of the village, then no commencement of the tenancy is shown before 1876 or some such time. That would be to neglect amongst other things the oral evidence of the defendants as to the possession of this land by themselves or their ancestors. It would also be to ignore the admissions of the plaintiffs themselves that they are unable to account for the original possession of this land by the defendants and their ancestors. In other words we get exactly a class of case where the origin of a particular right of an occupier or tenant is lost in antiquity.

That being so, in my judgment the lower Appellate Court arrived at the right conclusion on the question whether the defendants, were annual tenants or permanent tenants, and that the finding that they were pemanent tenants ought to be upheld.

Then a point was taken that, even if they were permanent tenants, they denied their landlords' title, and, therefore, that involved forfeiture. This is based on what in my opinion is a very narrow construction of the written statement of the defendants. There they pleaded first of all that they were old and permanent cultivators, that they were not tenants-at-will or annual tenants of the plaintiffs, but that they cultivated the land under the right of ownership or permanent tenancy since the time the village of Mehmadpura was founded, and they had been paying to the plaintiffs a fixed *salami* from the time of their ancestors.

As regards the word translated "ownership" the word used in the vernacular is *maleki*. And one knows from other cases that the word *malek* or *maleki* is often used in a sense which certainly cannot on investigation justify the suggestion of an absolute owner or ownership in law. I am satisfied that the real case put forward by the defendants was that they were permanent tenants and that they never denied that the plaintiffs were there landlords. Nor is there anything in the issues raised in the Trial Court to suggest anything of the sort. The main issues were Issues Nos. 8 and 9. The one raised a point whether the plaintiffs proved a tenancy from year to year. Issue No. 9 raised a question whether the defendants were permanent tenants of the disputed land. One may also say that where you find permanent tenants at what has been found to be here a uniform rent, their position after all does not differ very greatly from that of owners. Even an owner in fee simple who is liable to pay a certain fixed fee farm or quit rent in one sense is not an absolute owner of the land, because he has to pay this particular annual sum. But in the ordinary acceptation of the word, he undoubtedly would be looked upon as an owner not only by laymen but also by lawyers.

Then the next question is as to the validity of the notice to quit given by the plaintiffs. That point in the view I take it is unnecessary to decide, because I hold that the defendants were permanent tenants. But supposing they were annual tenants, then it is conceded that a notice to quit had to be given under s. 84 of the Bombay Land Revenue Code which runs: "An annual tenancy shall (in the absence, of any special agreement in writing to the contrary require for its termination a notice given in writing by the landlord to the tenant, or by the tenant to the landlord at least three months before the end of the year of tenancy at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of Sch. E, or to the like effect." If one turns to Sch. E it will be found that this notice may be in the following form: "I do hereby give you notice that I do intend to enter upon, and take possession of the land which you now hold as tenant under me, and you are, therefore, required to quit and deliver up possession of the same at the end of this current year, terminating on the day of ."I should here mention that an

earlier part of s. 84 enacts that "An annual tenancy shall, in the absence of proof to the contrary, be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on March 31".

Now the words of the particular notice given by the plaintiffs were :—

"You are hereby given notice that within ten days from the date of receipt hereof you should pay over to us rent of the last year and you should give in writing a *kabuliyat* to pay rent for the lands you cultivate, failing which you should hand over to us the lands which you cultivate and in default steps will be taken against you to take over possession from you or obtain any other remedy according to law."

I agree with the learned District Judge that on the true construction of this notice, the defendants were required either to pay the arrears of rent and pass a lease within ten days or in default to hand over possession on the expiry of ten days. That being so, the period of three months required under s. 84 was not given. For, I cannot accept the construction which is advanced by the defendants to the effect that we should imply that this notice to quit was to quit at the termination of the cultivating season.

It is unnecessary to refer to English authorities to show the strictness with which notices to quit are there construed, and I do not say that the same rules would necessarily apply in India. But here we have a definite section to guide us, and a definite form of notice, which, though not imperative, still indicates the class of notice which the Indian Legislature had in mind, and that notice would be very much what would be required under English law. After all it is a matter of common sense that if a landlord requires a tenant to go out of possession at a particular date, the specific date on which the tenant is required to quit the property should be given, otherwise the tenant would be left in a state of embarrassing uncertinty as to what arrangements he should make for his future home and for the removal of his furniture and other matters, or else in default of complying with some ambiguous notice he might be exposed to the nuisance and annoyance of a law suit.

In my judgment, therefore, the judgment of the lower Appellate Court was correct on this point also, *viz.*, that the plaintiffs did not give a valid notice to quit and that in the absence of such a notice the plaintiffs were not entitled to maintain this suit.

Then it was said that apart from that point and even supposing that the defendants were permanent tenants, even then the plaintiffs were entitled to enhance the rent. In this connection it will be remembered that in their pleadings the plaintiffs claimed back rent and possession of the land, and a declaration that they were entitled to increase the amount of rent at their pleasure. No doubt the exception to s. 83 provides that "Nothing contained in this section shall affect the right of the landlord (if he have the same by virtue of agreement, usage or otherwise) to enhance the rent payable, or services renderable by the tenant or to evict the tenant for non-payment of the rent or non-rendition of the services, either respectively originally fixed or duly enhanced as aforesaid." But here no agreement whatever is proved under which the plaintiffs had any right to enhance the rent. And as regards the usage or otherwise I can only say that I agree with the learned District Judge, when he says there is no issue framed to that effect and no evidence led, and that, therefore, there are no materials before the Court which would justify an Appellate Court in approaching the case from that stand-point.

When the learned District Judge says this, it must be remembered that he had already considered earlier in his judgment the question whether the defendants' story that they had paid a uniform rent was true, or whether the plaintiffs' case that the rent had varied was the correct one. As I have already said the learned Judge in at least two passages stated that he had come to the conclusion that the defendants' case that they had paid a uniform rent was the correct one. Consequently it cannot fairly be urged on behalf of the plaintiffs that one should accept the plaintiffs' evidence, *viz.*, that the rent was enhanced, or that a higher rent was paid at certain dates compared with others, and that that accordingly implied the power of the landlord to enhance the rent, and, therefore, there was evidence to support the alleged usage, and that as regards this particular land the landlord had the right to enhance the rent. Nor is it fair to the learned District Judge to say that in considering this point about enhanced rent, he did not take into consideration the evidence on the question of rent. He had already done that in the earlier part of

his judgment. He had there found that the plaintiffs had failed to make out their case on the point of fact as to the alleged varying rent. Consequently when he came to this final issue, the existing findings were of a long tenancy by the defendants at a uniform rent. Consequently on that finding as to the uniformity of the rent, there was no evidence on which you could infer that the landlord had either expressly or by implication a right to enhance the rent.

Then it was said the real point in this case was whether the defendants were annual tenants, and that if in fact they were permanent tenants, then we ought to leave open for decision in some future case the question whether the plaintiffs are still entitled to raise the rent, or alternatively we should remand this case back to the lower Court for further findings and further evidence. But this case began six years ago. The plaintiffs' plaint, as I have already indicated, stated in the clearest terms that they were entitled to increase the amount of the rent at their pleasure. It is clear that they could have based their claim alternatively, *viz.*, that if the defendants were annual tenants, as the plaintiffs claimed, then the plaintiffs were entitled to increase the rent, or to evict them for non-payment, or that if alternatively the defendants were permanent tenants, the plaintiffs had practically the same rights. In other words, it was open to the plaintiffs to prove if they could by proper evidence that whichever was the true legal position as regards the tenancy of the defendants, the plaintiffs were still entitled to enhance the rent, and if necessary to give a notice to quit in default of payment.

Under these circumstances I think the learned District Judge rightly decided the appellate Issue No. 6 against the plaintiffs. I also think that we should be entirely wrong if we either remanded this issue for further evidence or left the point open for decision in some other case. In my judgment the decision of lower Appellate Court dismissing the plaintiffs' suit with costs was correct. It follows that, in my judgment, this appeal should also be dismissed with costs, and that the other companion appeals should also be dismissed with costs, but all this is subject as regards four of the companion appeals to a technical point arising from the death of a sole defendant as to which we will hear the arguments later on.

Fawcett, J.—I agree generally with the judgment of my learned brother on the main question whether the defendants are permanent tenants. I think there is certainly no ground for interference with the decree of the lower Court in second appeal. There is evidence which definitely traces back the tenancy to the year 1876, and although the accounts for the preceding years that are produced by the plaintiffs do not give the actual names of the cultivators, yet they show that the land was cultivated by certain *patels*, who, in view of Ex. 45 and similar Exhibits appear to include ancestors of the defendants. These accounts go back to the *Samvat* year 1905 (A. D. 1848-49). Under the circumstance I think an inference arises that in that particular year the defendants' ancestors were cultivating this land and were tenants of the plaintiffs' ancestors.

Stress has, I think, been rightly laid by the learned District Judge on the fact that the plaintiffs, who employ *karbharis* and keep regular books, have not produced their accounts for previous years, and I entirely agree with him that a strong inference arises that, if they had produced those books, they would not have been in favour of the plaintiffs' case. In these circumstances there is satisfactory evidence that the defendants' ancestors were tenants of the plaintiffs' ancestors even prior to the year 1848, and the origin of this tenancy is lost in the mist of antiquity.

I also agree with the learned District Judge and my learned brother that the mere fact that the defendants state that the tenancy began with the foundation of the village in *Samvat* year 1712 is not a conclusive statement of the origin of tenancy, which would bar the operation of s. 83 of the Bombay Land Revenue Code. It is obviously a statement based on mere speculation or legend and is not "satisfactory evidence" of the kind contemplated by s. 83.

I also agree that the plaintiffs have not adduced any evidence in this suit, sufficing to show they are entitled to enhance the rent of the defendants on the basis of the defendants being permanent tenants.

I concur, therefore, in the order proposed by my learned brother.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1611 OF 1922.

May 1, 1925.

Present:—Mr. Justice Devadoss.

RAMASAMI REDDI AND OTHERS—DEFENDANTS Nos. 26, 27, 29 TO 44 AND 46 TO 48 —APPELLANTS

versus

E. RAJAGOPALACHARIAR—PLAINTIFF —RESPONDENT.

Hindu Law—Widow, alienation by—Necessity—Burden of proof—Consent of reversioners—Presumption.

It is for an alienee from a Hindu widow to prove circumstances which would amount to necessity under the Hindu Law justifying the alienation. If he is unable to prove such circumstances he must at least prove that he made *bona fide* enquiries and satisfied himself that such circumstances existed which would amount to a necessity under the Hindu Law. If he is unable to prove such circumstances or to prove that he made such *bona fide* enquiries, the proof that the nearest reversioners consented to the transaction is *prima facie* evidence or presumptive proof that such circumstances existed as would make the transaction one binding on the reversion. It is open to the reversioners to rebut the presumption by adducing evidence, as like all presumptions it is liable to be displaced by proof of facts. But so long as the reversioners do not adduce any evidence as regards the actual purpose of the alienation to the knowledge of the alienee, the presumption would be quite sufficient to enable the Court to give a decree in favour of the alienee. [p. 271, col. 1.]

It is not necessary that the purpose of the alienation should be mentioned in the document. All that the law requires is that the alienee should prove the existence of circumstances at the time that the transaction was entered into, which would justify a limited owner in passing a full interest in the property in favour of the alienee, in other words, which would entitle a limited owner to bind the reversion by the alienation. [p. 271, col. 2.]

Second appeal against a decree of the District Court, Chingleput, in A. S. No. 296 of 1920, preferred against the decree of the Subordinate Judge, Chingleput, in O. S. No. 7 of 1919, (O. S. No. 57 of 1918, District Court, Chingleput).

Mr. *T. R. Ramachandra Iyer*, for the Appellant.

Mr. *K. Bhashyam Iyengar*, for the Respondent.

JUDGMENT.—This appeal is connected with the one just disposed of as it arises out of the same suit. The appellants are defendants Nos. 26, 27, 29 to 44 and 46 to 48. They are alienees and the lower Appellate Court has decided that their alienations are not valid and binding on the plaintiff. The alienations were made so far back as 1888 and 1889 under Exs. 3, L2, L9 to L11 and C1. The alienations were made by the plaintiff and his two brothers and by their mother Alamelammal and by a minor brother for whom Alamelammal acted as guardian. The purposes for which amounts were borrowed under these documents were not mentioned in the deeds. Only cash consideration is recited and the mother and the sons are the executants of the documents. The District Judge has held that the mere execution of the document by the sons would not amount to consent on their part to the alienations, and, therefore, they were not bound by the alienations. The defendants in their written statement pleaded that the amounts got under these documents were spent for a purpose which could bind the reversion. Defendants Nos. 26 and 27 in para. 7 of the written statement say that "the allegations in para. 6 of the plaint are entirely false. At the time of the alienations mentioned above, Alamelammal was not even able to maintain herself out of the income of her properties. Of the suit items most are waste lands not brought under cultivation. The alienations were made solely for maintaining herself and her children and for paying *kist* on the suit lands. In para. 6 they say "the sale mentioned in para. 5 was effected for necessary purposes binding on the reversion. The other defendants have adopted the statement of defendants Nos. 26 and 27 in para. 7, 8 etc. The defendants, therefore, plead that the alienations were for purposes which could bind the reversion. The issue raised on this point Issue No 2 is whether the various alienations pleaded by the defendants are true and binding on the reversion. It was held in *Rangasami Gounden* v. *Nachiappa Gounden* (1) that the consent of the reversioners was *prima facie* evidence of necessity. At page 536* their Lordships observe. "When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will vali-

(1) 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 535; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72; 1 U. P. L. R. (P. C.) 66 (P. C.).

*Page of 42 M.—[*Ed.*]

date the transaction as a right and proper one".

In this case there is the allegation on the part of the defendants that the alienations were for a purpose binding on the reversion. They have not adduced any evidence and the documents are silent as to the purpose. The question is whether in such circumstances the consent of the reversioners is sufficient *prima facie* proof of the existence of circumstances which would amount to necessity under the Hindu Law. It is open to the reversioner to rebut the presumption by adducing evidence that at that time there was no necessity for the transaction. In the case of the alienations under appeal, the reversioners were not merely consenting parties but they joined in the execution of the documents along with their mother. They not only consented to the transaction but they actually participated in the transaction as executants. The principle deducible from *Rangaswami Goundan* v. *Nachiappa Goundan* (1) and the other cases decided by the Privy Council is this: it is for the alienee to prove circumstances which would amount to necessity under the Hindu Law. If he is unable to prove such circumstances he must at least prove that he made *bona fide* inquiries and satisfied himself that such circumstances existed which would amount to a necessity under the Hindu Law. If he is unable to prove such circumstances or to prove that he made such *bona fide* inquiries, the proof that the nearest reversioners consented to the transaction is *prima facie* evidence or presumptive proof that these circumstances existed which would make the transaction one, binding on the reversion, and it is open to the reversioner to rebut the presumption by adducing evidence. Like all presumptions it is liable to be displaced by proof of facts but, so long as the reversioners do not adduce any evidence as regards the actual purpose to the knowledge of the alienee, the presumption would be quite sufficient to enable the Court to give a decree in favour of the alienee. Mr. Bhasyam's contention for the plaintiff-respondent is that the purpose for which the alienation was made should be mentioned in the document and if it is not mentioned in the document, then it cannot be said that the circumstances which amounted to necessity existed at the time. It is not necessary that the purpose itself should be mentioned in the document. All that the law requires is that the alienee should prove the existence of circumstances at the time the transaction was entered into, which would justify a limited owner to pass full interest in favour of the alienee, in other words, which would entitle a limited owner to bind the reversion by the alienation. In this case the alienee did allege the circumstances which would amount to necessity in their written statement. It is not, therefore, necessary that such circumstances should have been mentioned in the documents by which the alienations were effected.

Then the next contention of Mr. Bhashyam is that the consent is only a consent to the fact that the money was borrowed or a sale was effected and does not amount to anything else. This argument overlooks the principle of the decision in *Rangasami Goundan* v. *Nachiappa Goundan* (1). When the reversioner consents to a transaction he does not merely say "I am only looking on and I see that you sell the property to the alienee or mortgage the property for consideration" but the very object of getting the consent of the reversioner is not only to appraise him of the fact that a transaction is taking place but to make him consent to the transaction on the ground that such circumstances do exist as would make the transaction binding on him. Otherwise the consent of the reversioners would be meaningless and no alienee would take the trouble to get the consent of the reversioner simply as a witness of the transaction and nothing more. I do not rest my judgment in this case on the question of estoppel. It may be said in this case that the reversioners having joined in effecting a sale of the property along with the limited owner, they cannot afterwards question the validity of their own act. What representations were made at the time and what representations were believed in by the alienees at the time have not been proved in the case. The transactions were more than 30 years before the date of the suit and it would not be easy to get evidence as to what transpired at the time, I prefer to rest my judgment on the principle enunciated in *Rangasami Goundan* v. *Nachiappa Goundan* (1) that, where reversioners consent to a transaction by a limited owner, in the absence of any evidence to the contrary, their consent is

prima facie evidence or presumptive evidence of the existence of circumstances which would be sufficient to constitute necessity under the Hindu Law and, which would be sufficient to bind the reversion. In the result I allow this appeal with costs. I set aside the decree of the lower Appellate Court and restore that of the District Munsif with costs in this Court and in the lower Appellate Court.

V. N. V.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 551 OF 1923.

September 30, 1924.

Present :—Mr. Justice Marten and Mr. Justice Fawcett.

JUVANSINGJI MOTISINGJI THAKOR —DEFENDANT—APPELLANT

versus

DOLA CHHALA—PLAINTIFF—RESPONDENT.

Bombay Land Revenue Code (Act V of 1879), s. 83—Landlord and tenant—Permanent tenancy—Enhancement of rent—Burden of proof—Pleadings—Document relied on by defendant—Plaintiff, whether entitled to prove grounds of invalidity.

Under the latter part of s. 83 of the Bombay Land Revenue Code if a landlord can prove that he has the right to enhance the rent of a permanent tenancy by virtue of an agreement, usage or otherwise, then he is entitled to do so. The burden lies on the landlord to prove that he has a right to enhance the rent. [p. 275, col. 1.]

Where a defendant in support of his pleas relies upon certain documents, it is open to the plaintiff to establish grounds which would go to prove that the documents relied upon by the defendant are invalid and are not binding upon him. [p. 273, col. 2; p. 274, col. 1.]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 341 of 1921, varying the decree of the Subordinate Judge, at Nadiad, in Civil Suit No. 384 of 1916.

Mr. *G. N. Thakor* (with him Mr. *N. P. Desai*), for the Appellant.

Mr. *H. C. Coyajee* (with him Mr. *G. S. Rao*), for the Respondent.

JUDGMENT.

Marten, J.—The present parties have been engaged in litigation over the suit land ever since the year 1909, though the particular suit before us did not begin till 1916.

The question that arises is whether the plaintiff is a permanent tenant at a fixed quit rent or *salami* of Rs, 5 per annum as he contends, or whether he is only a tenant-at-will or annual tenant as the defendant Thakor Sahib contends. Or alternatively, if he is a permanent tenant, then whether the Thakor Sahib has any right to enhance the rent.

The land in question is in the village of Chaklasi in the Nadiad *Taluka* and it forms part of a *wanta* land belonging to the defendant who is the Thakor of Sonipur. The present Survey No. is 1250; the old No. was 1238; and its area is six acres and 6 *gunthas*. The meaning of *wanta* is given in the first trial judgment in September 1917, and in effect it represents the portion (which is usually ¼th) which was left in the possession of the Rajput Thakors by the Muhammadan invaders of Gujarat. The plaintiff's theory on which this suit was brought was that the land was originally given to the plaintiff's *Brahmin* predecessors-in-title in *pasaita*. That expression is also explained in the same trial judgment as meaning land given in charity to *Brahmins*, temples, etc. It may be either rent free or subject to the payment of *salami* or quit rent.

The plaintiff originally claimed that the field in question was of his absolute ownership and possession subject to this quit rent of Rs. 5. But it was held in both the Courts below that he was only a permanent tenant, and this finding is not challenged by the plaintiff before us. What we have to consider in this appeal are the contentions by the Thakor Sahib as an appellant which I have already alluded to.

Now, apart from the question of the rent note, which I will deal with later the findings of the lower Courts that the plaintiff was a permanent tenant would appear to be justified in law on the facts as found by the lower Appellate Court. The plaintiff put in title-deeds going back to 1835, in the earliest of which the land is described as *pasaita* land and the last of which was a conveyance on sale to the plaintiff's father in May 1876, Ex. 27. The identity of this land is challenged by the Thakor Sahib, but after looking at the map and the comparative statement set out at page 23 of our paper-book, but which does not appear to have been a formal exhibit, we agree with the lower Court that the identity was established. As regards the northern and southern boundaries, they are substantially the same in the various deeds, *viz.*, the northern boundary being certain

fields of the Thakor and the southern boundary being a road. The east and west boundaries cause more difficulties, partly because of the reference to fields by the names of the then owners, and partly because a narrow way is sometimes mentioned and sometimes not. But on the whole we consider that the identity is made out.

That being so, we have got the necessary antiquity for the origin of the tenancy to allow a presumption to be made under s. 83 of the Bombay Land Revenue Code, for no one can say how long prior to 1835 it was originally created. In particular the witnesses of the Thakor Sahib are quite unable to point to any definite date for its commencement. Consequently, apart from the rent note which we alluded to, the ordinary presumption under s. 83 of the Bombay Land Revenue Code would seem to apply.

But great stress was laid by Counsel for the Thakor Sahib on certain rent notes which the plaintiff's father is alleged to have executed. It will be remembered that the plaintiff's father, Chhala Bhaiji, acquired this property on May 31, 1876, by the sale deed, Ex. 27. The rent notes relied on by the Thakor Sahib are in order of date 1886, Ex. 94; 1895, Ex. 97 ; 1897, Ex. 103; and 1898, Ex. 96. There were two other intervening material dates, *viz.*, that in 1885 the Thakor Sahib brought a suit in the *mamlatdar's* Court, Ex. 15, for a rent largely exceeding the rent of Rs. 5 and that that suit was unsuccessful. Similarly in 1892 he gave a notice, Ex. 28, in effect calling on the plaintiff's father to pay an increased rent, or in default to quit.

As regards the first of these rent notes passed in 1886, that does not relate to the suit land at all. It relates to the next Survey No. 1281 which went by the name of the *ganvatya* land. The other three Exhibits passed in 1895, 1897 and 1898 relate to both plots Nos. 1280 and 1281. The rent of plot No. 1280 is not thereby raised but is the same old rent of Rs. 5. But the clause relied on by the landlord is a clause at the end, which provides that the tenant is to give up possession at the end of the year of the tenancy. It was accordingly argued before us that having passed a rent note of that description, this was a complete answer to the plaintiff's claim of being considered a permanent tenant and that we must accordingly reject the claim which he had advanced in that respect. The findings of fact, however, in the lower Courts are that these rent notes passed in 1895, 1897 and 1898 were obtained by misrepresentation, inasmuch as the alleged tenant thought they only related to the field No. 1281 and did not understand that they related to the field No. 1280, that he himself did not execute the document because he was illiterate; that he was not actually present at the time, and that the person who signed on his behalf did so at the request of the Talati of the Thokar Sahib.

It was argued before us that this amounted to an allegation of fraud or misrepresentation against the officers of the Thakor Sahib, and that accordingly it ought to have been pleaded and an express issue raised upon it, and that, as this was not done, the evidence on the point should not have been admitted in the lower Court, and much less should any decision of the lower Courts have been founded on it, and that accordingly in this Court the plaintiff is not entitled to rely upon any such evidence.

As regards the pleadings, it must be borne in mind that it was not the plaintiff who was setting up the rent notes but it was the defendant. The rent notes are not referred to in the plaintiff's pleadings. Further, under the ordinary practice in the *mofussil* it is not customary for a plaintiff to put in a reply to the defendant's written statement. If the case had been one in the English High Court, a reply would be a matter of course. But even on the Original Side in Bombay it is not essential in many cases to put in a reply, and in others the express permission of the Court may have to be obtained for that purpose. Accordingly—I am speaking with experience of the Original Side—it frequently happens that the pleadings are left in what to an English trained lawyer is a defective state.

As regards the issues that were raised, they were in a broad general form and would enable this particular point to be gone into, inasmuch as the rent note would be relevant evidence on the issue whether the plaintiff was a permanent tenant or not. If the defendant was taken by surprise or had any objection to urge, he should have at once objected to the cross-examination of his witnesses to show that the documents were obtained by misrepresentation, and he could have at once taken the point that on the pleadings the plaintiff was not entitled to go into the

point, or alternatively, if no amendment or a further reply was allowed, then the trial should stand over to enable the defendant to meet the evidence on this new point.

But in fact nothing of the sort was done. Although this suit dragged on for many years, no objection appears to have been raised at the trial. The learned Judge gave his judgment on the point; there was no objection raised on this score in the memo. of appeal nor at its hearing before the lower Appellate Court. As far as we can see on the record before us the first time that the point is taken is in the memo of second appeal to this Court.

Under these circumstances we think that having regard to the course which the trial and the first appeal took, no injustice or surprise has been suffered by the defendant, and it would be almost pedantic on our part to send this case back for a remand after eight years with a direction that certain formal pleadings should be put in, and that the parties should be at liberty, if they like, to bring certain further evidence of which at present we have no idea of what it would consist. Counsel for the appellant in the course of extremely lengthy arguments to us did not venture to suggest that his client had any further evidence in his possession which would tend to negative the existing evidence as to misrepresentation which was before the Court at the remanded trial in September 1921.

Next it was said that the evidence itself did not support the findings which the lower Courts put upon it, as in particular certain witnesses who are alleged to have stated certain matters said in fact nothing of the sort. It is not our province in second appeal to weigh the appreciation of evidence. But having regard to the allegation that certain evidence relied on by the lower Courts in fact contained no statements whatever of the sort alleged, we did read the evidence of several witnesses. One in particular, Ex. 99, if it was accepted, was quite sufficient to establish the plaintiff's contentions in this respect. I do not propose to discuss the evidence of some of the other witnesses, who did not remember whether they were present at a particular time very many years ago.

Nor is this evidence at all inconsistent with the probabilities of the case. Seeing that Chhala, the plaintiff's father, had paid solid cash for this field, and that he had successfully resisted the efforts of the Thakor to increase the rent in the suit in the *mamlatdar's* Court in 1885, and that he paid no attention to a notice to quit of 1892, it is somewhat surprising to find that he is alleged in 1895 and in two or three subsequent years to have acknowledged that he was merely an annual tenant and was obliged to quit at the end of the current year. The explanation that he thought the document related to the other field of which he was an annual tenant is not an unlikely one. Or again it is possible that he may have thought that this document as regards No. 1280 only stated that he was a permanent tenant of that field at the rate of Rs. 5 per annum which in fact is the rent mentioned in these rent notes, but that he did not appreciate the importance of that clause at the end of the document about giving up possession, which was a proper clause as regards the other field No. 1281, but which would be fatal to his claim as regards the field No. 1280.

Further, it is to be observed that in the very first rent note of 1886, Ex. 94, this was only in respect of field No. 1281 and not in respect of the suit field. We have on this an explanation from the appellant's Counsel to the effect that in the books of the Thakor Sahib this land has been kept in the name or the *khata* of somebody else, and that accordingly the rent note in respect of No. 1280 was given to or made out in the name of a different person. But here again it is important to observe that in the *mamlatdar's* suit in 1885 the Thakor had sued as defendants not merely this other man in whose name this *khata* is alleged to have stood, but also the plaintiff's father himself. I think it only fair to assume that thereby he was put on inquiry as to what interest the plaintiff's father had in the suit land No. 1280, and accordingly that if he had really thought that Chhala, the plaintiff's father, was the sole tenant of No. 1280 as well as No. 1281, we should have had it so stated in Ex. 94

Nor, again, having regard to the findings of the Court on the question of illiteracy, would it at all be surprising to find that no permanent tenant would consciously enter into rent notes of the description in question if he had been fully aware of their legal significance.

Under these circumstances we see no reason to disturb the findings of fact in the lower Appellate Court that these rent

notes were obtained by misrepresentation, and that they are not binding on the plaintiff's father nor on the plaintiff. That being so, we are left with the presumption under s. 83 of the Bombay Land Revenue Code which I have already referred to, unfettered by any difficulty caused by these rent notes. It follows, therefore, that, in our judgment, the finding of the lower Appellate Court that the plaintiff was a permanent tenant at a quit rent or *salami* of Rs. 5 was correct, and will be affirmed.

Next comes the point as to whether even if the plaintiff is a permanent tenant, the defendant is entitled to enhance the rent. The section governing the matter is the proviso to s. 83 of the Bombay Land Revenue Code which runs:—"Nothing contained in this section shall affect the right of the landlord (if he have the same either by virtue of agreement, usage, or otherwise) to enhance the rent payable, or services renderable, by the tenant, or to evict the tenant for non-payment of the rent or non-rendition of the services, either respectively originally fixed or duly enhanced as aforesaid."

Now it is common ground that there was no agreement entitling the landlord to enhance the rent. But it is said there was a right in the landlord so to do by usage or otherwise within the meaning of this proviso. No evidence whatever in support of such right by usage or otherwise was put forward at either of the trials, but it was said that it was a well-known usage which was so clearly recognized by the Courts of this Presidency that we ought to take judicial notice of it and to hold it to be part of the settled law of the land. Alternatively it was said that once you get the relationship of landlord and tenant established, then *prima facie* the landlord has a right to raise the rent, unless some restriction on his power is established by the tenant. In other words, the onus lies on the tenant to show that the landlord has not this right, and that the onus does not lie on the landlord to say he has the right.

Now taking the words of the section, which are after all the governing factor on the subject, I consider them as meaning that if the landlord can prove that he has the right to enhance the rent by virtue of an agreement, usage or otherwise, then he is to be entitled to do so. This construction is I think borne out by the judgment of Sir Lawrence Jenkins in *Rajya* v. *Balkrishna Gangadhar* (1). That was not a case of *wanta* land or alienated land, as we have here, but of *mirasi* land in the Belgaum District. But there the Court had to consider this section, and at page 422* Sir Lawrence said:—"What has hitherto been payable we know; all that has to be determined is the right to enhance. In the first place, it must be determined whether what was paid was rent, and then whether the *inamdar* has the right to enhance as against one who holds on the same terms as the defendant does. Agreement is out of the case, but it is said that the enhancement sought is sanctioned by usage; this, therefore, should be proved."

Further, amongst the issues sent down to the lower Court, Issue No. 5 ran: Has the plaintiff the right by virtue of usage or otherwise to enhance as against the defendant? I have already said that the Thakor Sahib has adduced no evidence whatever in support of the alleged usage. It is said that we should now remand this case back to the lower Court in order to enable him to do so. During some fifteen years' litigation and eight years of the present litigation, there was ample opportunity for the defendant to ponder over the various judgments that were at intervals given by one or other of the various Courts before whom this litigation came. There was ample time for him to make up his mind what evidence and what sort of case he was going to prove before the Court. And really at this late stage to ask that he should be given this further opportunity is to my mind a request almost verging on absurdity. In any event I am quite satisfied that it would be most unjust to give that permission and that accordingly any such request should be refused.

Then comes the question of the authorities. We have been referred, in addition to *Rajya* v. *Balkrishna Gangadhar* (1) which I have just cited, to *Pratapray Gujar* v. *Rayaji Namaji* (2) and the cases referred to in the notes at pages 145 and 345; *Vishvanath Bhikaji* v. *Dhondappa* (3) *Laxuman* v. *Krishnaji* (4) and *Vyasacharya Madhavacharya* v. *Vishnu Vithal* (5). These cases have one common characteristic.

(1) 29 B. 415; 7 Bom. L. R. 439.
(2) 3 B. 141; 2 Ind. Dec. (N. S.) 94.
(3) 17 B. 475; 9 Ind. Dec. (N. S.) 309.
(4) 9 Bom. L. R. 861.
(5) 58 Ind. Cas. 289; 22 Bom. L. R. 717; 44 B. 566.

*Page of 29 .B—[*Ed.*]

They all relate to the Deccan; and most of them were in the Satara District or else in the Belgaum District. As regards the particular districts in which those cases arose, no doubt it has been laid down that the usage is clear and well recognised and must be given effect to. But there again they were all cases dealing with the rights of the *mirasdars* and they were all or nearly all cases of unalienated land. In the present case we have not to do with the Deccan. We are dealing with Gujarat, and Gujarat does not know about *mirasi* tenure. We are dealing here with alienated land, and if there is any substance—and there appears to me to be substance—in the contention of the plaintiff as to the origin of this tenure we are again brought to another region of facts under which it may very well be that the tenancy was to be at a fixed rent for all time. If land is to be given in charity at a small quit rent, one could understand it as being a charitable gift, though not so bountiful a one as if the land had been given out and out. But if in fact an alleged charitable donor is to be entitled to enhance the rent at his pleasure and in effect to demand a rack rent, then where is the charity? If the landlord gets the full value of his land, where is the religious merit and how could one say that anything has really been given?

Therefore, there appears to me to be a broad distinction of fact between the lands we have to deal with in the present case and those the subject of the above reported cases. In the absence of any evidence whatever on the point, I utterly decline to accept those authorities as laying down a universal rule applicable to the whole of this Presidency. Nothing would have been easier than for the Thakor Sahib to have led even a sentence or two of evidence to that effect if it was the fact. I think too there is considerable force in the argument put forward by Counsel for the plaintiff that if this is really the true state of the law in this Presidency, then why should the proviso to s. 83 be framed in this way? If the framers knew of this well established usage giving the right to the landlord in all cases to enhance the rents, then why should this proviso have been put in this limited form? In the view I take, the onus is thrown on the landlord to show that he has this right by agreement, usage or otherwise.

Curiously enough the same point came before my brother Fawcett and myself, on August 28, last in Second Appeal No. 553 of 1922 from the decision of the same learned District Judge of Ahmedabad Mr. D'Souza. There again the right to enhance was claimed in the Appellate Court, but substantially no evidence had been led in the Trial Court. On appeal to us in the state of the evidence in the case then before us, we declined to hold that the landlord in that case had any power to enhance the rent in the way in which he claimed. Mr. Thakor, who appears for the Thakor Sahib in the present case, was also Counsel for the *talukdar* in the other case, and he has stated to us that in the previous appeal he did not urge with sufficient force nor with sufficient reference to authorities his present contention as to the rights of the landlord to enhance the rent. I accept his recollection that he did not then refer us to the authorities which he has cited to us in the present case. But it may perhaps ease his mind if I were to say that even if he had cited these cases, it would not have made the slightest difference to the result of our judgment, although naturally we appreciate the industry of Counsel in bringing to our attention in the present case all relevant authorities that he can find. Certainly so far as my re-collection of the previous appeal goes as is my re-collection of the arguments in the present case, Mr. Thakor has urged and urged at length and with strength all possible arguments that could be taken on behalf of his client. Therefore, it cannot be said that there is any fault on the part of Counsel that the Court arrived at that particular decision.

In the present case I am happy to think that our decision that the plaintiff is a permanent tenant at a fixed rent is I believe entirely in accordance with the facts and justice of the case. On the facts as we have them, this man and his predecessors-in-title have been in possession of this land at a quit rent ever since 1835, and they have up to now successfully disputed the right of the landlord to alter that rent as has been attempted in comparatively recent years. I have little doubt that the present Thakor Sahib or his predecessors did not take proceedings in 1885, or again in 1892, because they knew that right was on the side of the plaintiff. It is without any hesitation accordingly that

I would confirm the decision in favour of the plaintiff which has been arrived at by the lower Court and dismiss this appeal with costs.

My brother Fawcett has reminded me that there is one other point which I should have referred to. It was contended in the lower Court that even if the plaintiff was an annual tenant or must be deemed to be so by having passed old rent notes, yet he had successfully asserted his right to be a permanent tenant, and that accordingly he must be taken to have been in adverse possession *qua* permanent tenancy notwithstanding his signature on these rent notes. Our finding that the rent notes are not binding on the plaintiff renders it unnecessary for us to express an opinion on that point. Speaking for myself we have not heard the full arguments on the point or indeed any argument from the plaintiff. Under these circumstances I personally shall express no opinion whatever on that point, nor whether it was rightly decided in favour of the plaintiff in the Court below.

Fawcett, J.—My learned brother has dealt so fully with the points arising in this appeal that I need only add a few remarks.

The learned District Judge decided the appeal before him in favour of the plaintiff-respondent on two grounds. The first of these was that by his open assertion to the knowledge of the defendant Thakor of his right to hold as a permanent tenant at a fixed rental of Rs. 5 per annum, he had acquired by adverse possession the status of a permanent tenant holding at a fixed rate. The learned Counsel for the appellant has drawn our attention to certain rulings of the Privy Council which support the view that the plaintiff could not legitimately be held to have acquired this status by adverse possession, inasmuch as the defendant could not have taken steps merely on account of that assertion to recover possession of the land in suit. The rulings in question are those of *Mohammad Mumtaz Ali Khan* v. *Mohan Singh* (6) and *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande* (7). It may be that in view of those rulings the view taken by this Court in cases like *Budesab* v. *Hanmanta* (8) and *Thakore Fatesingji* v. *Ramanji Ardeshir Dalal* (9) may have to be re-considered, although at any rate in the former of those cases the fact that an attempt to evict a tenant had been made under the *Mamlatdar's* Court Act, is a special consideration which may alter the application of the general principle laid down in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (10) by the Privy Council.

But in the present case it is not necessary—and, in my opinion, undesirable—to consider this question, because the learned District Judge has also decided in favour of the plaintiff on other grounds, which, in my opinion, are amply sufficient to support his decree, and any remarks which we might make on this particular question would be merely *obiter dicta*.

Both the lower Courts have held that the plaintiff has succeeded in showing circumstances that justify the presumption being raised in his favour which is allowed by s. 83 of the Bombay Land Revenue Code. So far as such finding can be challenged in second appeal, I am clearly of opinion that there is no sufficient ground for our interference.

As regards the point of identity of the land, the defendant, if he wanted to rely upon the description of the boundaries in the different title-deeds as showing that the land mentioned in one or other of them could not possibly be identical, should have directly raised that point in the cross-examination of the plaintiff and given him an opportunity of explaining any differences that there are in respect of the description of the boundaries. So far as I can judge from the materials before us, there is nothing which makes it impossible that the boundaries should be the same, and a good deal which favours their really being so. I do not think that we have any good ground for not accepting the finding

(6) 74 Ind. Cas. 476; 50 I. A. 202; (1923) A. I. R. (P. C.) 118; 21 A. L. J. 757; 45 A. 419; 26 O. C. 231; 45 M. L. J. 283; 9 O. & A. L. R 901; 10 O. L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 33 M. L. T. 321 (P. C.).

(7) 74 Ind. Cas. 362; 50 I. A. 255; 25 Bom. L. R. 1005; (1923) M. W. N. 689; (1923) A. I. R. (P. C.) 205; 33 M. L. T. 389; 47 B. 798; 28 C. W. N. 857; 20 L. W. 248; 47 M. L. J. 248 (P. C.).

(8) 21 B. 509; 11 Ind. Dec. (N. S.) 341.

(9) 27 B.515 at p. 540; 5 Bom. L. R. 274.

(10) 82 Ind. Cas. 226; 47 M. 337; (1924) A. I. R. (P. C.) 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 28 C. W. N. 809; 51 I A. 83; L. R. 5 A. (P C.) 33 (P. C.).

of the learned District Judge as to the identity of the plaint field mentioned in the several documents produced by the plaintiff.

Then as regards the question arising about the circumstances under which the plaintiff's father passed certain rent notes to the defendant, I have little to add to what my learned brother has said. The C. P C., by O. VIII, r. 9, requires the leave of the Court before any party can make a further pleading after the written statement has been filed, and I can corroborate the statement of my learned brother that it is not the practice in the *mofussil* for the plaintiff to put in a counter statement to the defendant's written statement. The point about the alleged misrepresentation really arose out of the cross-examination of certain witnesses adduced by the defendant, and the circumstances are very like those that arose in *Riding* v. *Hawkins* (11), where upon cross-examination of the defendant an occasion arose for a plea being put in about misrepresentation with the leave of the Court.

This is not a case where the plaintiff from the very start set up that there was a misrepresentation on the part of the defendant in regard to certain documents, and so as to require an affirmative plea of misrepresentation by him in the first instance which is the ordinary case where the rule applies that fraud or misrepresentation must be properly pleaded and particulars given. In the present case all that I think can legitimately be said is that the plaintiff's Pleader should have raised an issue on this point at the time the issues were framed, because undoubtedly the defendants had pleaded these rent notes. Therefore it can fairly be said that so far as the defendant was disputing the legal effect of the rent notes, his Pleader should have asked the Court to frame an issue on the point.

But the mere fact that no such issue was framed is not a sufficient ground for our interfering with the decree of the lower Court in this second appeal. In support of that view I may refer to the Privy Council case of *Mitna* v. *Syud Fuzl Rub* (12) where their Lordships say at page 582* as follows:—

"In this case the omission to raise the issues was brought before the notice of the Appellate Court; the Appellate Court expressed its regret, and their Lordships are glad to observe that it did express its regret that the Principal *Sudder Ameen* had omitted to settle the issues. The Court, however, nevertheless conceived that it was not under any positive obligation to remand the case; but seeing that the parties had gone to trial knowing what the real question between them was, that the evidence had been taken, and that the conclusion had been in the opinion of the Appellate Court correctly drawn from that evidence, they thought it within their competence to affirm that decision without sending the case back for a re-trial. Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 354th section (which corresponds to O. XLI, r. 25, of the present C. P. C.) of the C. P. C. At all events, it appears to their Lordships that there is nothing in the Code which made it imperative upon the Appellate Court, or now makes it imperative upon their Lordships, to yield to that objection, and, therefore, fully concurring in the observations made by the Appellate Court that it was the duty of the Judge to settle the issues, and that it was much to be regretted that he omitted to settle those issues, they still think that, under all the circumstances of the case, substantial justice having been done, there has not been that fatal mis-trial of the cause which vitiates all the proceedings and renders a new trial necessary."

So, here I think there is no question of surprise arising, and that s. 99 of the C. P. C. applies. There has been at the most an irregularity which does not justify our interference in second appeal. And after all quite apart from any allegation of misrepresentation, the question is substantially one of what is the weight to be given to the admissions which are relied upon in these particular rent notes. That is the point of view from which both the lower Courts have really addressed themselves to the question, and it is a point of view which from very early times has been one which has been authorised by the decisions of this Court

One of the earliest cases dealing with the

(11) (1889) 14 P. D. 56; 58 L. J. P. 48; 60 L. T. 869; 37 W. R. 575.

(12) 13 M. I. A. 573; 15 W. R. P. C. 15; 6 B. L. R. 148; 2 Suth. P. C. J. 387; 2 Sar. P. C. J. 626; 20 E. R. 665.

*Page of 13 M. I. A.—[*Ed.*]

question of admissions in rent notes passed by illiterate cultivators is *Gangaji* v. *Sakharam* (13) which is referred to by Sir Lawrence Jenkins in *Raghunath* v. *Lakshuman* (14). There is also the recent case of *Rama Ranchhod* v. *Abdul Rahim* (15) which is mentioned in the judgment of the lower Courts, where it was held on general grounds that it would be unsafe to rely upon a particular admission of being a tenant-at-will in a rent note contrary to evidence showing that the tenant had been asserting a right to permanent tenure, and continued to hold the land.

In the present case the fact that these rent notes include a piece of land, to which the stipulation as to giving up the land at the end of the year could properly apply, is a clear ground for not giving the rent notes the weight they might otherwise have. Quite apart from any deliberate misrepresentation by the Thakor or his Talati, the Court would be clearly justified in saying that it cannot attach any real weight to the admission, and of course an admission is not in itself conclusive. I think, therefore, that the conclusion of the lower Courts that a presumption of permanent tenancy arises in favour of the plaintiff is correct and is binding upon us in second appeal.

As regards the question of the defendant's right to enhance the rent, no doubt inasmuch as the plaintiff asked for a declaration that the defendant had no right to enhance the rent, the onus of proof would in the first instance rest upon him under ss. 101 and 102 of the Indian Evidence Act, that is to say, if neither party adduce any evidence about this right to enhance, the plaintiff would fail not having sustained the onus upon him. But after the plaintiff had adduced evidence that he and his predecessor-in-title had been in possession of this particular land under circumstances which justify a presumption in plaintiff's favour under s. 83 of the Bombay Land Revenue Code and that they had paid a uniform rental for a long number of years, the onus was clearly shifted on to the defendant to show that by agreement, usage or otherwise he still had a right to enhance the rent. I agree with my learned brother that the last paragraph of s. 83 of the Bombay Land Revenue Code contemplates the landlord having to satisfy that onus. But quite apart from that, I think that under ordinary rules of evidence the onus in this case would lie upon the landlord, and in view of his having adduced no evidence at all on this particular point, I cannot see that there is any ground for our interfering with the view taken by the District Judge, *viz.*, that the right to enhance is not one which is inherent in the defendant, and that he has failed to satisfy the onus that lies upon him in that respect.

I agree with all that my learned brother has said as to the rulings about the right to enhance the rent in the case of *mirasdar* being entirely inapplicable to the present case. I think that possibly, if the defendant had set up the right to enhance the rent on the ground that this land had been originally granted in charity and improperly alienated by the grantees so as to divert the profits from the charitable institution, he might have been able to show some foundation for his claim to enhance the rent. The case is in some respects analogous to that of Government granting land as a *devasthan inam* and resuming it by the levy of full assessment from the existing owner, where the profits of the *inam* land have been diverted from the institution itself, or the institution itself has ceased to exist or to be used as such. This is done either under the conditions of the *sanad* on which the land is given or under the general declaration that land held on behalf of religious or charitable institutions wholly or partially exempt from the payment of land revenue shall not be transferable from such institutions either by assignment, sale, gift, devise or otherwise, howsoever, which is contained in cl. (3) of s. 8 of the Bombay Act II of 1863. But there is no corresponding clause in Act VII of 1863 which applies to Gujarat, and it has been held that full assessment cannot be legally levied in the case of alienation of endowed property : see *Shankerlal Tapidas* v. *Secretary of State for India* (16). Therefore so far as the analogy of Government lands is concerned, the case for the defendant put on this footing would naturally be somewhat weak. In any case the defendant has not set up any such contentions. He has adopted the defence that this land was never given in *inam* that

(13) (1889) P. J. 156.
(14) 2 Bom. L. R. 93.
(15) 59 Ind. Cas. 278; 22 Bom. L. R. 1214; 45 B. 303.
(16) 51 Ind. Cas. 910; 43 B. 583; 21 Bom. L. R. 668.

it was part of his ordinary *wanta* land, that the plaintiff was an ordinary tenant-at-will and that on ordinary general principles the Court should decide in his favour. In these circumstances there is obviously no ground for any inquiry into the possibility I have mentioned. The point should have been properly raised in the suit, if it was going to be raised at all, and I think that, as the defendant has chosen not to set up any such claim or to adduce any evidence, he must suffer the consequences, and he has only himself to blame if thereby he loses what he might otherwise have been allowed.

I concur, therefore, that this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1717 OF 1922.

July 23, 1925.

Present:—Mr. Justice Phillips.

THE TRUSTEE OF VIJIANAGARAM ESTATE—PLAINTIFF—APPELLANT

versus

PAILA ACHANAH AND OTHERS—DEFENDANTS NOS. 3, 4, 1 AND 2—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 3 (11), 19, Sch. A, Art. 8—Rent, suit for, in respect of lands in river bed—Jurisdiction of Revenue Courts—Civil Procedure Code (Act V of 1908), O. VII, r. 10—Plaint presented to wrong Court—Procedure.

Under the definition contained in s. 3 (11) of the Madras Estates Land Act 'rent' means whatever is lawfully payable to a land-holder for the use or occupation of land in his estate for the purpose of agriculture and, therefore, includes whatever is payable not merely on *ryoti* land or old waste or *kambatham* but on any land whatsoever, provided the land is used or occupied for the purpose of agriculture.

All suits for recovery of rent except on *kambatham* land are covered by Art. 8 of the Schedule, Part A, Madras Estates Land Act, and are exclusively triable by a Revenue Court.

Where a plaint is presented to a Court having no jurisdiction to try the suit the Court ought to return the plaint for presentation to the proper Court, and not to dismiss the suit.

Second appeal against a decree of the District Court, Vizagapatam, in A. S. No. 336 of 1919, reversing that of the Court of the Deputy Collector, Vizianagaram, in Rent Suit No. 104 of 1915.

Mr. *S. Venkatesa Iyengar*, for the Appellant.

Mr. *Y. Suryanarayana*, for the Respondents.

JUDGMENT.—This is a suit for rent in respect of certain lands called *badava* lands situated in a river bed. The District Judge has found that these lands were neither *kambatham* nor old waste nor *ryoti* nor of any of the other descriptions mentioned in s. 3 (16), (*a*), (*b*) and (*c*) of the Estates Land Act. He has in consequence held that the Revenue Courts have no jursidiction to try a suit for rent in respect of these lands. He has, however, omitted to notice that the definition of 'rent' in s. 3 (11) runs as follows:—"Rent means whatever is lawfully payable in money or in kind or in both to a land-holder for the use or occupation of land in his estate for the purpose of agriculture". That is to say, it includes whatever is payable not merely on *ryoti* land or old waste or *kambatham* but on any land whatever. Under s. 19 a Revenue Court is debarred from trying a suit for rent on *kambatham* land but all other suits by land-holders for recovery of rent seem to be covered by Art. 8 of the Schedule, Part A. The District Judge was, therefore, wrong in declining jurisdiction in this case and his order must be set aside. I would further point out that he should not have dismissed the suit but should have returned the plaint for presentation to the proper Court. That is not of much importance now as I direct him to restore the appeal to file and dispose of it in accordance with law. The costs here will abide the result.

The memorandum of objections does not lie because it merely relates to an argument which the respondents are entitled to put forward but is not in any way an objection to the decree. It must, therefore, be rejected.

The Court-fee on the appeal memorandum will be refunded.

V. N. V. *Order set aside.*

Z. K.

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

November 17, 1924.

Present:—Lord Sumner, Lord Phillimore, Sir John Edge and Sir Lawrence Jenkins.

FATEH SINGH AND OTHERS—PLAINTIFFS APPELLANTS

versus

JAGANNATH BAKSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV, O. XXIII, r. 1—Hindu Law—Widow, alienation by—Reversioners, remote, whether can challenge alienation—Suit by remote reversioners for declaration,

dismissal of—Second suit on basis of family custom, whether maintainable—Res judicata—*Leave to institute fresh suit, effect of.*

A suit for declaration that a gift by a Hindu widow is void as against the reversionary heirs of her husband is competent only to the nearest prospective reversioner, and if a more distant relation claims to sue, he can only maintain his suit by showing that the nearer reversioner has precluded himself by his own act or conduct from suing, or has colluded with the widow, or has concurred in the act alleged to be wrongful. [p. 281, col. 2; p. 282, col. 1]

Plaintiffs, alleging themselves to be the reversioners of a deceased Hindu, brought a suit for a declaration that a gift made by the widow of the deceased of property belonging to the deceased was void as against the reversioners of the deceased. One of the defences set up by the defendants was that the plaintiffs were not the nearest reversioners of the deceased and that the only person entitled to dispute the deed of gift was one *G* who was the nearest reversioner of the deceased and who had also been impleaded as a defendant to the suit. In answer to this plea the plaintiffs took up the position that even if *G* was a nearer reversioner of the deceased the plaintiffs had a right to maintain the suit on account of *G* having colluded with the other defendants. The widow died during the pendency of the suit and the plaintiffs thereupon made an application to the Court praying for permission to amend the plaint so as to be able to plead a family custom under which they were entitled to succeed to the estate of the deceased along with *G*, although the latter was a nearer reversioner of the deceased. They also prayed to be allowed to claim a decree for possession of their share in the property. The application was rejected and the suit was dismissed, but the Court while dismissing the suit remarked that the plaintiffs were at liberty to file a fresh suit for possession. Plaintiffs then brought another suit for possession of their share of the property founding their title on family custom :

Held, (1) that the allegation of the family custom was an allegation which might and ought to have been made a ground of attack in the previous suit and that not having been pleaded in the previous suit it could not be pleaded in the subsequent suit having regard to Expl. IV to s. 11 of the C. P. C.; [p. 283, col. 1.]

(2) that the previous suit having been dismissed there was no question of the suit being allowed to be withdrawn with liberty to bring a fresh suit on the same cause of action and that the expression of opinion by the Court when dismissing the suit that the plaintiffs were at liberty to bring a fresh suit for possession, did not furnish them with a cause of action for a fresh suit, and that consequently the present suit was not maintainable. [*ibid.*]

Appeal against the judgment and decree of the Subordinate Judge, Bahraich.

Mr. *A. de Mello*, for the Appellants

Messrs. *Parikh* and *Dube*, for the Respondents.

JUDGMENT.

Lord Phillimore.—This is an appeal by the plaintiffs from concurrent judgments against them given by the Subordinate Judge of Bahraich and affirmed by the Court of the Judicial Commissioner of Oudh.

It is a suit for possession of land, in which the defendants-respondents raised as a first defence that the matter was *res judicata*, having already been decided between the same parties.

Both Courts being of this opinion and having determined this issue, found it unnecessary to determine any of the other issues and dismissed the suit.

The history of the case is as follows : The present appellants and plaintiffs with others filed a suit in July, 1908, against one *Musammat* Har Kunwar, and the present defendant and respondent Jagannath Bakhsh Singh, and one Ganga Baksh, now represented by the defendant and respondent Bishunath Singh, in which they stated that *Musammat* Har Kunwar, being a Hindu widow, was in possession of her husband's property for the ordinary Hindu woman's estate, that they (the plaintiffs) and Ganga Baksh were the presumptive heirs of her husband, and that she intending to defeat their succession, had purported to make a deed of gift of the property to Jagannath Baksh, her daughter's son; and they claimed that the deed of gift might be declared void and illegal against them.

The defendants in that suit among other defences pleaded that the plaintiffs were not equal in degree with Ganga Baksh but that he was the nearest reversioner and the only person entitled to dispute the deed of gift. To this the plaintiffs replied that if he were the nearer heir—

"even then the plaintiffs are entitled to maintain this suit on account of Ganga Baksh Singh's denial and his not joining the suit, owing to his indifference towards the preservation of his rights, having regard to his views expressed in the written statement and on account of his colluding with the defendants Nos. 1 and 2; and the defendants Nos. 1 and 2 cannot derive any benefit by setting up a *jus tertii* in favour of Ganga Baksh Singh, as alleged by them."

In this state of the pleadings the widow died.

A suit for a declaration that a gift by a Hindu widow is void as against the reversionary heirs of her husband is one which is contemplated by the Specific Relief Act (I of 1877, s. 42) as is shown by the explanation lettered (*e*) to that section. But it is established that such a suit is *prima facie* competent only to the nearest

prospective reversioner, and that if a more distant relation claims to sue, he can only maintain his suit by showing that the nearer reversioner has colluded with the widow, or for some similar reason.

The rule of law on this subject is stated in the case of *Rani Anand Kunwar* v. *Court of Wards* (1) in the following terms :—

"Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment... The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct, from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue."

When the widow died, the question of collusion between Ganga Baksh and her became comparatively unimportant. By this event the question of reversionary heirship became settled, and if Ganga Baksh was the nearest heir, the plaintiffs could get no title to the property. They might indeed have brought their suit for declaration to a hearing for the purpose of determining in that suit the question of heirship as between them and Ganga Baksh, or to establish their averment of collusion in order to get the costs of the suit. But now that the widow was dead the real matter was to get possession; and they accordingly endeavoured to turn their suit into one for possession.

It seemed, however, that if according to the ordinary Hindu Law of descent, Ganga Baksh was the heir, to the exclusion of the plaintiffs, that they must fail in such a suit. They were minded accordingly to make a new case, namely, that by a family custom they were equal in degree with Ganga Baksh and entitled as such to maintain a suit for possession.

Accordingly, they made an application in the suit setting forth the death of the widow and claiming that they had become entitled to institute a suit for possession, and that in order to show their right it had become necessary to mention certain additional averments of fact in the plaint, the additional averments being allegations of the family custom and a statement as to the death of the widow, and the new relief claimed being a decree for possession of a ten-annas share in the property.

This application to amend came on for hearing on March 15, 1909, and the learned Judge rejected the application to be allowed to add the amendments averring the family custom, holding that it was an attempt to introduce a new case. When he had intimated that this was his opinion, the question remained whether the plaintiffs should be allowed to add their prayer for possession, and whether it was worth while continuing the suit. It was admitted by the plaintiffs' Counsel that, apart from custom, they were one degree more remote than Ganga Baksh, and that if they could not make the case of a family custom, their suit must fail; and the learned Judge thereupon dismissed it with costs; and from this decision there was no appeal. He did, however, in the course of his judgment use the following expressions, which will need consideration :—

"The death of the lady has given the plaintiffs a fresh cause of action for possession. I leave them to the liberty of filing a fresh suit for possession."

The plaintiffs took no further steps till February 5, 1921. In the meantime one of the present defendants brought an action against the other; and the parties compromised on the terms of each taking one half.

In the present suit brought on February 5, 1921, the plaintiffs are claiming possession of one-half of the property, founding their title on family custom. To this the defendants, besides denying the custom and asserting the validity of the widow's gift, have pleaded that the suit was barred by s. 11 of the C. P. C. as raising a question which had already been heard and decided. Both Courts, as already stated, took this view, and without going into other portions of the case, dismissed the suit. In their Lordships' opinion their decisions were right.

The language of the section in question is as follows :—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially

(1) 8 I. A. 14 at p. 22; 6 C. 764; 8 C. L. R. 381; 14 Shome L. R. 78; 4 Sar. P. C. J. 195; 5 Ind. Jur. 161; Rafique and Jackson's P. C. No. 63; 3 Ind. Dec. (N. S.) 495 (P. C.).

in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

With this must be read :—

"*Explanation IV.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

When the plaintiffs brought their first suit, they had to show their title to impeach the widow's gift. For this purpose they had to show either that they were some at least of the nearest reversionary heirs, or that the only nearer reversionary heir had colluded with the widow. In their plaint they did not rely on collusion, which they only introduced in their replication. Taking, however, that view of the pleadings which is most favourable to them and treating them as relying equally on both grounds of claim, it is now clear that they can only make out a claim to be some of the next reversioners on the footing of the family custom and that the allegation of that custom, therefore, was an allegation which "might and ought to have been made" within the meaning of Expl. IV.

Or, to put it in another way. One of the alternative cases on which they were basing their title to sue was their nearness of kin, and to prove their nearness of kin it was essential to aver the family custom. They claimed as next heirs and their claim was dismissed. They cannot fight it over again.

But, as the Judges in the Court of the Judicial Commissioner have observed some complication was introduced by the language of the Judge who tried the first case and by his expressing himself as if he had power to give leave to bring a fresh suit. It was contended on behalf of the plaintiffs that in so expressing himself he was purporting to exercise the powers given to the Court by O. XXIII, which allows the Court in certain cases to grant the plaintiff permission to withdraw from a suit with liberty to issue a fresh suit, in which case the bar against a fresh suit which is otherwise imposed on a plaintiff who abandons his first suit is removed.

The same point was raised at their Lordships' bar, but their Lordships agree with the Court of the Judicial Commissioner that it is not a good one. There was no application for leave to withdraw the suit, nor was it withdrawn; it was dismissed. And the power of the learned Judge ceased upon this dismissal. It may have been unfortunate for the plaintiffs that the learned Judge thought that he had a power which he did not possess but happily, as the Judges on the appeal observed, it is improbable that there was substance in the claim which they have been prevented from further prosecuting.

In passing it may be observed that if the learned Judge thought that he was exercising power under O. XXIII he must also have thought that the subject-matter of any future suit would be the same subject-matter as that of the suit which he dismissed. This confirms the view which the Courts below and their Lordships have taken.

Several authorities upon the construction of s. 11 of the C. P. C. were cited, which it was suggested put a construction on Expl. IV which was favourable to the plaintiffs. They have been considered by their Lordships; but, in fact, they have no bearing upon the present case.

Perhaps the one which requires the most careful examination is that of *Doorga Persad Singh* v. *Doorga Konwari* (2) because in that case their Lordships intimated that the plaintiff would not be barred from setting up a family custom of descent upon the death of a widow by reason of his having in a previous suit in which he was a defendant averred the family custom as entitling him to oust the widow during her life and having failed on this point. But they held that as to the immediate point then under consideration he was barred, and after citing a very strong passage from *Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Tavr* v. *Katama Natchiar* (3), they proceeded to express themselves as follows:—

"If the defendant did not resist the claim in the former suit upon the ground of the family custom, he is not entitled in the present suit to upset the former decision,

(2) 5 I A. 149; 4 C. 190; 3 C. L. R. 31; 3 Suth. P. C. J. 540; 3 Sar. P. C. J. 827; 2 Ind. Jur. 650; 2 Shome L. R. 21; 2 Ind. Dec. (N. S.) 121 (P. C.).

(3) 11 M. I. A. 50 at p. 73; 10 W. R. P. C. 1; 2 Sar. P. C. J. 212; 20 E. R. 20.

because he failed to set up a custom which he ought to have relied upon at the time."

In *Zamindar of Pittapuram* v. *Proprietors of the Mutta of Kolanka* (4), the plaintiff had brought a previous suit which had failed against his grandfather's widow and certain other defendants; and some of the defendants to the second suit might have been held to be successors-in-title to some of the defendants in the previous suit. But in the view which the Judicial Committee took of the facts, there were three properties concerned in the first suit, (1), (2) and (3), and numbers (1) and (2) were not in question in the second suit; while as regards number (3) no case was made in the first suit affecting the defendants in the second suit, and the only way in which number (3) came into the first suit was because the plaintiffs at that time sought to restrain the widow (since dead and not a party to the second suit) from waste. This being so, nothing had been decided in the first suit which affected the question of the title of the plaintiff to property number (3), and as to it there was held to be no case of *res judicata*.

Chand Kour v. *Partab Singh* (5) was a suit by reversionary heirs alleging the intention of a widow to injure their right by selling or mortgaging the property, which failed, and then a second suit to set aside an actual deed of gift. This second suit was, upon the construction of the earlier Act then in force, held to be a suit upon "a different and subsequent cause of action to that relied upon in the first suit." It may be added that in that case the failure of the first suit was caused by the non-appearance of the plaintiff at the trial, and inasmuch as the first suit might have failed in either of two respects (either the plaintiff might have no title or the widow might not have been threatening to sell or mortgage), a mere dismissal for non-appearance could not be held to determine that the plaintiff had failed for want of title.

Lastly, their Lordships would refer to the case of *Kailash Mondul* v. *Baroda Sundari Dasi* (6) decided in the High Court at Calcutta. In that case the plaintiff had sued the defendant for rent, and the defendant had pleaded abatement and had adduced no evidence in support of his plea, so that the plaintiff recovered judgment. Many years after the plaintiff sued the defendant for the rent subsequently accruing, and the defendant sought to raise various defences. It was contended, and so held in the lower Courts, that the matter was *res judicata*, and concluded in favour of the plaintiff. But the High Court held that it did not follow because rent was due from the defendant in one year that it was necessarily due in later years; and this seems obvious, for the position of either of the parties might have changed. Maclean, C. J. ,said that it might be that on looking further into the matter some particular issue might be found to have been previously decided, and then the principle of *res judicata* might apply, but that as the matter stood it did not necessarily so appear. Banerji, J., it is true, made some observations upon those words "heard and finally decided," which appeared in the old Act and are in the present Code; and to these observations, couched in language not so careful as it might have been, undue prominence has been given by the reporter in the summary of the case which appears in the head-note. But in the actual decision there is no conflict with the established authorities.

The other cases which were brought by the learned Counsel for the appellants before their Lordships have, in their Lordships' judgment, no bearing upon the present decision. Upon the whole, therefore, their Lordships agree with the Courts below that this is a case of *res judicata*, and that the defence succeeds.

Their Lordships will, therefore, humbly recommend His Majesty that this appeal should be dismissed with costs; but the respondents must have only one set of costs between them.

Z. K. *Appeal dismissed.*

Solicitor for the Appellants:—Mr. *Edward Dalgado.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.* and *H. S. L. Polak.*

(4) 5 I. A. 206; 2 M. 23; 3 C. L. R. 265; 2 Ind. Jur. 616; 2 Shome L. R. 128; 3 Sar. P. C. J. 850; 1 Ind. Dec. (N. S.) 288 (P. C.).

(5) 15 I. A. 156; 16 C. 98; 5 Sar. P. C. J. 243; 12 Ind. Jur. 331; 8 Ind. Dec. (N. S.) 65 (P. C.).

(6) 24 C. 711; 1 C. W. N. 565; 12 Ind. Dec. (N. S.) 1143.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 445 OF 1922.

January 26, 1925.

Present:—Mr. Justice Madhavan Nair.

CHALLA LAKSHMAKKA—PLAINTIFF—APPELLANT

versus

CHALLA BALA RANGAPPA, MINOR, BY MOTHER AND GUARDIAN YENKATAMMA —DEFENDANT—RESPONDENT.

Construction of document—Hindu Law—Partition—Arbitration for division of property.

Four brothers executed a document called a *mukhtiarnama*, appointing certain persons as arbitrators to effect a final division of their properties. The document was as follows :—"Already, three years ago, not having been in good terms among ourselves, we were living separately and the lands and the debts due by us to outsiders were, however, held in common; but dispute having arisen among us thereby, we have appointed you this day for the purpose of putting a stop to our dispute and for finishing the division of our assets and liabilities. Therefore, we shall abide only by the decision given by you" :

Held, that, on a construction of the document, there was a severance of interest between the executants *inter se*. [p. 286, col. 1.]

Kasam v. *Jorawar Singh*, 68 Ind. Cas. 573; 49 I. A. 358; 31 M. L. T. 46; 16 L. W. 223; 18 N. L. R. 127; (1922) A. I. R. (P. C.) 353; 43 M. L. J. 676; 21 A. L. J. 57; 25 Bom. L. R. 1; 37 C. L. J. 73; 27 C. W. N. 179; 50 C. 84 (P. C.), relied on.

Second appeal against a decree of the Court of the Subordinate Judge, Anantapur, in Appeal Suit No. 36 of 1921, preferred against that of the Court of the District Munsif, Gooty, in Original Suit No. 49 of 1920.

Mr. *L. A. Govinda Raghava Iyer*, for the Appellant.

Mr. *Rajagopalachariar*, for the Respondent.

This second appeal coming on for hearing on the 20th and 21st March 1924, and having stood over for consideration till the 26th March 1924, the Court delivered the following

JUDGMENT.—The plaintiff (appellant) instituted this suit for the recovery of the suit properties on the ground that they belonged to her deceased husband who obtained them for his share in a partition between himself and his three brothers, one of whom was the father of the defendant. The defendant's case is that the defendant's father and the plaintiff's husband were given a joint share while the other two brothers took each a separated share and on account of the death of the plaintiff's husband the properties survived to him and that she has no right to them. The necessary issue for trial was first recorded by the District Munsif as follows:—"Whether the plaintiff's husband was divided from defendant's father and whether defendant has, therefore, no right to resist plaintiff's suit?" Some time, after, this issue was amended by the District Munsif in the following form:—"Whether plaintiff's husband was not divided from other members of his family?" As the amended issue stands, it is clear that the burden of proving that there was no division as alleged lay on the defendant. The District Munsif held that the defendant did not prove that the plaintiff's husband did not get divided from the other members of the family as set up in the written statement and that the evidence showed that the plaintiff's husband got divided from each of his other brothers. On this finding the plaintiff's suit was decreed. On appeal the learned Subordinate Judge held that the burden of proof as regards partition was wrongly thrown on the defendant and that it was the duty of the plaintiff to prove that her husband effected an out and out severance from the defendant's father and his other brothers; and since she had not done so, he reversed the decision of the District Munsif and dismissed the plaintiff's suit.

It is argued before me by Mr. Govindaraghava Ayyar that, in the circumstances of the case, the lower Appellate Court's decision as regards the party on whom the burden of proof lay is wrong and that this fact vitiates the whole judgment. In order to understand this argument, it is necessary to mention that all the brothers prior to the actual division of the properties executed Ex. IV, which is called a *mukhtiarnama*, appointing some arbitrators to effect a final division of their properties. The material portion of this *mukhtiarnama* runs as follows:— "Already, three years ago, not having been in good terms among ourselves, we were living separately and the lands and the debts due by us to outsiders were however held in common; but dispute having arisen among us thereby we have appointed you this day for the purpose of putting a stop to our dispute *and* for finishing the division of our assets and liabilities. Therefore, we shall abide only by the decision given by you. If we, however, do not act according to your advice but raise objection, the Court of Justice need not accept our statement. This *mukhtiarnama* has

been executed with our consent." (Note:—In this translation of *mukhtiarnama* after the word "*and*" I have substituted "for finishing the division of our assets and liabilities" in the place of "for making a settlement of division in respect of our assets and liabilities" as I am informed that that is the correct translation of the document.) It is clear that it is this Ex. IV to which reference has been made in para. 3 of the plaint and also in para. 2 of the written statement, though there may be a slight discrepancy with regard to the date of the transaction as given in those paragraphs of the pleadings. The argument that is now advanced is that this document effects a complete severance of interest between the various brothers on account of the unequivocal declaration contained therein by the four brothers of their intention to divide the properties; in short, that it amounts to a partition between the brothers to be followed up later on by actual division of the properties. If this construction of the document is accepted, it would then follow that the plaintiff has proved the separation of her husband from his other brothers by partition and then it would be for the defendant to prove that no such out and out partition took place, what actually happened being that the defendant's father and the plaintiff's husband were given a joint share while the other brothers took each a separated share; in other words, the burden of proof will be on the defendant to show that the plaintiff's husband was not divided from the other members of his family as alleged in the plaint.

Numerous cases were cited to me by Mr. Govindaraghava Ayyar to show that this reference to arbitration really amounted to a severance of interest between the brothers. As we are concerned solely with the construction of the document, no useful purpose will be served by a discussion of those cases, but I would refer to one case, namely, *Kasam* v. *Jorawar Singh* (1), in which their Lordships of the Privy Council had to construe an arbitration agreement which is very much like the present one. In that case the substance of the document is given as follows:—"On December 4, 1905, all the members of the family signed a *kararnama* appointing one Ghasi Ram as arbitrator to partition the property and agreeing to accept whatever partition he might make." Later on it is stated in the judgment that "the arbitrator divided the property into two lists . . . The formal division was not at once carried out . . . but after his death the lists appear to have been acted upon by all the persons interested." Their Lordships held that this document effected a severance of the joint estate. In the same way it appears to me that a severance of interest has been created by Ex. IV and the arbitrators were appointed simply to finish this severance already effected by the division of the assets and liabilities. It is argued by Mr. Rajagopalachariar for the respondent that no severance of interest can be said to have taken place in this case inasmuch as it appears from the arbitrators' evidence that when they divided the properties a joint share was given to the plaintiff's husband and the defendant's father. In my view, this difference does not affect the question whether under Ex. IV there was a severance of interest between the various brothers.

The severance of interest being thus proved by the plaintiff, it will be for the defendant to prove the special plea that he has set up. In my view, the issue was properly amended by the District Munsif, though this amendment was made very late. As I consider that the learned Subordinate Judge's judgment is vitiated on account of the burden of proof being wrongly placed on the plaintiff, I think the District Court of Anantapur should be called upon to reconsider the evidence on record in the light of the above remarks and submit a fresh finding on the amended issue. I order accordingly. No other point was argued before me in the second appeal. The finding should be submitted before the 1st of August. Time for objections ten days.

In compliance with the order contained in the above judgment the District Judge of Anantapur submitted the following

FINDING.—The High Court has remitted this appeal for a finding on the first issue as amended in the Original Court, *viz.*, "Whether the plaintiff's husband was not divided from the other members of the family."

* * * * * * *

(1) 68 Ind. Cas. 573; 49 I. A. 358; 31 M. L. T. 46; 16 L. W. 223; 18 N. L. R. 127; (1922) A. I. R. (P. C.) 353; 43 M. L. J. 676; 21 A L. J. 57; 25 Bom. L. R. 1; 37 C. L. J. 73; 27 C. W. N. 179; 50 C. 84 (P. C.).

The defence evidence about the partial partition is either worthless or false. I find that there was a complete partition between all the four brothers in 1909.

This second appeal coming on for final hearing after the return of the said finding from the District Court of Anantapur upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—It has been now found by the lower Court that there was a complete partition between all the brothers in 1909. It cannot be said that this finding has been arrived at without considering the defendant's case or his evidence for the learned District Judge says in para. 8 of his order that the defendant's evidence about the partial partition is either worthless or false. It may also be pointed out that no specific case of re-union was ever set up by the defendant

Accepting the finding, the lower (Appellate) Court's decree is set aside and the decree of the District Munsif is restored with costs here and in the Court below.

V. N. V.
N. H. *Order accordingly.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1211 OF 1923.

July 8, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

JOYNAL KARIKAR—DEFENDANT—APPELLANT

versus

MULLUK CHAND MULLICK—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 105 (2)—Appeal, second—Remand order by consent, whether can be objected to.

Where a party to an appeal consents to an order of remand being made to enable the opposite party to show that a certain document is admissible in evidence under a certain provision of the Evidence Act, it is not open to the party so consenting to object in second appeal that the document is not admissible in evidence. [p. 287, col. 2; p. 288, col. 1]

Appeal againt a decree of the Subordinate Judge, Fourth Court, Dacca, dated the 15th of January 1923, affirming that of the Munsif, Second Court at Manikgunj, dated the 15th of March 1922.

Mr. *Gunada Charan Sen* (with him Babu *Prokash Chandra Pakrashi*), for the Appellant.

Babu *Nirod Bandhu Roy*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant against a decision of the Fourth Subordinate Judge of Dacca, affirming a decision of the Second Munsif of Manickgunj

The facts are as follows: The suit was brought by the plaintiff-respondent for the possession of certain land. The first Court passed a decree in favour of the plaintiff but on appeal the case was remanded to the first Court in order that the plaintiff should have an opportunity of adducing evidence with regard to a certain *kobala* Ex. 4 in the suit. Now, it appears that at the time of the remand the defendant objected to this *kobala* going in evidence. But eventually by consent of both parties the case was remanded to the lower Court for a *de novo* trial so as to enable the plaintiff, if he could, to show that Ex. 4 was admissible under the provisions of cl. (3) of s. 32 of the Indian Evidence Act. The remand order further provided that both parties should be allowed to adduce fresh evidence. The first Court after the remand again decreed the suit in favour of the plaintiff and the second Court affirmed the decree of the first Court.

The first point made before us in this appeal is that the document to which I have already referred, namely, the *kobala* Ex. 4 is not admissible in evidence at all as it is a conveyance by a third party to a third party and, accordingly, it is said that no statement therein with regard to the boundaries of the land, which was the point upon which the document was adduced in evidence, is admissible as against the defendant as the document was between third parties. It seems to us, however, that this argument is not now open to the present appellant. It is true that he objected to the admissibility of the document before the remand in the lower Appellate Court on the ground that it had not been proved but eventually he consented to a remand to enable the plaintiff to show that Ex. 4 was admissible in evidence under the provisions of cl. (3) of s. 32. In these state of facts, we do not think that it is now open to the defendant having regard to his consent to the remand and having regard to the provisions of s. 105,

sub-s. (2) of the C. P. C. to contend that Ex. 4 is not admissible in evidence on the grounds which I have stated. If the document was not at all admissible in evidence the appellant should have resisted the remand and should have preferred an appeal against the order of remand. Having failed to do this, it seems to us that the provisions of s. 105. sub-s. (2) are a bar to his now raising the question which he seeks to raise with regard to the admissibility of the *kobala* and moreover we have in addition his consent to a remand order to which I have already referred.

Then a second point was made with regard to the Record of Rights. The Record of Rights with regard to the land shows that the *jote* belonged to Haran who is the father of the appellant and that 8-annas interest belonged to Janu who is the appellant's cousin. Accordingly, therefore, the entry in the Record of Rights supported the plaintiff's case but it is suggested that the *dakhilas* and also the landlord's papers which showed payment of rent by Haran have rebutted the presumption raised by the Record of Rights and it is said, therefore, that if any title is now sought to be made in Janu, Janu must show that he obtained the title by adverse possession against Haran. The learned Judge states that the rent receipts stand in the name of Joylal and his father and that this is not inconsistent with Janu and his father having any share in the holding and he goes on to state that the oral evidence in support of Janu's possession is more reliable than that of the exclusive possession of the appellant. He finds as a fact that Janu was in possession. It seems to us, therefore, that the entry in the Record of Rights has not been rebutted by the evidence adduced on behalf of the defendant. The second point, therefore, also fails.

In the result, therefore, the appeal is dismissed with costs.

Appeal dismissed.

Z. K.

PATNA HIGH COURT.

CIVIL MISCELLANEOUS JUDICIAL CASE No. 30 OF 1925.

June 8, 1925.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Macpherson.

In the matter of Raja RAJENDRA NARAYAN BHANJA DEO OF KANIKA—ASSESSEE.

Income Tax Act (XI of 1922), s. 29—Notice of demand, when must be issued—Notice 14 months after year of assessment, validity of.

No period is prescribed in the Income Tax Act within which a notice of demand under s. 29 of the Act must be issued. Such a notice must, however, be issued within a reasonable time. A notice issued nearly 14 months after the expiration of the year in respect of which the assessment is made would not necessarily be too late. [p. 289, col. 2.]

Messrs. *K. P. Jayaswal* and *S. Saran*, for the Assessee.

Mr. *Sultan Ahmed*, Government Advocate, for the Crown.

JUDGMENT.

Miller, C. J.—The only question in this case is whether the assessee can escape payment of income-tax and super-tax assessed at Rs. 3,898, for the financial year 1922-23 on the ground that the demand notice issued to him claiming payment of the tax was not issued during the financial year for which the tax was payable. What happened was that for the previous year (1921-1922) he had been assessed for income-tax and super-tax to a sum of over Rs. 18,000. That was under the Act of 1918. Under the provisions then in force the assessment was in all cases a provisional one based on the previous year's income but liable to adjustment when the actual income for the year in question came to be known. It so happened that the income for that year 1921-1922 had been provisionally assessed at a sum very much larger than the actual income turned out. In fact the actual income for 1921-1922 produced a tax and super-tax amounting together to only Rs. 3,898. There was, therefore, a balance due to the assessee on adjustment of over Rs. 14,000. That balance was ascertained after taking into consideration the return made by the assessee of his actual income for the year 1921-1922. The return was made for the purpose of ascertaining the income for the next succeeding year, that is to say, the year which began in April 1922. That year came under the new Act of 1922, by which the provisional adjustments were abandoned and

a different method of adjustment was adopted, namely, the income for any financial year was based once and for all upon the actual income of the previous year. Accordingly on the 1st November 1922. the assessee whose return was accepted was served with a notice intimating that in respect of the income of the previous year he was entitled to a refund of Rs. 14,277. That sum was the surplus which he had paid for the previous year over and above that which, as it turned out, he was liable to pay upon the actual income earned. When that notice was issued it was perfectly clear from the form of it that the income for the year 1922-1923 which was based upon exactly the same assessment would also be taxed and super-taxed to the extent of Rs. 3,898, but for some reason or other no actual demand for payment of that sum for 1922-1923 was made at that time. This appears to have been discovered sometime before January 1924 and on the 26th of that month the Income-tax Officer, finding that no income-tax had been paid by the assessee in respect of the year 1922-1923, treated the case as one under s. 34 of the Income Tax Act, 1922, which provides for cases where no assessment has been made or where certain items of income have not been taken into account in making the previous assessment. The section provides in effect that in such a case where income has escaped assessment or has been assessed at too low a rate for any year the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax a notice containing the requirement which may be included in a notice under sub s. (2) of s. 22 and may proceed to assess or re-assess such income. If that were the real state of affairs and no assessment had in fact been made for the year 1922-1923 then no doubt s. 34 would apply and the notice which was issued under that section, on the 26th January 1924, would be a notice issued within the time prescribed for that purpose under that section. Here again it was obvious to the assessee that he had been assessed for a tax to the amount of Rs. 3,893 for the year in question, so that although no demand in the prescribed form for the income-tax for that year was served, there was in fact an intimation to the assessee on two occasions, namely, on the 1st November 1922, and the 26th January 1924 of what the amount of the income-tax payable by him was.

The Income tax Commissioner before whom the case came eventually and who stated a case for the High Court ,considered that this was not a case to which s. 34 applied, that is to say, he did not think it was a case where no assessment had been made for the year in question or where any part of the income, profits or gains had escaped assessment, for an assessment had actually been made. Therefore upon the case stated we must take it that the facts do not disclose a case coming within s. 34. Then on the 9th June 1924, the assessee having taken exception to the demand under s. 34 a fresh notice was issued in the ordinary form prescribed under the Act demanding the income-tax for the year 1922-1923. It will be seen that this notice was issued something more than a year after the expiration of the year of assessment and the assessee contends that that is too late to make any demand under the provisions of s. 29 of the Act. Section 29 of the Act provides that: "When the Income-tax Officer has determined a sum to be payable by an assessee under s. 23, or when an order has been passed under sub-s. (2) of s. 25 or s. 28 for the payment of a penalty, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum so payable." The first thing to be observed is that no period within which such a notice demanding income-tax is to be issued is prescribed in the Act and, therefore, *prima facie* a notice issued about 14 months after the expiration of the year of assessment would not necessarily be too late. The assessee, however, relies upon the form under which the demand referred to under s. 29 is to be made. That form is headed "Notice of demand under s. 29 of the Income Tax Act, 1922." It begins thus:— You have been assessed for the current "year to income-tax amounting to Rs. . . . . ." and so on. The learned Counsel for the assessee contends that the form clearly indicates that the demand can only be made during the current year, that is to say, the year in respect of which the income-tax is payable. No doubt in the ordinary course the form prescribed would be quite applicable because assessments are generally made as soon as possible after the commencement of the financial year and the demand notices are sent out in the ordinary course soon after the assessment is made. I cannot believe, however, that

it was intended by prescribing a form of notice of this sort to create a limitation period within which such notice must be given. If it had been the intention of the Legislature to prescribe a period of limitation for such notices I think that such an important provision would have found place in the body of the Act itself indicating that intention. In other sections of the Act we do find that where certain notices have to be given the period within which they have to be given is prescribed. But so far as s 29 is concerned no period at all is prescribed in the Act. Again it is quite possible that in certain cases no demand could be made within the actual year for which the tax is payable. Provision is made for disputes which may arise as to the acceptance or rejection of the assessee's return. If his return is not accepted then an enquiry takes place, evidence may be demanded of him and much time may be expended in carrying on the enquiry, and it is quite possible that such enquiry would not terminate until after the year of assessment and I do not think it can be suggested that because the ordinary form prescribed for such a demand contemplates that it will be issued during the current year of assessment, it is tantamount to an enactment that it cannot be issued afterwards. If any part of the form should not be applicable to the particular facts of the case then I presume it can be altered in the ordinary course before the form is sent out, but the mere fact that forms are prescribed under the Act does not seem to me to carry with it the result that unless everything is done exactly as provided by the form it is of no force and effect. Although no time is prescribed for issuing the notice in question I suppose it may be said that such a notice must be issued within a reasonable time. What would be a reasonable time might vary according to circumstances. In the present case it was, as I have already said, about 14 months after the expiry of the year of assessment but from November of the year of assessment the assessee had in fact had notice, although no formal demand was made upon him, of the amount for which he had been assessed to income tax for that year, and again he had notice in the following January showing that a demand was being made upon him for payment of the same sum on the ground that no previous assessment had been made. In these circumstances it seems to me that the notice was issued within a reasonable time. There is no period of limitation in the Act and I do not think in the circumstances the assessee should be allowed to escape payment of that which is justly due from him. I think that in this case the costs should be paid by the assessee who asked for a case to be stated. Having regard to the small amount in dispute we assess the hearing fee at Rs. 150.

Macpherson, J.—I agree.

Z. K. *Order accordingly.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 357 OF 1924.

August 22, 1925.

Present:—Mr. Findlay, Officiating J. C.

PILURAM—PLAINTIFF—APPELLANT

versus

MAHADEO—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 41 (3)—Occupancy tenant—Notice of intention to transfer holding—Tenant informed of landlord's intention to purchase—Application to fix valuation by Revenue Officer—Landlord, duty of—Transfer by tenant, validity of—Landlord, whether entitled to claim possession from transferee.

Under s. 41 (3) of the C. P. Tenancy Act of 1898, where an absolute occupancy tenant intimates to the landlord his intention of transferring his holding, it is incumbent on the landlord not only to inform the tenant of his desire to purchase the holding at a value to be fixed by the Revenue Officer but to apply to the Revenue Authorities to fix such valuation, and if the tenant is unwilling to part with the holding in his favour for the price fixed then to bring a suit for possession on payment of the price fixed by the Revenue Officer. A mere declaration to the tenant by the landlord of his intention to acquire the holding for himself, if unaccompanied by an application to the Revenue Officer to fix the valuation, is not sufficient to disentitle the tenant from proceeding with the sale and does not entitle the landlord to claim possession of the holding from the transferee of the tenant. [p. 291, col. 2.]

Bharatsingh v. *Dhansing*, 14 C. P. L. R. 162 at p. 165 and *Seetaram* v. *Ramdayal Marwari*, 1 N. L. R. 6, relied on.

Second appeal against a decree of the District Judge, Nagpur, dated the 10th May 1924, in C. A. No. 34 of 1924.

Messrs. *M. B. Kinkhede*, R. B., and *M. K. Padhye*, for the Appellant.

Messrs. *M. R. Bobde* and *R. N. Padhye*, for the Respondent.

JUDGMENT.—The plaintiff-appellant Piluram is an eight-anna share-holder and *lambardar* of *Mauza* Pachkhedi (Nagpur). He sued the defendant-respondent Mahadeo for possession of absolute occu-

pancy field No. 11 in that village. His case was that he was entitled to possession under a deed of surrender, dated 14th July 1922, executed by the tenant Jhibal in his favour. There was, moreover, in existence a previous sale deed in favour of the plaintiff's sons *benami* on his account, dated 7th February 1922. The defendant-respondent Mahadeo's case was that he had acquired the field from Jhibal, the tenant, by a sale-deed, dated 2nd May 1917, and that previously thereto Jhibal had given the requisite notice to the plaintiff on 23rd May 1916 with reference to s. 41 (2) of the Tenancy Act of 1898. The plaintiff admitted having received this notice, and it is further clear that he sent a reply thereto declaring his intention of acquiring the field himself after fixation of the value by the Revenue Officer. The said reply (Ex. D-2) also contained a definite statement that he had applied to the Collector thereanent. It is admitted now that this application was never made by the plaintiff.

The Munsif held that the notice given by Jhibal to the plaintiff on 23rd May 1916, was a valid notice; that the mere fact of the plaintiff sending the reply he did to the notice, without taking effective steps to have the value of the field fixed, was no bar to Jhibal's transfer in favour of the defendant and that the latter had duly acquired the field by purchase from Jhibal under the sale-deed, dated 2nd May 1917. The plaintiff's suit was accordingly dismissed, and the appeal to the District Judge by the plaintiff has also failed.

The learned District Judge has recorded a careful and detailed judgment in the case. The main question before me in this appeal concerns the construction of s. 41 (3) of the Tenancy Act of 1898. On behalf of the plaintiff-appellant it has been urged that the mere fact of his sending the reply (Ex. D-2), which he did to Jhibal, was in itself sufficient to disentitle the defendant-respondent's vendor from proceeding with the sale in his favour. It is urged that, under the provision of law quoted, there was no obligation on the landlord to apply for fixation of the value of the holding to the Revenue Officer. The decision in *Kodubakhsh* v. *Bishnu* (1) was quoted in support of this contention, but it, in reality, gives no help to the appellant. I have been referred in this connection to s. 6 (4) of the C. P. Tenancy Act of 1920. It is undoubtedly true that the said provision is more happily and specifically drafted, and, moreover, the Second Schedule thereto contains a provision giving one year's limitation for an application by a landlord to fix the value of the holding. Although the new Act may be more happily and specifically drafted, the question before me is whether s. 41 of the previous Act bears the construction which both the lower Courts have put upon it.

For my own part I can see not the slightest reason for differing from the view which was taken by Ismay, J. C., in *Bharatsingh* v. *Dhansingh* (2). There it was remarked as follows:—

"Section 41 of the Tenancy Act is not very happily worded but it appears to contemplate that within the period of one month from the receipt of notice the landlord must intimate to the tenant his desire to purchase the absolute occupancy right. If the price cannot be amicably settled the landlord must apply to a Revenue Officer and have the value fixed. If the tenant is still recusant he must then bring a regular suit within the period prescribed by law. If the holding has been already sold the suit would be a suit to enforce a right of pre-emption" Again, in *Seetaram* v. *Ramdayal Marwari* (3), Ismay, J. C., further held that a suit by a landlord to enforce his right of pre-emption under s. 41 of the Tenancy Act is governed by Art. 10 of the Limitation Act. It was also pointed out that in the meantime it was incumbent on the landlord to exercise due diligence in having the value of the holding fixed by a Revenue Officer. For my own part, I can see not the slightest reason for differing from the view taken by Ismay, J. C., in these two cases. The construction I am asked by the appellant to place on s. 41 (3) of the 1898, Tenancy Act, seems to me an impossible one. It has seriously been suggested that under the provision as drafted the tenant might conceivably apply for the value to be fixed. Even if we make such an assumption, the only reasonable conclusion could be that the tenant was applying in pursuance of an

(1) 2 N. L. R. 27.

(2) 14 C. P. L. R. 162 at p. 165.
(3) 1 N. L. R. 6.

understanding with the landlord and on his behalf.

But the provision clearly, in my opinion, must be read as contemplating the landlord making an application to the Revenue Officer within the time contemplated. Sub-cl (*a*) of the provision clearly requires the claim to purchase as the main and vital item, and a secondary and consequential incident is that the landlord must apply to the Revenue Officer to have the value fixed unless indeed he can arrive at an agreed upon value with the tenant privately. Any other construction of this provision would strain the language therein to a point which would be utterly unreasonable. Moreover, in the present case it is perfectly clear from the contents of the reply (Ex. D-2) given by the landlord that he fully realised the duty incumbent upon him, for, as I have already shown, this reply contains a definite, though incorrect, statement that he had already applied to the Revenue Court for the fixation of value. Thus, in 1916 what the plaintiff had was a right of pre-emption and he allowed that right to lapse by default in view of his failure to take effective steps to comply with the provision quoted in the way of asserting and substantiating the said right. It follows therefrom that the transfer made in favour of the present defendant by Jhibal was not voidable at the instance of the plaintiff and is now binding on him.

Reference has been made to the copy of the judgment in Civil Suit No. 48 of 1920 (Ex. P-3), in which Piluram sued Jhibal for arrears of rent. The present defendant sought to intervene, but his application was disallowed. I need hardly point out that this decision in a rent suit before the Additional Munsif, Umrer, is in no way binding on the defendant-respondent and in no way prejudices his position in the present case. Likewise, the fact that the plaintiff has declined to accept him as a tenant and has refused to receive rent payments from him, is utterly beside the point. It follows therefrom that on 2nd May 1917 the defendant had a valid title transferred to him by Jhibal in the field in question, and it equally follows that Jhibal, in his turn, had no valid title to transfer to the plaintiff by either the sale-deed or the surrender of 1922.

I may point out further that the position of the plaintiff in this appeal, if pushed to the logical conclusion, leads, in reality, to a *reductio ad absurdum*. His right in 1916 amounted to nothing more than one of pre-emption. Beyond sending the reply he did to Jhibal he took no effective steps to enforce his right. He now, in reality, is claiming a right to possession forthwith and, in effect, thereby, he abandons his right to pre-emption. In the circumstances of the case the tenant Jhibal having fully complied with the provision of the law in 1916 and the plaintiff having failed to enforce the right which remained to him under s. 41 of the Tenancy Act, it is obvious that Jhibal had full power and title to make the transfer he did under the sale-deed of 2nd May 1917 in favour of the defendant. *Pari passu* the plaintiff could not acquire any title under the two documents of 1922 executed by the late tenant.

I fully concur in the careful findings arrived at by the learned District Judge and the present suit was obviously a hopeless one. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 243 OF 1923.

August 20, 1924.

Present :—Mr. Justice Beasley.

Subadar NAIMATHULLA KHAN SAHIB AND OTHERS—DEFENDANTS NOS. 4 TO 6—RESPONDENTS NOS. 4 TO 6—PETITIONERS

versus

ABDUL RAZACK SAHIB—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—"Other sufficient grounds," whether ejusdem generis *with "some formal defect"—Leave to withdraw, when can be given.*

The words "other sufficient grounds" for allowing the plaintiff to institute a fresh suit in O. XXIII, r. 1 (2) (*b*) of the C. P. C. must be taken to be *ejusdem generis* with the words "some formal defect" in cl. (2) (*a*) of the rule.

A plaintiff who is not prepared to go on with his case with the evidence available to him and before the Court is not entitled to apply under r. 1 of O. XXIII of the C. P. C., for leave to withdraw his suit with liberty to bring a fresh suit.

Petition under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the District Munsif, Vellore, in I. A. No. 813 of 1922, in O. S. No. 141 of 1921.

Mr. *A. Ramachandra Iyer*, for the Petitioners.

Mr. *Mohammed Ibrahim Sahib*, for the Respondent.

JUDGMENT.—The point in this case is whether the District Munsif was right in giving the plaintiff permission to withdraw the suit and to institute a fresh suit. The order of the District Munsif which is dated 9th October 1922 states :—"The affidavit discloses grounds for the grant of the prayer but as the petition is filed at a late stage, the plaintiff must pay the defendants' costs. I allow the petition on condition that, in case the petitioner institutes a fresh suit, he will do so only after paying the defendants' costs. In case the suit is not filed, no costs need be paid." "The order under which the withdrawal is granted is O. XXIII, r. 1, Sch. I, C. P. C., which states :—"(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim ; (2) where the Court is satisfied (*a*) that a suit must fail by reason of some formal defect or (*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim."

The history of this suit is that the plaint was presented on 9th February 1921. The date fixed for the first hearing was 11th March 1921. The plaintiffs' witnesses' Nos. 1 to 5 were examined on 6th October 1921 There were numerous adjournments according to the entry in the B. Diary. There was an application made to amend the plaint and the plaint was ordered to be amended by the 6th February 1922. Subsequent to this there were numerous adjournments and eventually it culminated in a petition being presented on the 9th October 1922 for permission to withdraw the case and to institute a fresh suit. That petition was presented at the last moment. I have read through the affidavit and it appears to me from para. 6 that the real reason for making the application was that the plaintiff's witnesses were not present and that the plaintiff had found subsequently that there were records and witnesses to prove his case. It is quite clear that these witnesses were not before the Court and it was not possible to go on with the case without them. The last few words in para. 6 are "Futher certain statements in the plaint have to be amended." In my view, the real reason for asking for permission to withdraw the case was because the plaintiff was not prepared to go on with the evidence which he had in Court. The allegation "Further certain statements in the plaint have to be amended" is so vague that it deserves no notice whatever. The plaint had already once been amended. The question now is whether or not the reasons set forth in the affidavit were other sufficient grounds for allowing the plaintiff to institute a fresh suit. It is quite clear to me that the words of O. XXIII, cl. 2 (*b*) "other sufficient grounds for allowing the plaintiff to institute a fresh suit" must be taken to be *ejusdem generis* with the words in cl. 2 (*a*), that is to say, "Some formal defect." This point has been considered in *Burathagunta Pentadee* v. *Thurlapati Rajamma* (1). There the Judge, in giving the judgment says, "The use of the word 'other' suggests that the sufficient grounds must be ones *ejusdem generis* with the formal defects under sub-cl. (*a*)." In this case as I have already said, the ground for asking for the withdrawal appears to me to be quite different from any formal defect. The plaintiff was not ready to go on with his case. In my view the District Munsif was quite wrong in giving permission to the plaintiff to withdraw the suit and to institute a fresh suit. Under the circumstances I think the proper thing to do is to set aside the order of the District Munsif allowing the plaintiff to withdraw the suit with liberty to file a fresh suit and direct him to re-place the case on his file and dispose of it according to law ; that is to say, I do not think that the plaintiff should be shut out from calling the witnesses and other evidence indicated in the affidavit and whom he was not ready to call, but I certainly think that he should not be allowed to amend his plaint. The plaintiff will only be allowed to go on with the case on condition that he pays the costs incurred by the defendants in the District Munsif's Court and the costs of this hearing.

V. N. V. *Order set aside.*

Z. K.

(1) 8 Ind. Cas. 868; (1911) 1 M. W. N. 105; 9 M. L. T. 204.

BOMBAY HIGH COURT.

APPEAL FROM ORDER NO. 34 OF 1923.

July 29, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Madgavkar.

GULABCHAND RAMSUKH—PLAINTIFF—APPELLANT

versus

RAMSUKH RAMPARTAP—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 96 (3), O. XXIII, r. 3, O. XLIII, r. 1 (m)—*Compromise of suit—Decree passed on compromise—Appeal, whether lies.*

Where a suit is compromised and the terms of the agreement between the parties are signed by the parties, all that the Court is to do is to pass a decree according to the terms to which the parties have agreed. In such a case there is no room for an adjudication on the question whether a lawful agreement has been arrived at, inasmuch as the parties are agreed that they have come to an agreement. The decree passed by the Court in such a case is a consent decree and is not open to appeal.

Appeal against an order of the First Class Subordinate Judge, Jalgaon, in Suit No. 73 of 1921.

Mr. *Bahadurji* (with him Mr. *G. S. Rao*), for the Appellant.

Mr. *Kanga*, Advocate General, (with him Messrs. *P. B. Shingne* and *K. H. Kelkar*), for the Respondent.

JUDGMENT.—There were three suits pending in the Court of the First Class Subordinate Judge at Jalgaon. On March 7, 1923, a consent decree was passed in terms of a certain compromise signed by all the parties including the present appellant except a formal party against whom no relief was claimed. The Judge said :—

"These three suits have been amicably settled by throwing the whole responsibility for the amount payable to plaintiff on defendant No. 1. So the minor defendant's share or interests in no way are prejudiced. The plaintiff has been given in addition some property, but even then it would be within the limits of defendant No. 1's share."

The plaintiff has now filed an appeal against this consent decree and in the grounds of appeal it is stated as follows :—

(1) The order recording the compromise in the aforesaid suits is illegal and improper. (2) It is not proved to the satisfaction of the Court that the three suits were adjusted wholly or in part by a lawful agreement or compromise. (3) Under O. XXIII, r. 3, of the C. P. C., the Court has to satisfy itself by positive proof that there has been a lawful agreement to adjust the suit before ordering the agreement to be recorded. In the present case the Court passed the order without an inquiry, or proof on this point. (4) The said compromise was brought about by the appellant's Pleader Mr. Juwekar with undue haste, without mature deliberation, and without giving the appellant sufficient time to think or judge for himself or consult his friends or relations in the matter. (5) The appellant was quite unwilling to enter into the compromise, but his Pleader threatened him that if he did not sign the agreement of compromise as proposed by him, he would be ruined. (6) The circumstances under which the appellant was forced to sign the agreement of compromise against his will are fully set out in the appellant's affidavit. They clearly show that the suits were not adjusted by a lawful agreement. The said agreement is, therefore, not binding on the appellant."

A preliminary point was taken that an appeal from a decree passed by the Court with the consent of parties is barred by s. 96, sub-s. 3. The appellant urges that the Court has passed an order under O. XXIII, r. 3, and that an appeal lies under O. XLIII, r. 1, cl. (*m*), from such an order. But in this case there was no question whether an agreement had been arrived at, the terms were signed by the parties and all that the Court had to do was to pass a decree according to the terms to which the parties had agreed. There was no adjudication, therefore, on the question whether a lawful agreement had been arrived at, because it was never disputed that the parties before the Court had come to an agreement. It was open to any one of the parties before the decree was passed to contend that a lawful agreement had not been arrived at.

Under these circumstances we think that no appeal is competent. There are other remedies open to the appellant if he thinks fit to pursue them The appeal will be dismissed with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 168-B OF 1924.

September 3, 1925.

Present:—Mr. Findlay, Officiating, J. C., and Mr. Prideaux, A. J. C.

PURSHOTTAM—PLAINTIFF—APPELLANT

versus

SAHU—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 74—Mortgage-bond payable by instalments—Default in payment of instalments—Whole amount due on default—Interest, whether payable after default—Penalty—Compensation.

The doctrine that the Court will carry out all contracts between parties, is confined to the carrying out of the primary contract, and does not extend to secondary or subsidiary contracts which are to come into operation if the primary contract is broken. In bonds securing the payment of money, the contract regarded as primary is the promise to pay the amount due to the creditor with the interest, if any, agreed upon. Any further contract to be binding on the promisor if he breaks this contract is regarded as a secondary one intended to secure the fulfilment of the primary contract and the Courts are not bound to carry out such a secondary contract apart from its justice and reasonableness. [p. 297, col. 1.]

Under a mortgage transaction interest was added to the principal sum at the inception of the transaction and the total amount of principal and interest was agreed to be paid in certain instalments. The bond provided that compound interest was to be chargeable on any defaulted instalment, while the whole sum was to become due after three consecutive defaults. The mortgagor made default in the payment of three consecutive instalments and the mortgagee sued to recover the total amount due under the bond together with interest at the rate mentioned in the bond payable in case of default in the payment of an instalment:

Held, (1) that the clause in the bond with regard to the consequences of default in the payment of three successive instalments was in the nature of a secondary contract and that, therefore, the Court had full power to re-open the contract and to allow reasonable compensation to the mortgagee under s. 74 of the Contract Act; [*ibid.*]

(2) that the mortgagee was entitled to compound interest on the defaulted instalments up to the date on which default in the payment of the third instalment took place; [*ibid.*]

(3) that thereafter simple interest at the rate of 6 per cent. per annum was a reasonable compensation to be allowed to the mortgagee. [p. 297, cols. 1 & 2.]

Appeal against a decree of the District Judge, East Berar, Amraoti, dated the 16th February 1924, in Civil Appeal No. 68 of 1923.

ORDER.

Baker, J. C.—(*March 3, 1925*).—The facts are set out in the judgment of the lower Appellate Court and the only question in this appeal is whether the plaintiff is entitled to interest from the date of default.

The Courts below have found that the plaintiff is not so entitled relying on an unreported case of this Court: *Bhauji* v. *Bhagwant Atmaram Dhongdi* (1) which is admittedly on all fours with this case.

The appellant relied on *Shoppa* v. *Rukhma* (2), where when a mortgage-deed provided for payment by instalments without interest, but on default in any instalment interest was payable thereon till satisfaction, and there was a further provision that on default in three instalments the whole debt shall be payable, but there was no further express provision as to interest, it was held that the whole debt bears interest until satisfaction.

It is contended that this case can be distinguished because the instalments were without interest, whereas in the present case *sawai* has been added to principal in the bond itself.

The instalments, however, in the present case are also without interest, if paid on due dates.

There appears to me to be some difficulty in reconciling the view taken in this case with the view taken in *Bhauji* v. *Bhagwant Atmaram Dhongdi* (1) (*supra*), and as I feel some doubt about the matter I think the cese should be heard by a Bench.

The appeal will accordingly be argued before a Bench of the Judicial Commissioner and Third Additional Judicial Commissioner.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *M. R Bobde*, for the Respondent.

JUDGMENT.—The present suit was filed in respect of a grain mortgage transaction, dated 17th August 1908. The plaintiff Purshottam advanced to the defendant Sahu thereunder 27 *khandis* of grain. To this some 6 *khandis* odd were added by way of *sawai*, and re-payments were to be made yearly on *Fag Badi* 15, the first instalment to be of 3 *khandis* and odd *kudos* and the remaining ten instalments of 3 *khandis* each. The bond provided that compound *sawai* was to be chargeable on any defaulted instalment, while the whole sum was to become due after three consecutive defaults The parties are agreed that the whole sum accrued due on 30th March 1911, none of the first three instalments having been paid within time.

(1) 45 Ind. Cas. 722.
(2) 2 Ind. Cas. 27; 5 N. L. R 37.

The question for our consideration, therefore, is whether the plaintiff is entitled to interest after the default of the three consecutive instalments. The plaintiff's case is that full interest should be allowed, as interest did not cease to run in spite of the whole amount due having become exigible from 1st April 1911.

The Judge of the first Court, relying on the decision of Stanyon, A. J. C., in *Bhauji* v. *Bhagwant Atmaram Dhongdi* (1) held that the interest ceased to run after the due date and granted decree on this basis.

On the plaintiff appealing to the Court of the District Judge, he also held that such interest could not be allowed and pointed out that in the present case there had been no notification by the plaintiff to the defendant that he claimed payment of the whole sum at once and would charge interest on it while it remained unpaid. The District Judge further pointed out that the present suit had been brought some 12 years after the whole sum had become exigible and, following the decision of Stanyon, A. J. C., already quoted, he held that the interest claimed by the plaintiff could not be allowed.

The plaintiff has come up on second appeal to this Court, claiming full interest as asked for in the plaint. In this connection reliance has been placed on the decisions of Skinner, A. J. C., in *Sheoppa* v. *Rukhma* (2) and *Sampat* v. *Chango* (3). In the former case there was a very vital difference when it is compared with the present one; in it the initial arrangement was that the Rs. 2,400 borrowed was to be re-paid in 16 instalments of Rs. 150 without any interest at all. This circumstance of itself introduces a vital element of distinction, for in the present case, as we have shown above, *sawai* interest was included from the first. In the decision in *Sampat* v *Chango* (3) quoted above, future interest was included in the original capital amount of Rs. 1,875, the primary agreement being to re-pay this by 15 instalments of Rs. 125. In this case, however, it is obvious that Skinner, A. J. C., felt some doubt as to whether the interest agreed upon in the deed should be allowed on the whole debt after default of the fourth instalment or only on the overdue instalments upto that date, but, as the appellant did not press the point, interest was only given at the contract rate of Rs. 12 per cent. per annum on the first three overdue instalments from the date of default in each case to that of default in the fourth instalment and thereafter, on the whole amount which then became payable at the Court rate of 6 per cent. per annum until payment. The facts of the case decided by their Lordships of the Privy Council in *Gangaram Biharilal* v. *Firm of Shriram Shaligram* (4) are, it is now obvious, wholly different from those of the present one. In it the loan was re-payable on demand subject to three months' notice, and interest at 9 per cent. was payable upto date of demand. Their Lordships held that in these circumstances plaintiff could claim interest at 9 per cent. even after demand upto date of decree and at 6 per cent. thereafter until realization, the *ratio decidendi* of their conclusion being that the mortgagor could not claim to get off on easier terms than if he had acted according to the deed. It is obvious that this decision is wholly inapplicable to the present case. In this case the agreement does contain a special provision in case of default of instalments, *viz.*, that the whole amount is to become payable at once.

Two other decisions of their Lordships of the Privy Council were also relied on by the Pleader for the appellant, *viz.*, those of *Mathura Das* v. *Raja Narindar Bahadur* (5) and *Bindesri Naik* v. *Ganga Saran Sahu* (6). The conditions regarding re-payment and interest of both the mortgage-deeds concerned were, however, wholly dissimilar from those of the present case. Appellant's case, however, is that on these and many other similar decisions the proper construction of an agreement like that we are concerned with is that, in the absence of a clear expression to the contrary, the intention of the parties must be presumed to be that interest should be charged at the contract rate upto the date of payment.

We are of opinion that in the case of a transaction embodying such terms as the present one does, it is our duty to determine what was the intention of the parties by an examination of the terms of the deed. Was it their intention that compound *sawai* interest was to run even after there had

(3) 10 Ind. Cas. 738; 7 N. L. R. 46.

(4) 2 N. L. R. 162 (P. C.).

(5) 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 25 (P. C.).

(6) 20 A. 171; 2 C. W. N 129; 25 I A. 9; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S.) 471 (P. C.).

been a default of three instalments or was an entirely fresh state of matters to come into existence after such default? The scheme of s. 74 of the Indian Contract Act has been succinctly summed up by Sundara Ayyar, J., in *Arathani Muthukrishnier* v. *Sankaralingam Pillai* (7). There the learned Justice remarked as follows :—

"The doctrine that the Court will carry out all contracts between parties, is confined to the carrying out of the primary contract and does not extend to a secondary or subsidiary contract to come into operation if the primary contract is broken. In bonds securing the payment of money, the contract regarded as primary is the promise to pay the amount due to the creditor with the interest, if any, agreed upon. Any further contract to be binding on the promisor if he breaks this contract, is regarded as a secondary one intended to secure the fulfilment of the primary contract; and the Courts both in England and in India do not feel bound to carry out such a secondary contract apart from its justice and reasonableness."

We undoubtedly think that it is from this point of view the present transaction is to be regarded. In this case interest was amalgamated with the principal from the inception of the contract. The total amount of so called principal thus arrived at was re-payable in 11 instalments. If one instalment was in default, compound interest was chargeable thereon. But—and here we pass from the primary to secondary contract—if three successive instalments were in default, a new condition of affairs was to come into operation. Thereafter the whole amount was to become due and this is, in our opinion, in itself a distinct penalty. It cannot be forgotten, moreover, in the present case that appellant never sent any notice to the respondent with regard to the new condition of affairs, which has come into operation, and has instead allowed the debt to run on for many years after the date.

It seems to us, therefore, that from the date of default, *viz.*, 31st March 1911, the Court has full power to re open the contract and allow what seems to it reasonable compensation, having regard to s. 74 of the Contract Act. Up to that date appellant is entitled to compound *sawai* on the defaulted instalments. Thereafter we think that any further reasonable compensation will be amply provided for if simple interest at 8-annas per cent. per mensem is allowed on the amount then due up to date of decree.

It is impossible, in our opinion, to overlook the fact that appellant gave no notice to respondent after the default and that he seems to have deliberately delayed filing the present suit. A decree will be drawn up accordingly and it will bear future simple interest at 8-annas per cent. per mensem. In this and the lower Appellate Court we order parties to bear their costs as incurred, while in the first Court costs will be borne by the parties in proportion to their success or failure as now decreed. The time for payment of decretal amount is extended up to 3rd March 1926.

Z. K. *Order accordingly.*

(7) 18 Ind. Cas. 417: 36 M. 229 at p. 265; 13 M. L. T. 20; 24 M. L. J. 135.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 872 OF 1923.

July 27, 1925.

Present:—Mr. Justice Jackson.

THE KRISHNA JUTE AND COTTON MILLS, CO., LTD., ELLORE—PLAINTIFFS—PETITIONERS

versus

THE MUNICIPAL COUNCIL, VIZIANAGARAM—DEFENDANT—RESPONDENT.

Madras District Municipalities Act (V of 1920), ss. 80, 354—Professional tax, wrongful levy of—Suit for refund of amount paid—Plea of appropriation of amount towards Companies tax—Absence of notification under s. 80—Levy and appropriation, legality of—Statutory bodies, duties of.

A Municipal Council cannot impose charges upon private persons not authorised by the Act to which the Council owes its existence and then, when a suit is filed for the recovery of the amount thus illegally levied allot the amount to some demand alleged to be under the authority of the Act and plead under s. 354 of the Madras District Municipalities Act that no suit lies.

A Municipal Council can levy a tax on Companies under s. 78 (1) (*b*) of the Madras District Municipalities Act only after publishing a notification under s. 80 of the Act. The provisions of that section are mandatory and the Council has no power to dispense with the notification therein provided for.

Large powers are conferred upon local bodies under the Madras District Municipalities Act upon the strict understanding that they observe the conditions of the Statute to which they owe their origin, and they cannot be allowed to levy taxes upon private persons without strict compliance with the provisions of the Act and Courts have no power to relieve them from the statutory obligations imposed upon them.

Where a tax is levied by a Municipal Council without the authority of the Act, the person aggrieved is entitled to a decree for refund.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Vizianagaram, in S. C. S. No. 966 of 1922.

Mr. *T. Ramachandra Rao*, for the Petitioner.

Mr. *V. Suryanarayana*, for the Respondent.

JUDGMENT.—The petitioner seeks to revise the decree of the Court of the District Munsif of Vizianagaram in S. C. S. No. 966 of 1922.

The petitioner is the Krishna Jute Cotton Mills Co., Ltd. On 31st March 1922 it was served with a demand notice by the counter-petitioner, the Municipal Council of Vizianagaram for profession tax from 1st October 1921 to 31st March 1922 assessed at Rs. 125 The petitioner paid and preferred the appeal Ex. A to the Council pointing out that the Company had been decreed exempt from profession tax in O. S. N. 521 of 1919.

The petitioner, receiving no reply to this appeal, gave the Council notice of suit, Ex. B, dated 28th August 1922. No reply was received, and on 7th October, 1922, the petitioner filed the suit under revision. On the next day a memorandum Ex. D was drafted in the Municipal Office, which was signed on 17th October, 1922, by the Chairman. The petitioner was informed that his appeal against the Companies tax had been read, and that the proper assessment should have been Rs. 75 and Rs. 50 would be refunded.

On 6th November 1922, the Council filed its written statement in the suit. It claims that the suit is barred under s 354 of the Madras Act V of 1920; that the plaintiff had not been charged profession tax, but had been assessed under cl. 16 of Sch IV of Companies tax and when plaintiff paid, he had been given a receipt on the form intended for profession tax. Nevertheless plaintiff was bound to pay profession tax.

At the trial the defendant Council did not, it seems, attempt to prove that the tax had been originally levied as Companies tax, and only receipted as profession tax on the wrong form. It was conceded that the tax was levied as profession tax, and the only question raised was whether the Council's retention of Rs. 75 out of the sum illegally levied could be justified on the ground that it hadbeen allotted to Companies tax and was, therefore, imposed under the authority of the Act within the mischief of s. 354, and so irrecoverable by suit.

It is very doubtful if this defence is open to the Council. A Municipal Council cannot impose charges not under the authority of the Act and then, when a suit is filed for their recovery, allot the money thus unlawfully obtained to some demand alleged to be under the authority of the Act and plead that no suit lies. But in the present suit the plea has no validity for the demand to which the collection has now been allotted is as illegal as that under which it was originally made.

A Council may levy a tax on Companies (s. 78 (1) (*b*)) if it publishes a notice of its intention (s. 78 (3)) and then a notification in the District Gazette (s. 80) and if the Chairman publishes that notification, Companies shall be liable to pay the tax (s. 92). Only on such terms can a Council impose such a charge under the authority of the Act. Admittedly the Council published no notification under s. 80 but the learned District Munsif finds that a Council may dispense with the notification. This finding is a mis-interpretation of s. 80 which is mandatory and a perusal of s. 92 ought to have made the matter perfectly clear. It is no use finding that the Council has " substantially complied " with the Statute. Large powers are conferred upon these local bodies, upon the strict understanding that they observe the conditions of the Statute to which they owe their origin, and to allow them to levy taxes upon private persons without such strict compliance would be a grave scandal. At any rate the Courts have no power to relieve the local bodies from the statutory obligations imposed upon them.

I find that the levy of profession tax and the levy of Companies tax were not made under the authority of the Act, Plaintiff is entitled to sue, and to have a decree for a refund of the money sued for. with costs.

The decree of the lower Court is reversed and the petition allowed with costs.

V. N. V.

Z. K. *Petition allowed.*

BOMBAY HIGH COURT.

REFERENCE No. 16 OF 1924.

July 20, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, Mr. Justice Crump and Mr. Justice Coyajee.

USUF DADABHAI—PLAINTIFF

versus

CHAND MAHOMED—DEFENDANT.

Stamp Act (II of 1899), s. 57—Reference to High Court, when can be made - No case pending—Reference, whether competent.

A reference to the High Court under s. 57 (1) (*b*) of the Stamp Act can be made only when there is a case pending which is to be disposed of by the Revenue authority on receipt of the judgment of the High Court. A reference to the High Court on a mere abstract question when there is no case pending before the Revenue authority for disposal is not competent.

Reference under s. 57 (1) (*d*) of the Indian Stamp Act, 1899, made by the Superintendent of Stamps, Central Provinces and Berar.

Mr. *A. G. Desai*, for the Plaintiff.

Mr *Petigara* (with him Mr. *C. D. Mehta*), for the Defendant.

JUDGMENT.—This is a Reference by the Superintendent of Stamps of the Central Provinces and Berar under s. 57 (1) (*b*) of the Indian Stamp Act.

Usuf Dadabhai filed a suit in the Civil Court on two Bills of Exchange of Rs. 500 each. One was stamped with an eight-anna postage stamp and a one-anna postage and revenue stamp, equivalent to a sum of nine annas, the amount of duty leviable on the Bill. The second Bill of Exchange was stamped with four eight anna postage-stamps, two four anna postage stamps and one one anna postage and revenue stamp of the total value of Rs. 2-9 0 being stamps of the proper duty leviable on the bill.

The plaintiff applied under s. 37 of the Indian Stamp Act and r. 18 of the Rules framed thereunder to the Collector for validation and certification of the Bills, on payment of the duty required by the rule. The Collector passed an order that having regard to the ruling of the Judicial Commissioner's Court in *Tukaram* v. *Sonaji* (1) he had to hold that the instruments had been stamped with stamps of improper description. As stated in that case, the object of the Act was not to exclude evidence or to enable parties to avoid their obligations on technical grounds but to obtain revenue for the Government. That object had been served in the present case. He, therefore, directed that the applicant should affix stamps of the proper description, on which those two instruments should be held as duly stamped under r. 16 framed under the Indian Stamp Act.

The documents were then admitted in evidence and a decree was passed in favour of the plaintiff.

As the decision of the Judicial Commissioner's Court appeared to be in conflict with the decision in *Reference under s 57 of Act II of 1899* (2), the Superintendent, on the matter being brought to his notice by the defendant in the suit, thought it advisable to submit the case to this Court for a decision whether the words "improper description" used in r. 18 were confined to stamps issued by Government for the purposes of the Act as described in r. 3 (1), or were applicable to stamps of any description issued by Governmant in any department.

No one has been instructed on behalf of the Superintendent of Stamps to argue the question before us, but the Pleader for the plaintiff and Counsel for the defendant have appeared. We do not think that there is any case within the meaning of s. 57 (1) of the Indian Stamp Act. The Collector has validated the documents on stamps of the proper description being affixed to them. The documents have been admitted and a decree has been passed. The decision of this Court on the reference, therefore, could have no effect on the case. It would be merely a decision on the abstract question referred.

Section 59 defines the procedure to be followed by the High Court in disposing of the case stated. It runs: "The High Court or Chief Court, upon the hearing of any such case, shall decide the question raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded. (2) The Court shall send to the Revenue authority by which the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar; and the Revenue authority shall, on receiving such copy, dispose of the case conformably to such judgment" There must then be a case which is to be disposed of by the Revenue authority on receipt of the High Court judgment. If we were to give a decision on this abstract question, and a copy of our judgment sent under the seal of the

(1) 10 Ind. Cas. 702; 7 N. L. R. 26.

(2) 23 A. 213; A. W. N. (1901) 54 (F. B.).

Court and the signature of the Registrar to the Revenue Authority there would be no case for him for disposal on receipt of this judgment.

In our opinion, therefore, the Reference is not competent.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 778 OF 1923.

August 18, 1925.

Present:—Mr. Justice Madhvan Nair.

AMIN MALLIKARJUNA—PETITIONER

versus

BANGRA BEERANKUNTI AND OTHERS —PETITIONER AND RESPONDENTS NOS. 2 TO 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Court Officer, misconduct of, in executing Court's order—Jurisdiction of Court to remedy injury—Inherent powers of Court.

When an Officer of Court deputed to execute an order issued by the Court conducts himself dishonestly with the result that one of the parties to the suit in which the order is issued suffers thereby, the Court, on being informed on this fact, has jurisdiction under s. 151 of the C. P. C. to remedy the injury by passing necessary orders, for instance, by directing the officer so conducting himself to refund money misappropriated by him.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the District Munsif, Kasragod, of 23rd January 1923, in R. E. A No. 489 of 1922, in R. E. P. No. 885 of 1922 in O. S. No. 331 of 1922.

Mr. *M. C. Sridharan*, for the Petitioner.

Mr. *G. N. Tirumalachari* (*Amicus Curiæ*), for the Respondents.

JUDGMENT.—An *amin* of the District Munsif's Court of Kasargod is the petitioner. He was deputed by the District Munsif in the course of the execution of the decree in O. S. No. 331 of 1922, to inspect the locality and estimate the quantity of paddy and straw heaped at the place and to attach the same. It was alleged that in discharging his duty he mis-appropriated a portion of the paddy and straw. On that ground an application was made by the aggrieved party (defendant in the suit) to the Munsif to take action against the *amin* under s. 151, C. P. C., for "abusing the process of Court." The District Munsif inquired into the matter and came to the conclusion that the mis-appropriation complained of was true. He, therefore, directed the *amin* to make good to the petitioner 52 *paras* of paddy and 1000 bundles of straw valued at Rs. 57 and 5 respectively.

The order is now sought to be revised on the grounds that the learned District Munsif has no jurisdiction to pass such an order under s. 151 of the C. P. C. According to that section, the Courts have inherent powers to make "such orders as may be necessary for the end of justice, or to prevent the abuse of the process of the Court." It seems to me that, when an officer of Court deputed to execute an order issued by it conducts himself dishonestly with the result that one of the parties to the suit in which the order was issued suffers thereby, the Court, on being informed on this fact, has jurisdiction under s. 151 of the C. P. C. to remedy the injury by passing necessary orders; and that is what has been done in this case. On the finding arrived at by the learned District Munsif the order passed by him is eminently a just one. In these circumstances, I decline to interfere with the order under s. 115 of the C. P. C.

The petition is dismissed.

I am much obliged to Mr. Tirumalachariar for helping the Court by his arguments on behalf of the respondent who was not represented in this Court.

V. N. V. *Petition dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 137 OF 1923.

July 21, 1925.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

THE COLLECTOR—APPELLANT

versus

RAMCHANDRA HARISCHANDRA—RESPONDENT

Land acquisition—Valuation of large plot of land—Market-value, ascertainment of—Procedure.

Where a large area of land is proposed to be acquired in a neighbourhood where there are only scattered buildings and nothing in the nature of a regular residential settlement, although persons have acquired here and there a few small plots fronting on the road either for speculation or for the purpose of putting up buildings of a residential character, it is impossible to fix the value of various portions of the plot proposed to be acquired at different rates on anything approaching an accurate basis. The only way in which the market-value of the plot can be arrived at in such a case is to judge from other sales what the whole land would have been likely to

realize in the market at the time of the proposed acquisition. In determining the market-value of the whole plot the Court should not proceed by determining the value of the front land separately and then dividing the interior land into separate portions and valuing them again at different rates. [p. 301, col. 2; p. 302, col. 1.]

First appeal from the decision of the Assistant Judge, at Thana, in Reference No. 35 of 1920.

Mr. *S. S. Patkar*, Government Pleader, for the Appellant.

Mr. *G. N. Thakor*, (with him Mr. *B. V. Desai*), for the Respondent.

JUDGMENT.

Macleod, C. J.—This is an appeal from the decision of the Assistant Judge of Thana on a reference under s. 18 of the Land Acquisition Act. The land in question measures 13 acres and 27 *gunthas*, and is situate at Chembur. The Acquiring Officer awarded compensation at the rate of Rs. 2,000 per acre for the agricultural lands, 13 acres and 21½ *gunthas*, and Rs. 833 for the remaining portion of the land, plus 15 per cent. thereon. Most of the lands were notified for acquisition on December 5th 1918, and the remainder on June 23rd 1919. The total amount awarded by the Collector was Rs. 27,908. The claimant asked for an award of Rs. 46,478+15 per cent for compulsory acquisition. The Judge increased the award by Rs. 16,037 8-0. The Government of Bombay being dissatisfied with that decision have appealed. It appears from the notification that the land was leased for a period of eleven years from 1914. Two years prior to the notification, the rent under the lease was Rs. 600 per annum for the whole area. Then it was raised to Rs. 700 per annum. The total gross income of the whole property was Rs. 742. Deducting the non-agricultural rent of Rs. 5, the net income was Rs. 737 per annum. Capitalizing the rent of the property, which would be realized on the basis of the land being used for agriculture, the amount comes to Rs. 12,284. Admitting that there were certain possibilities of the land fetching more than its agricultural value in the market, owing to a certain amount of speculation, the Collector awarded Rs. 27,908, which was more than twice its agricultural value. The Judge said :—

"The building potentiality of the land within no distant time or within a short time is taken for granted by both sides In the public mind also there has been created alm a certainty that in no distant time the Chembur village will become an important suburb of Bombay (as it is very likely now) from various incidents. According to the claimant's witness, Ex 60, a Municipal servant of Bombay residing at Kurla, the Bombay Municipality in 1914 decided to allow the G. I. P. Railway to open their Kurla-Devnor Katchra Siding Railway line for passenger traffic, and in 1915 or 1919 the G. I. P. Railway actually erected a platform near Chembur and opposite the Municipal quarters. The Government expert deposes "Any tangible enquiry for lands in Chembur commenced in 1914 and remained the same for five years. The values were increasing year by year. The high speculation for land purchasing commenced about the middle of 1919 and reached its zenith at the end of that year. Then it commenced its downward movement. There have sprung up few buildings but there might arise a rise in values of lands without buildings springing up because the people have to await the development by Government by way of roads and railways."

The Judge then annexed a list of sales of properties in the neighbourhood commencing from June 1916 till December 1919. The marked rise in the values appearing in the sale-deeds from July 25, 1919, showed that there was speculation in the purchase of lands after the middle of 1919. The claimant says that this speculation must have been gradually increasing from an earlier date. It is quite true that 5 acres out of the land acquired were acquired in June 1919, and the plaintiff was entitled to ask us to take that fact into consideration. I do not know why the land was not notified altogether in 1918. But in case like this where a large area of 13½ acres has to be valued, it is impossible to fix the value of various portions of it at different rates on anything like approaching an accurate basis. The only way in which the market value can be arrived at is to judge from other sales what the whole land would have been likely to realize in the market somewhere between December 1918 and June 1919, and in cases of this kind I deprecate the suggestion of some of the witnesses that we should give one value to so much of front land, and divide again the interior land into separate portions and value them again at different rates. In a neighbourhood like this where there were only scattered buildings, and nothing

in the nature of a regular residential neighbourhood, although persons were acquiring here and there a few small plots fronting on the road, either for speculation or for the purpose of putting up buildings of a residential character, there does not appear to be any evidence to show that if the claimant had put his 13½ acres for sale into the market anybody would have been so rash as to have given to him anything like the compensation he is being paid by Government. It might have been likely that a few *gunthas* fronting on the back road which according to the plan, was the southern boundary to Survey Nos. 260, 261, 262 and 263 would be sold. As a matter of fact he could not have sold himself, as the whole land was let out on lease. Still for the purpose of valuation, we may assume that the whole land is available as free-hold placed on the market. But if a few of the frontage plots were sold, there is no evidence that the remainder of the land could be sold for building purposes, and that is a fact which we find in so many cases has not been recognized, where attempts have been made to value the potentiality of land like this. It is altogether wrong to assume that every square yard of land has a potential value; the present value of which is more than nominal. Even assuming then that a small strip of land fronting the road I have mentioned would realize over Rs. 2,000 an acre, it is perfectly certain that the greater portion of the land at the back would not realize within any reasonable time more than its agricultural value. From the instances of sales before June 1919 it does not appear that even the best plots of land of small area, evidently purchased for building purposes, realized more than Rs. 2,500 an acre. (Instances (C) and (F) include land and buildings.) Their agricultural value was under Rs. 1,000 an acre. It is clear that if the appellant could have found a purchaser for the front area at Rs. 2,500 an acre he could not have sold the rest for more than Rs. 1,000 an acre. Taking the average of Rs. 2,000 all over awarded by the Acquiring Officer, we think that was a very liberal award to the claimant for his property. We think, therefore, that the appeal must be allowed and the award of the Collector restored with costs throughout.

Coyajee, J.—I concur.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 913 OF 1923.

July 15, 1925.

Present:—Mr. Justice Jackson.

KAMAN MADA AND OTHERS—DEFENDANTS—PETITIONERS

versus

MALLAI AND OTHERS—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 3, 5, 10—Limitation Act (IX of 1908), s. 3—Pauper suit, institution of, date of—Court-fee payable—Enhancement of Court-fees after application, effect of.

Where an application to sue *in forma pauperis* is granted, the suit is deemed to have been instituted on the date when the application was made.

When the pauper plaintiff succeeds in the suit, the Court-fee leviable from him under r. 10 of O. XXXIII of the C. P. C. is that payable under the law in force on the date on which the application for leave to sue as pauper was made and not the law in force on the date of the decree.

The Limitation Act is in *pari materia* with the C. P. C., and the rule laid down in s. 3 of the Limitation Act with regard to the date of institution of a pauper suit must be read along with O. XXXIII, r. 8 of the C. P. C.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the decree of the Court of the District Munsif, Kollagel, dated the 5th March 1923, in O. S. No. 153 of 1922, in so far as the said decree directs the petitioners to pay to Government Rs. 175 as Court-fee on the plaint.

Mr. *C. S. Venkatacharair*, for the Petitioners.

Mr. *C. V. Ananta Krishnier* (Government Pleader), for the Respondents.

JUDGMENT.—The petitioners seek for revision of the decree of the District Munsif Kollegal, in O. S. No. 153 of 1925 on the following ground.

The petitioners are defendants and judgment-debtors in a pauper suit. In assessing the costs the Court has ordered them to pay Rs. 175 as Court-fee on the plaint which would be correct if the old Court Fees Act were applicable. But if on the day the plaint was filed the new act was applicable, then the fee, chargeable on the value of one year's maintenance would be considerably less.

The point for determination is, therefore, when was the plaint filed.

The application to sue as a pauper was presented under O. XXXIII, r. 3 on 23rd December 1921, when the old act was in force. The applicant was allowed to sue as pauper under O. XXXIII, r. 7 on 30th

June, 1922 when the new Act was in force. The application was then numbered and registered and deemed the plaint in the suit under O. XXXIII, r. 8. The petitioners plead that it could only be so deemed for the purpose of levying the Court-fee on the date when it was numbered and registered. The counter-petitioner contends that it must be deemed to have been filed as a plaint from the date of presentation.

It is urged that until the numbering and registering, there is no filing as contemplated, by s. 6 of the Court Fees Act. I do not think that anything turns on the technicality of the words "file". If for any purposes the application can rank as a plaint from the date of presentation then it must be regarded as filed from the date. Now the Limitation Act lays down, s. 3, that in the case of a pauper a suit is instituted when his application for leave to sue as pauper is made. That must mean that from the date of his application it is assumed that his plaint is filed; it cannot mean that limitation ceases to run by operation of an unfiled plaint.

The language used by the Judicial Committee, *Stuart Skinner* v *William Orde* (1), leaves no room for doubt in the matter. On page 250 "the petition..... should operate as a plaint without the necessity of filing a new case. The petition is filed, and proceedings are taken"

The Limitation Act is in *pari materia* with the C. P. C., and the stipulation in s. 3 of the Act must be read along with O. XXXIII, r. 8 of the Code. The application shall be deemed the plaint in the suit from the date when the application is made. That being so it would be anomalous to have a plaint in the suit for which no Court-fee was payable till a later date. The Court-fee is payable from the date of the presentation of the application and it is exactly that fee to which the Court must address its mind when it considers the pauper application. It considers the fee on the date of presentation and whether the applicant can afford to pay it, not what the fee may be in future if ever it should become payable.

For the above reasons I see no cause to revise the order of the lower Court.

The petition is dismissed with costs.

V. N. V. *Petition dismissed.*

(1) 2 A. 241; 4 C. L. R. 331; 6 I. A. 126; 3 Ind. Jur. 334; 4 Sar. P. C. J. 31; 3 Suth. P. C. J. 627; 1 Ind. Dec. (N. S.) 708 (P. C.),

MADRAS HIGH COURT.

CIVIL APPEAL No. 11 OF 1923.

February 4, 1925.

Present:—Mr. Justice Phillips.

Sri PARANKUSAM VENKAYYA GARU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BANDARU SATYANARAYANAMURTHI, MINOR, BY MOTHER AND GUARDIAN TAYARAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Rules of Practice (Mad.), r. 278 (b)—Costs—Suit, dismissal of, for default to pay stamp duty—Scale of taxation.

Where a suit is dismissed for default of payment of stamp duty and there is no trial of the suit, although the pleadings are filed and issues framed, the case comes under r. 278 (*b*) of the Madras Civil Rules of Practice and the fees should be calculated in accordance with that rule. The costs cannot be taxed as if the suit had been dismissed after contest.

Appeal against a decree of the Court of the Additional Subordinate Judge, Ellore, so far as it relates to costs in O. S. No. 14 of 1922, (O. S. No. 104 of 1920, on the file of the Sub-Court, Ellore).

Mr. *G. Lakshmanna*, for the Appellants.

Mr. *Satyanarayana Murti*, for the Respondents.

JUDGMENT.—This appeal relates solely to costs. The plaintiff brought a suit for partition impleading his co-sharer the first defendant, and a large number of defendants who are alleged to be in possession of the land sought to be partitioned. The Subordinate Judge held that the plaintiff ought to have paid additional stamp duty in respect of his claim against the defendants other than the first defendant. The plaintiff did not pay this amount and his suit was dismissed with costs. It appears that in the decree the costs have been taxed as if the suit had been dismissed after contest; but inasmuch as the suit has been dismissed for default of payment of stamp duty, and as there has been no trial of the suit although the pleadings have been filed and issues framed, the case would appear to come under r. 278 (*b*) of the Civil Rules of Practice; and the fees should be calculated in accordance with that rule.

It also appears that separate costs have been awarded to a very large number of defendants, and there is no provision for this in the judgment. It would appear that so far as the separate costs are concerned, the first defendant would be entitled to his costs and the other defendants jointly to a second set of costs.

The decree must be set aside and remitted to the lower Court for framing a fresh decree in accordance with the above remarks.

No order as to costs.

V. N. V. *Decree set aside.*

Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 457 OF 1923.

August 6, 1925.

Present:—Mr. Findlay, Officiating J. C.

NAKTU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAMCHANDRA BAPU—PLAINTIFF—RESPONDENT.

C. P. Land Revenue Act (II of 1917), ss. 107, 108 (4), 220—Status of protected thekadar *acquired under* kabuliyat *and lease*—Thekadar, *whether can dispute terms of* kabuliyat *and lease—Jurisdiction of Civil Courts.*

Where a person obtains the status of a protected *thekadar* under a *kabuliyat* and a lease, a plea put forward by him that he is not bound by the terms of the *kabuliyat* and the lease cannot be entertained by a Civil Court having regard to the provisions of ss. 107, 108 (4), and 220 (1) of the C. P. Land Revenue Act. [p. 305, col. 1]

Second appeal against a decree of the District Judge Bhandara, dated the 28th July 1923, in Civil Appeal No. 14 of 1923.

Mr. *M. R. Bobde*, for the Appellants.

Mr. *S. Y. Deshmukh*, for the Respondent.

JUDGMENT.—The facts of this case are sufficiently clear from the judgments of the two lower Courts. The plaintiff is the proprietor of *Mauza* Dalna, while the second defendant-appellant is the protected *thekadar*, the first defendant being a co-sharer in the *theka*. The plaintiff's case is that as proprietor he is entitled to the produce of the *mohwa* trees standing on the waste land of the village, and in this connection a decree for Rs. 14-6-0 was passed against the appellants in the first Court. Their appeal to the Court of the District Judge proved unsuccessful and they have now come up to this Court on second appeal.

A long and elaborate argument has been advanced on behalf of the appellants to the effect that they must be considered to have acquired permanently a right in the *mohwa* trees in question. This position starts, so to speak, from the lease for 3 years given to the defendants' predecessor in 1851. It has been suggested on behalf of the appellants that though this lease was originally only for 3 years, they have continued to enjoy the property onwards from then. The lower Appellate Court is alleged to have been wrong in regarding their position as akin to that of a tenant-at-will, and it has been urged that the acceptance of protected status by the defendant No. 2 does not take away his pre-existing right, that is to say, the right to *mohwa* would still remain: *Cf. Fagwa* v. *Budhram* (1). Reference has also been made to the *Wajib-ul-arz* for 1896-97, para. 10, (Ex. D.6), which states that the trees are to be the property of the *thekadar*. It has been advanced that there is no basis for the assumption made by the lower Appellate Court that the grant of protected status in 1920 could take away the pre-existing rights which had accrued to the defendants long before.

Great stress has also been laid on the alleged admission of the defendants' right to *mohwa* contained in documents like Exs. D.3 and D. 4, which appertain to the years 1911 and 1913 respectively.

It seems to me, however, that this Court as well as any other Civil Court is expressly debarred from entertaining the plea of the defendant-appellants in this connection. The terms of ss. 107 and 108 (4), Land Revenue Act, leave, in my opinion, not the slightest room for dubiety on this score and, if any remained, such dubiety would clearly be removed by the terms of s. 220 (1) of the Land Revenue Act. The second defendant admittedly entered into the *kabuliyat* and lease (Exs. P-1 and D-1). Under these documents *mohwa* is expressly reserved to the proprietor.

It has been suggested on behalf of the appellants that the contention, on which they are attempting to succeed in this appeal, *viz.*, that in spite of the terms of the lease and *kabuliyat* they are entitled to their share in the *mohwa*, does not involve any direct challenge of the lease and *kabuliyat*. It has been seriously suggested that all that the defendants' plea amounts to is that the extent of their rights has not been stated correctly in the *kabuliyat*. I am wholly unable to entertain a meticulous argument of this nature. The defendants' position involves a direct and deliberate

(1) 24 Ind. Cas. 855; 10 N. L. R. 64.

attempt on their part to dispute the terms of the lease and the *kabuliyat*. The Civil Courts are expressly debarred from entertaining any such matter and it is, therefore, impossible for this Court to go into the merits or alleged merits of the defendants' position.

I may only refer to one incidental point. Although the second defendant executed the lease and *kabuliyat*, he in his statement before the Registrar at the time of the registration of the documents took up the puerile position that he accepted the conditions of the *kabuliyat* excepting those relating to *mohwa*. I need hardly say that having admitted execution of the lease and the *kabuliyat*, he is bound by their terms and any such statement as that referred to could in no way protect the defendants from not being held bound to these terms. The whole matter is thus one which is under statutory provisions contained in the Land Revenue Act, expressly excluded from the purview of the C. P. C. Were one to entertain the defendants' plea and to find it in their favour, there would be an obvious and gross disobedience of both s. 108, sub-s. (4), and of s. 220, Land Revenue Act. The learned District Judge indeed seems to have arrived at this conclusion himself, at the very end of his judgment, after fully considering matters and giving findings on points which were, in the circumstances, expressly excepted from the purview of the C. P. C. Whether or not the defendants had pre-existing rights in the *mohwa* crop and even if these existed up to the year 1920, it is perfectly clear that the acceptance of the terms, on which protected status was granted to defendant No. 2 necessarily implies that thereafter he could not claim these *mohwa* rights under the terms of the lease and *kabuliyat* expressly accepted by him As was pointed out in *Fagwa* v. *Budhram* (1) any one, who is entitled to the benefits of a protected *thekadar*, is equally bound to perform the duties prescribed by the law for such a *thekadar*. It, therefore, follows that the 2nd defendant is not entitled to question the conditions laid down in the lease and *kabuliyat* that the *mohwa* belongs to the proprietor, and in any event the jurisdiction of the Civil Court is expressly barred, inasmuch as the entertaining of the plea, which is the basis of this appeal, *viz.*, that the appellants are entitled to their share in the *mohwa* produce, is expressly prohibited by the statutory provision referred. The first defendant as a co-sharer in the *theka* necessarily stands or falls with the second one.

The present appeal, therefore, fails and is dismissed. The appellants must bear the respondent's costs in all three Courts.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 278 OF 1924.

July 21, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

HANMAVVA ADIVEPPA SOMRADDI AND OTHERS—DEFENDANTS—APPELLANTS

versus

VENKAPPA GOVINDAPPA KADEMANI—PLAINTIFF—RESPONDENT.

Hindu Law—Widow succeeding to estate of her husband's reversioner—Adoption by widow, effect of—Suit by next reversioner challenging adoption, maintainability of.

Under the Hindu Law where the widow of a *gotraja sapinda* succeeds to a life-estate in the property of a reversioner of her deceased husband, she cannot by an adoption defeat the rights of the next reversioners in such property, although the adopted son might be entitled to succeed to his adoptive father's estate, as distinct from the estate of the reversioner in which the adoptive mother has a life-interest as the widow of a *gotraja sapinda*. [p. 307, col. 1.]

On the death of a Hindu the widows of his two uncles succeeded to a life-estate in his property and both of them subsequently made adoptions to their respective husbands. A reversioner of the deceased brought a suit for a declaration that an adoption made by one of the widows was invalid and would not affect his reversionary rights. It was contended in defence that as the other widow was the immediate reversioner of the widow who had made the adoption, the plaintiff had no right to maintain the suit:

Held, that both the widows having by making adoptions attempted to defeat the rights of the plaintiff who was in the position of the next reversioner on the death of both the widows, the suit as framed was maintainable. [p. 307, col. 1.]

Second appeal from a decision of the District Judge, at Dharwar, in Appeal No. 122 of 1922, reversing that of the Subordinate Judge at Gadag, in Civil Suit No. 22 of 1921.

Mr. *A. A. Adarkar*, for Mr. *K. H. Kelkar*, for the Appellant.

Mr. *H. B. Gumaste*, for Respondent No. 1.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to have it declared that defendant No. 1 had not taken defendant No. 2 in adoption and

that if taken the adoption was invalid, that defendant No. 1 was not competent to make alienations which would be valid beyond her lifetime and that such alienations did not bind her reversioners. A pedigree of the family for the purpose of this suit may be set out as follows:—

BHIMRADDI

Somaraddi = Bhimawa	Adiveppa = Hanmawa, defendant, No. 1.	Venkappa (died 1902) = Chinnawa defendant, No. 6.	Shasawa (died 1901)	Ningawa
Huchappa (died May 1903).			Venkappa, plaintiff.	O

The first defendant Hanmawa adopted a son, who is the second defendant. Chinnawa defendant No. 6 adopted also a son who is not made a party to the suit. The trial Judge held that the adoption of the second defendant by the first defendant was invalid, and as the alienations by defendant No. 1 were not proved to have been for necessity, the plaintiff was entitled to the declarations sought.

The first defendant contended that the adopted son of Chinnawa was a necessary party to the suit, and that the plaintiff was not entitled to file his suit as he was not the next reversioner.

The Judge on this question held that:

"As defendant No. 6 had herself made an adoption she was not in a position to say that defendant No. 1 who was in the same boat with her could not make an adoption. Hence in this case the next reversioner, *i. e.*, defendant No. 6, was precluded from suing defendant No. 1 by her own act or conduct, *viz.*, the adoption by defendant No. 6. Hence plaintiff, a remote reversioner, was entitled to sue."

He also held there was no evidence as to collusion between defendants Nos. 1 and 2 and defendant No. 6.

On appeal the Judge said:

"It is not, at this moment, possible to say who will be the nearest reversioner when the estate ultimately reverts. Future contingencies cannot be declared. This much, however, is clear. Shasawa's son has a hope of succession. Adiveppa's adoptive son is interested to deny his right. Shasawa's son can, therefore, come within the ambit of s. 42, Specific Relief Act. Shasawa's son can sue for a declaration. This is not the place to consider the position of Chinnawa's adoptive son. The plaintiff has not asked for any declaration about this adoption, and there is no reason why he should. I must not, however, be understood to accept the proposition that Chinnawa's adoption has conferred upon her adoptive son an incontestable right or a right of any kind to the reversioner of Huchappa's estate. The appellant's Pleader found it impossible to contend that Hanmawa could by adoption confer any title to her nephew's estate. Chinnawa's position seems to be indistinguishable from the position of her sister. With Chinnawa's adoption I have, however, at this time no concern except this, Chinnawa's adoption of a son does not debar plaintiff from suing for a declaration that Hanmawa's adoption confers no title to Huchappa's estate."

It will be seen from the pedigree that Huchappa was the last male holder. He died on May 6, 1903. The inheritance then went to his mother Bhimawa who died on September 26, 1903. Hanmawa and Chinnawa, the widows of Adiveppa and Venkappa, then succeeded to a life estate of the property under the ruling established in *Lallubhai Bapubbai* v. *Cassibai* (1). If their husbands had been alive, they would have succeeded absolutely to the estate as tenants-in-common. The position of the widows of two *gotraja sapindas* succeeding under the ruling I have mentioned has not been clearly laid down as far as I know in any of the reported cases.

It was contended for the appellants that they each took a life estate in one-half of Huchappa's property. So that when one died the reversion of that half would fall to the other and on this contention is based the argument that as Venkappa is not the nearest reversioner to the half shares held respectively by Hanmawa and Chinnawa, he cannot validly sue for the declaration he asks for. I doubt very much whether that is the true position. It would follow, if it were correct that Venkappa would be precluded until the death of one of the widows from contesting any alienation by either of them.

But in this case we have this further complication that both of them have adopted sons. Under the decision in *Datto Govind* v. *Pandurang Vinayak* (2) those

(1) 7 I. A. 212; 5 B. 110; 4 Sar. P. C. J. 164; 3 Suth. P. C. J. 715; 4 Ind. Jur. 533; 3 Shome L. R. 245; 7 C. L. R. 445; 3 Ind. Dec. (N. S.) 75 (P. C.).

(2) 32 B. 499; 10 Bom. L. R. 692.

adoptions are invalid. It is clear they are invalid to this extent that a widow of a *gotraja sapinda* taking only a life-estate cannot by an adoption defeat the rights of the next reversioners whatever rights the adopted son may have against the estate of his adoptive father. There seems to be no reason why such an adoption should not be good so as to enable the adopted son to succeed to his father's estate though it would not entitle him to succeed to the estate in which his mother had a life-interest as the widow of a *gotraja sapinda*.

In any event, we think, in the circumstances of this case, both widows having adopted, and so having attempted to defeat the rights of Venkappa who would certainly be in the position of the next reversioner on the death of both the widows, defendant No. 1 cannot object to the plaintiff's suit as at present framed.

We think, therefore, that the decision of the District Judge was in effect correct, but the declaration in the decree that the adoption of defendant No. 2 is invalid, should be amended by adding the words "so far as it purports to give the second defendant any interest in the estate of Huchappa," The appeal will be dismissed with costs.

Coyajee, J.—I am of the same opinion.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 422 OF 1923.

October 28, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

DEVABHAKTUNI BUTCHAMMA—DEFENDANT No. 1—APPELLANT

versus

DEVABHAKTUNI PUNAMMA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1—Temporary injunction—Waste or damage, findings of—Notice, necessity of.

An injunction restraining the defendant from interfering with the possession of the plaintiff over the property in suit should not ordinarily be granted on the *ex parte* statement of the plaintiff that he is in possession of the properties and without issuing notice to the defendant or giving him an opportunity of being heard.

Before granting a temporary injunction restraining a party from interfering with the possession of the other party the Court must find that the property is in danger of waste or damage and there must also be a finding as to which of the parties is in *prima facie* possession of the property.

Appeal against an order of the Court of the Subordinate Judge, Baptila, dated the 6th August 1923, in I. A. No. 650 of 1923, in O. S. No. 48 of 1923.

Mr. *Ch. Raghava Rao*, for the Appellant.

Mr. *V. Rama Doss*, for the Respondent.

JUDGMENT.—The lower Court, first of all, granted plaintiff an injunction restraining defendants from interfering with her possession of the property in A and B schedules of the plaint merely on the *ex parte* statement of plaintiff that she was in possession and without issuing notice to the other side, or giving them an opportunity of being heard. This was clearly improper. When first defendant naturally moved to set that injunction aside, the lower Court then heard both sides and passed the order under appeal.

That order is itself very defective, in that (*a*) there is no finding that the property is in danger of waste or damage, etc., and (*b*) there is no finding as to who is in *prima facie* possession of the property, with which the injunction is concerned.

We are asked to support the order of the lower Court, because it can be supported from affidavits filed in the lower Court, from paras. 7 and 8 of defendant's written statement and from the presumption of law that possession follows title. On none of these grounds, has the lower Court relied and we are not prepared to usurp here the duty of the lower Court to find *inter alia*, who were *prima facie* in possession, on the date of suit.

We cannot support an order, which evades the real points at issue. We cancel the lower Court's order and injunction.

First defendant will get her costs throughout in both Courts.

V. N. V.

Z. K. *Order set aside.*

PATNA HIGH COURT.

APPEAL FROM ORGINAL ORDER No. 249 OF 1924.

June 2, 1925.

Present :—Mr. Justice Das and Mr. Justice Ross.

HIA LAL KUMAR AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

GANU MAHTO AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (2)—Decree obtained by several plaintiffs jointly—Appeal—Death of one respondent—Substitution, absence of—Consent decree passed by Appellate Court—Execution of decree by heirs of deceased respondent—Limitation, commencement of.

A decree was obtained against the defendants by several plaintiffs jointly. The defendants appealed and during the pendency of the appeal one of the decree-holders respondents died and his legal representatives were not brought upon the record within the time allowed by law. At the hearing of the appeal the defendants filed an affidavit stating that they had settled the dispute out of Court with the heirs of the deceased respondent and eventually the Appellate Court passed a consent decree in the appeal reducing the amount due to the other respondents on the assumption that the judgment-debtors had settled with the heirs of the deceased respondent. In execution it turned out that no settlement had been made by the judgment-debtors with the heirs of the deceased decree-holder and the latter also applied for execution of the decree :

Held, that having regard to the wording of cl. (2) of Art. 182 of Sch. I to the Limitation Act, limitation for execution of the decree as against the heirs of the deceased respondent began to run from the date of the decree of the Appellate Court and not from the date of the decree of the Trial Court. [p. 310, col. 1.]

Case-law referred to.

Appeal against an order of the Subordinate Judge, Bhagulpore, dated the 25th August 1924.

Messrs. *S. N. Palit* and *S. M. Mullick*, for the Appellants.

Messrs. *K. B. Dutt* and *J. P. Sinha*, for the Respondents.

JUDGMENT.

Ross, J.—On the 10th of September 1919 a decree was passed in a suit instituted by Nasib Kumar and his sons and grandson Hia Lal Kumar, Thakur Prasad Kumar and Thitar Kumar and by Kare Prasad Kumar against the defendants Nos. 1 to 7 and 8 who are represented by the respondents to this appeal. That decree ordered that the plaintiffs do get Rs. 3,735-8-6 and proportionate costs from defendants Nos. 1 to 7 and Rs. 1,678-12-0 and proportionate costs from defendant No. 8, the amount of the decree to carry interest at 6 per cent. per annum from the date of the decree until realization. The defendants appealed on the 5th of January 1920 to the High Court against that decree. During the pendency of the appeal, on the 22nd of February 1921, Kare Prasad Kumar died. No substitution of his legal representatives was made and the appeal against him abated—It should be mentioned that the decree was a decree in favour of the plaintiffs jointly. When the appeal came to be heard a sworn petition was filed in the High Court by the appellants stating that they had settled out of Court the dispute with the heirs of Kare Prasad Kumar whose share in the decree had already been paid by means of a registered bond, dated the 18th of January 1922. In the judgment of the High Court it was stated that two questions arose in the case, first, whether the abatement of the appeal as against the respondent No. 4 (that is, Kare Prasad Kumar) had caused the abatement of the entire appeal by reason of the decree being a joint one, and *secondly* what was the effect of the payment out of Court of a portion of the decree said to represent the share of Kare Prasad Kumar which had not been certified in the Court below. Their Lordships held that, assuming that these two points were decided against the appellants the respondents Nos. 1 to 3 would be entitled to execute the entire decree which amounted to Rs. 6,433 against both sets of appellants and complications would certainly arise in the course of execution as to the effect of the payment made to one of the joint decree-holders. In order to avoid these complications the parties have settled their difference and a consent decree was passed to the effect that the decree of the Court below be reduced to Rs. 3,550 payable by the appellants to the respondents Nos. 1 to 3 for principal and costs out of which appellants Nos. 1 to 9 would be liable for Rs. 2,415 and the appellant No. 10 for Rs. 1,135. These sums were to carry interest at the rate of 6 per cent. per annum. This decree was dated the 3rd of January 1923. On the 3rd of January 1924, an application was made by Hia Lal Kumar, Thakur Prasad Kumar and Thitar Kumar and by the sons of Kare Prasad Kumar for execution. The application stated the date of the decree passed by the Court of first instance to be the 10th of September 1919, and the 3rd of January 1923 the date of the decree of the Appellate Court. The amount claimed was Rs. 8,584-5-0. The account stated in the application contained first an

item of Rs. 3,735-8 6 with costs and interest amounting in all to Rs. 5,305-0-9. From this was deducted Rs. 2,415 as payable to the plaintiffs Nos. 3, 4 and 5. On the balance interest was calculated from the date of the High Court decree giving a total of Rs. 3,063-6-3 as the share of the sons of Kare Prasad Kumar. The share of the representatives of Nasib Kumar was stated as in the High Court decree to be Rs. 2,415 and on this sum interest was calculated. These were the amounts due by the defendants Nos. 1 to 9. The amounts due by the defendant No. 10 to the sons of Kare Prasad Kumar and to the representatives of Nasib Kumar were similarly calculated and the total already stated was arrived at.

Two objections were taken by the judgment-debtors to this application for execution, first, that the application was not maintainable in its present form, and secondly that as regards the representatives of Kare Prasad Kumar it was barred by time. The learned Subordinate Judge gave effect to both of these objections and dismissed the petition. The decree-holders have appealed and on behalf of the respondents the same points have been urged.

With regard to the maintainability of the application it seems to me that if the contention of the appellants on the question of limitation is sound, there can be no objection to the form of the application. If time runs against the representatives of Kare Prasad Kumar from the date of the appellate decree then, as the appeal had abated against them, the only decree which they can execute is the decree of the Original Court, while it is evident that the representatives of Nasib Kumar are bound by the consent order passed by the High Court and the only decree that they can execute is the decree of the High Court. It should be stated that the settlement out of Court which was alleged at the hearing of the appeal in the High Court was untrue and has been disbelieved by the Subordinate Judge. If that misrepresentation had not been made, it is quite clear that the appeal to the High Court must have been dismissed because the decree was a joint decree and as the appeal had abated against one of the decree holders it had abated against all. It was in view of that misrepresentation, which was accepted as a true statement of fact, that the High Court passed the decree by consent. The rights of the parties having been adjusted in that way, it seems to me that the account stated in the application for execution has been stated in the only possible way and the application is maintainable.

The principal question in the appeal, however, is the question of limitation. The learned Advocate for the appellants relies on the language of Art. 182 of the First Schedule to the Limitation Act which lays down the period of limitation as three years, where there has been an appeal "from the date of the final decree or order of the Appellate Court, or the withdrawl of the appeal." The contention is simply that the present case falls within these words because there has been a final decree of the Appellate Court, and that the present application, though beyond three years from the date of the decree of the Original Court, is within three years from the date of the final decree of the Appellate Court. So for as the representatives of Nasib Kumar who were parties to the appeal are concerned, there can be no question of limitation as against them and the only question is as to the representatives of Kare Prasad Kumar who seek to execute the decree of the Original Court, but claim the benefit of the date of the decree of the Court of Appeal. The contention on behalf of the respondents is that as the appeal had abated so far as Kare Prasad Kumar was concerned there was no final decree or order of the Appellate Court and, therefore, the decree of the Appellate Court is not material in the case of his representatives. Reliance is placed on the decision of this Court in *Tikait Krishna Prasad Singh* v. *Wazir Narain Singh* (1) where it was held that Art. 182 (2) does not apply where a decree has abated by operation of law. On the other hand in *Shiv Ram* v. *Sakha Ram* (2), it was held that where some of the parties to a decree appealed against it the decree in appeal is the final decree for the purpose of the execution with respect to all the parties. In that case it was argued for those who opposed the application for execution that the words of cl. (2) in the third column of Art. 182 should not be taken literally and that as the opponents did not appeal against the original decree although the other defendants did, the date of the

(1) 58 Ind. Cas. 977; 5 P. L. J. 731; (1920) Pat. 342; 2 U. P. L. R. (Pat.) 237; 2 P. L. T. 49.
(2) 1 Ind. Cas. 459; 33 B. 39; 10 Bom. L. R. 939.

final decree of the Appellate Court which was passed within three years from the initiation of the proceedings was a date which did not concern the opponents, as the original decree, which was final so far as they were concerned was passed more than three years before. Their Lordships overruled this contention holding that they could not disregard the plain words of cl. (2): "There was an appeal and the final decree of the Appellate Court was passed less than three years before the plaintiffs' application and that application was, therefore, within time." I do not myself see how the fact that the respondents allowed their appeal against Kare Prasad Kumar to abate can prevent the representatives of Kare Prasad Kumar from taking the benefit of the date of the Appellate Court decree. The facts in *Tikait Krishna Prasad Singh Wazir Narain Singh* (1), were very peculiar. Wazir Narain Singh who was seeking to execute the decree had been a party neither to the original nor to the appellate decree and his position was, therefore, different from that of the representatives of Kare Prasad Kumar in the present case. It was held that Wazir Narain Singh could not execute the original decree, and as he had not been a party to the appellate decree, he could not execute that either. The observations of their Lordships on the effect of abatement must, therefore, be treated as unnecessary to the decision of the case and in view of the plain words of cl. (2) of Art. 182 and of the decision above referred to in *Shiv Ram* v. *Sakha Ram* (2), I am of opinion that time runs against the representatives of Kare Prasad Kumar from the date of the decree of the Court of Appeal and their application is, therefore, not barred by time. That the decisions of the Privy Council in *Abdul Majid* v. *Jawahir Lal* (3), and *Batuk Nath* v. *Munni Dei* (4) have no application to the present question is clear from the discussion of these decisions in *Raghu Prasad Singh* v. *Jadunandan Prasad Singh* (5). The decision in the last-mentioned case does not apply precisely to the present question, because there the appeal had been dismissed for non-payment of printing costs and there had been an order of dismissal passed by the High Court, whereas in a case of abatement no order is made. But on principle the decision does apply where their Lordships observed: "It would be a strange thing if the period of limitation were to be revived where the appellant withdraws his appeal and yet it were not to be revived in cases where the appellant, instead of withdrawing his appeal, allows the appeal to be dismissed by default." The same anomaly would arise if the period of limitation were not revived where the appellant instead of withdrawing the appeal allowed it to abate. There is no distinction in principle and there ought to be no difference in the result. In the present case the judgment-debtors got a consent decree in appeal against some of the decree-holders on the allegation of a settlement out of Court by the other decree-holders against whom the appeal had abated. The whole case was essentially a single case and the consent decree rested on this allegation. It seems to me impossible to deprive the representatives of Kare Prasad Kumar of the benefit of the date of this decree in calculating the period of limitation as against them.

I would, therefore, allow this appeal with costs, set aside the order of the Subordinate Judge and direct that the execution do proceed.

Das, J.—I agree.

Z. K. *Appeal allowed.*

(3) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.).

(4) 23 Ind. Cas. 644; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729; (1914) M. W. N. 437; 41 I. A. 101 (P. C.).

(5) 59 Ind. Cas. 896; 6 P. L. J. 27; (1921) Pat. 34; 2 P. L. T. 28.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 751 OF 1921.

March 27, 1924.

Present:—Mr. Justice Wallace.

L. A. NIQLAKANTA SARMA—PLAINTIFF—APPELLANT

versus

GANESHA IYER AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Minor—Alienation by guardian—Consideration partly for discharge of mortgage-debt—Prior undertaking of guardian to pay off mortgage—Purchaser acting in good faith—Sale, whether binding—Consideration, major portion of, valid, effect of.

Certain properties burdened with a mortgage were gifted to a minor and his guardian sold the properties

to a third person, a portion of the sale consideration being required for the discharge of the said mortgage. It appeared, however, that under an arrangement between the donor and the guardian, the guardian himself had undertaken to discharge the mortgage-debt but it was found that the purchaser was not aware of any such arrangement :

Held, that the consideration relating to the discharge of the mortgage-debt was binding on the minor. [p. 311, col. 2.]

Where an alienation is left unchallenged for a number of years, and the major portion of the consideration for the sale is held to be valid and binding, the alienee should be permitted to retain the property on payment of the amount disallowed with interest. [p. 311, col. 2; p. 312, col. 1.]

Second appeal against the decree of the Court of the Additional Subordinate Judge, Trichinopoly, in A. S. No. 130 of 1920, (A. S. No. 152 of 1919, on the file of the District Court, Trichinopoly), preferred against the decree of the District Munsif, Srirangam, in O. S. No. 345 of 1916.

Mr. *K. S. Ramabhadra Iyer*, for the Appellant.

Mr. *T. R. Arunachala Iyer*, for the Respondents.

JUDGMENT.—The point for decision in this appeal is whether the sale-deed, Ex. XI dated 27th August 1907, by the father and guardian of the then minor plaintiffs, in favour of 3rd defendant, is binding on the plaintiffs.

The property sold, under Ex. XI, is Item No. 5 of the plaint properties. At a partition, Ex. I dated 1895, between plaintiffs' grandfather and his sons, it fell to the share of the former. On 4th August 1902, he gifted it to plaintiffs. Even at the time of partition, it was subject to a mortgage, Ex. XVII dated 22nd August 1893 in favour of one Appadurai Iyer of the family of 1st defendant. On the date of Ex. XI about Rs. 110 was due on that mortgage. The consideration recited in Ex. XI is this ; Rs. 110 and another sum of Rs. 90 to discharge *othi*, Ex. XIV, by plaintiffs' father, in favour of 3rd defendant. This *othi* purported to have been executed in order to get money for the minors' expenses; but both the lower Courts have found that there was no necessity for the loan. This is a concurrent finding of fact, involving no question of law. Exhibit XI is, therefore, not binding so far as this sum of Rs. 90 is concerned.

But the other sum of Rs. 110, to discharge Ex. XVII, comes in a different category. The lower Courts have held that because Ex. I directs that plaintiffs' father shall himself discharge Ex. XVII he had no right to sell the minors' property, to discharge it and, therefore, such sale cannot bind the plaintiffs. They have not noticed the fact that the plaint does not set out any such case and have further overlooked altogether the question, whether 3rd defendant was a *bona fide* purchaser for value, without notice of this family arrangement for the discharge of Ex. XVII. Now, there is no plea and no finding that 3rd defendant was not a *bona fide* purchaser for value. It was suggested before me that he was the agent of 1st defendant, who probably colluded with plaintiffs' father to sell the property. Such a contention was never raised in the lower Courts and I can see no reason why I should suspect collusion in a sale, taken to discharge a mortgage over the same property. There is no suggestion that either first or 3rd defendant was aware of the family arrangement in Ex. I, or that Rs. 110 was not due on the mortgage. We have then a purchaser, ignorant of Ex. I and knowing only that there is a binding mortgage over the property, paying over good money to buy the property and thus discharge the mortgage. There was nothing to put him on notice of Ex. I. The property sold was liable for the whole mortgage, as much as any of the other property mortgaged under Ex. XVII. I do not appreciate the argument that, because the mortgagee might have proceeded against other property, therefore, this sale was not for necessity, or for the benefit of the minors It was to discharge a genuine debt, charged upon the property, prior to the gift of it to the minors. The property came to them, saddled with the onerous obligation. It is not suggested that the minors had any ready cash, out of which the debt might have been paid, if their father broke his undertaking in Ex. I, to discharge the mortgage, from his own funds, the *bona fide* alienee cannot be held responsible for that.

I am quite clear that the lower Courts have erred in law in finding that the family arrangement under Ex. I is sufficient ground for holding that the sale under Ex. XI to discharge the mortgage Ex. XVII, is not binding on the plaintiffs. I reverse the finding of the lower Appellate Court and find that Ex. XI is binding on the plaintiffs to the extent of Rs. 110.

I consider that, since the major portion of the consideration is found valid, and since the alienation was left unchallenged for 9

years, this is a case in which the alienee should be permitted to retain the property on payment of the amount disallowed with interest. The decree will accordingly be that 4th defendant do pay to plaintiffs Rs. 90, with interest at 6 per cent. from 27th August 1907, till date of payment and that until payment of that amount, plaintiffs will have a charge over Item No. 5 of the plaint properties for that amount, until date of payment. Plaintiffs and 4th defendant will pay and receive proportionate costs throughout in all Courts.

V. N. V. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1221 TO 1225 OF 1923.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

June 24, 1925.

EKABBAR ALI SHA PAGAL PANTHI FAKIR—DEFENDANT NO 1—APPELLANT

versus

SHEIKH ALIM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Tenancy by holding over, what constitutes.

In order that a tenancy by holding over may be created or may exist, the tenant holding over after the expiry of the term of his lease must be both in possession of the land and paying rent to the landlord for the land. [p. 313, col. 1.]

Appeals against the decrees of the Subordinate Judge, Third Court, Mymensingh, dated the 4th September 1922, modifying that of the Munsif, Second Court, Netrokona, dated the 31st May 1921.

Babus *Hogesh Chandra Roy* and *Jotindra Nath Sanyal*, for the Appellant.

Mr. *Gunada Charan Sen* (with him Babu *Paramananda Lahiri*), for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the defendant No. 1 against a decision of the Subordinate Judge of Mymensingh modifying a decision of the Munsif of the Second Court of Netrokona. The suit out of which this appeal arises was brought by the plaintiff against 41 defendants for *khas* possession of certain disputed land by demolition of the huts alleged to have been wrongfully erected on the land by these defendants. Forty of defendants did not appear in the suit and it was only contested by the present appellant, defendant No. 1.

The Munsif decreed the plaintiff's suit as to two-thirds of the land in dispute but as to one-third of the land he found that it formed part of a *chak* of defendant No. 1, and accordingly, he passed a decree in favour of the plaintiff for joint possession with the defendants of two-thirds of the land in suit. Defendant No. 1 preferred an appeal against the decision of the learned Munsif. In this appeal, the only respondent was the plaintiff and the other 40 defendants were not brought on the record in the appeal. The plaintiff filed a cross objection against that portion of the Munsif's judgment which failed to give him possession of one-third of the disputed land. The other 40 defendants were not made parties to the cross-objection. In the result, the lower Appellate Court upheld the Munsif's decision with regard to the two-thirds and altered his decision with regard to the one-third holding that it was not part of the defendant's *chak* and the whole suit was decreed in full in favour of the plaintiff.

Various matters have been urged before us by the appellant in this appeal. *First* of all, it is said that the decision of the Munsif dismissing the plaintiff's claim as to one-third of the land could not have been reversed in appeal on the plaintiff's cross-objection as the other 40 defendants were not parties thereto.

Secondly, it was urged that no decree could have been passed in respect of one-third share if there had been an independent appeal by the plaintiff against the Munsif's decision on this point as in such an appeal the plaintiff must have brought on the record the 40 defendants who did not appear in the suit.

Thirdly, it is said upon certain facts which I shall presently state that the suit is not maintainable by the plaintiff as his tenancy in the land has expired and lastly the decision of the lower Appellate Court with regard to the one third share in the land in dispute is attacked on its merits it being said that the Munsif's decision was right, namely, that this one-third formed part of the *chak* of defendant No. 1 and it is said that the lower Appellate Court has wrongly held that this one-third did not form part of the *chak* of defendant No. 1 and that the learned Judge has arrived at his decision by an error which he has made in thinking that the whole of this *chak* fell within

Mouzah Khalia Kanda whereas it is asserted that the *chak* was situate not only in *Mouzah* Khalia Kanda but in other adjoining *mouzahs*. In our opinion, it is not necessary to consider the first two and last points which are raised in appeal for, we think, that the appeal must succeed on the third ground to which I have referred and it is now necessary in connexion therewith to state certain facts.

The plaintiff's title arose under a lease dated the 15th March 1917 whereby he obtained from some Lahiris a lease for 3 years expiring on the 14th January 1920 of 1-anna 2 *gandas* share which fell to the Lahiris as their interest in the *zemindary*. The lessor of the plaintiff was also an *ijaradar* whose interest extended to the remaining 12 annas 3 *gandas* share in the *zemindari*. The *ijara*, we are told, expired on the 17th September 1920, and as I have already stated the 3 years' lease which the plaintiff had claimed in the land in suit expired on the 14th January 1920, on the 18th September 1919, the plaintiff, it is alleged, was dispossessed by the defendants and this suit was brought on the 15th April, 1920. From these dates, it appears, that at the time the plaintiff's suit was commenced his tenancy had expired and, moreover, the *ijara* expired, as I have already stated, on the 17th September 1919 one day before the plaintiff's alleged dispossession. The plaintiff, however, alleges that, notwithstanding the fact, that his lease expired on the 14th January 1920 he is entitled to bring and maintain the suit on the ground that he was recognized as tenant by the landlords of the land in dispute and it is suggested that though the lease has expired the plaintiff may be treated as holding over with regard to land with the assent of the *zemindars* and that he has paid rent to them in respect of the land. This argument seems to me entirely wrong; the essence of a title of this kind is that the tenant holding over after the expiry of the term must be both in possession of the land and paying rent to the landlord for the land in order that any such tenancy may be created or may exist. We have no such thing here, as I have already stated, dispossession took place on the 18th September 1919 during the continuance of the lease. So even if the argument as to the possession and of the holding over of the land be correct, which I think it is not, it would not apply here as at the time the suit was brought the lease had expired and the plaintiff was out of possession.

In the circumstances, in our opinion, the plaintiff cannot maintain the suit and the suit should have been dismissed on this ground. As I have already stated, in this view, it is not necessary to deal with other contentions that have been raised by the appellant in the case.

In the result, the appeal succeeds and the appellant will be entitled to his costs in all Courts. This judgment will govern the other four analogous cases.

B. B. Ghose, J.—I agree.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 765 OF 1923.

August 18, 1925.

Present:—Mr. Justice Jackson.

PARASURAMA MUDALIAR—PLAINTIFF—PETITIONER

versus

MUTHUSWAMY PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 1—Reference to arbitration—*Ex parte *defendant not party to reference—Award, validity of—Revision.*

To constitute a valid reference to arbitration under para. 1 of Sch. II to the C. P. C. all the parties interested in the suit whether *ex parte* or otherwise must agree that the matters in difference between them should be referred to arbitration. [p. 314, col. 1.]

Polita Pavana Panda v. *Narasinga Panda*, 51 Ind. Cas. 155; 42 M. 632; 36 M. L. J. 538, relied on.

Where a Court refers a case to arbitration without the consent of some of the parties interested in the suit who are *ex parte*, it exercises a jurisdiction not vested in it by law and no decree ought to be passed in terms of the award made by the arbitrator on such a reference. A decree so passed is liable to be set aside in revision by the High Court under s. 115 of the C. P. C. [p. 314, col. 2.]

Petition, under s. 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the District Munsif, Tirukoilur, in O. S. No. 37 of 1922, dated the 10th January 1923.

Mr. *Bhashyam Iyengar*, for the Petitioner.

Messrs. *A. Venkatarayaliah*, *L. Venkatanarasiah*, *S. Rajagopalachariar* and *V. C. Veeraraghavachariar*, for the Respondent.

JUDGMENT.—The petitioner seeks to revise the award decreed by the District Munsif of Tirukoilur in O. S. No. 37 of 1922 on the ground that he was a party

interested and never signified his agreement that the matter should be referred to arbitration. It is not disputed that the petitioner never agreed. He was *ex parte* in the suit and only those who put in an appearance signed in token of their consent. Nor can it be said that, by remaining *ex parte* he waived his right to be consulted in the matter. There is some conflict of judicial opinion on this point, the Calcutta High Court holding that even though he be *ex parte*, the party interested must be consulted and the Allahabad High Court holding the contrary view, *Girijanath Roy Chowdhury* v. *Kannai Lal Mitra* (1) and *Ajodhya Prasad* v. *Badar-ul-Husain* (2). The ruling case in this Court is *Polita Pavana Panda* v. *Narasinga Panda* (3) to which I refer.

It remains to consider whether the petitioner was a party interested. He was impleaded by plaintiff as one of his vendors. That is to say, he had covenanted to convey a title to the plaintiff and was interested in the plaintiff's suit to establish that title, for otherwise he might be sued for damages. It cannot be argued that no question of damages could arise because the purchaser knew that there were disputes about the title. The plaintiff has freely admitted before the arbitrators that he knew of these disputes and objected but was assured that he would be given documents to prove that the property was the vendor's by ancestral right. That, in these circumstances, the vendee still has a claim against the vendor is laid down in *Vellayappa Rowthen* v. *Bava Rowthen* (4) by a Bench of this Court.

So it may be taken on the facts that in the present suit all the parties interested did not agree that the matter in difference between them should be referred to arbitration.

It was next argued that even in such circumstances, this Court should not interfere by way of revision. The case already referred to *Polita Pavana Panda* v. *Narasinga Panda* (3) is sufficient authority that such interference is justifiable. *Vellayappa Rowthen* v. *Bawa Rowthen* (4) is sometimes quoted as if a Court acting under the Second Schedule of the Code was entirely immune from revisional proceedings. But if a Judge refers a case to arbitration, without the consent of the parties interested, he is exercising a jurisdiction not vested in him by law as is made clear in this very ruling; that is one of the contingencies for which the Judicial Committee contemplated the possibility of revision.

Lastly, it was suggested that the petitioner is colluding with the plaintiff and only remained *ex parte* in order to upset the award, should occasion arise. There is no evidence of collusion and if this were the plot, the respondents should have taken care to defeat it by discovering at the outset if the petitioner meant to withhold his consent.

Accordingly, the petition is allowed and the decree is reversed. The suit must proceed to trial, costs to be part of the costs of the suit.

V. N. V. *Petition allowed.*

(1) 43 Ind. Cas. 169; 27 C. L. J. 339.
(2) 41 Ind. Cas. 357; 39 A. 489; 15 A. L. J. 427.
(3) 51 Ind. Cas. 155; 42 M. 632; 36 M. L. J. 538.
(4) 29 Ind. Cas. 747.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 623 OF 1923.

July 30, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Madgavkar.

GIRIAPPA SUBANNA—DEFENDANT—APPELLANT

versus

GOVINDRAO GANRAO—PLAINTIFF RESPONDENT.

Bombay Land Revenue Code (Act V of 1879), s. 83—Landlord and tenant—Permanent tenancy—Enhancement of rent—Burden of proof.

Under s. 83 of the Bombay Land Revenue Code if a tenant proves that he has fixity of tenure, then he is entitled to fixity of rent, unless the landlord can prove either by agreement, usage or otherwise that he has a right to enhance the rent. If he proves such a right, the question of the extent of the enhancement must be left to the Court as the final arbiter. [p. 315, col. 1.]

Second appeal from the decision of the Assistant Judge, Bijapur, in Appeal No. 122 of 1921, varying that of the Subordinate Judge at Bagalkot, in Civil Suit No. 276 of 1920.

Mr. *R. A. Jahagirdar*, for the Appellant.

Mr. *Bahadurji*, (with him Mr. *H. B. Gumaste*,) for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff sued to recover from the defendant possession of the

plaint land together with Rs. 19-10-0 as arrears of rent. The defendant pleaded that he was a permanent tenant, and not a yearly tenant, and that the plaintiff had no right to enhance the rent. The Trial Judge found that the defendant was a permanent tenant. He was entitled to the presumption under the 2nd paragraph of s. 83 of the Land Revenue Code.

Then the question arose as to the landlord's right to enhance.

The Subordinate Judge relying on a passage of Dandekar's Law of Land Tenures, held that he was entitled to fix a reasonable enhancement, which he declared to Rs. 100 a year.

On appeal the Assistant Judge remanded the case to the lower Court for findings on two issues: (1) Whether the plaintiff proved that there existed no usage or custom in the locality in respect of the enhancement of the rent of the land of the like description and tenure as the land in suit. (2) If not having regard to any such usage or custom as aforesaid to what extent would an enhancement of rent be made.

It seems to me that, apart from the frame of those issues which does not err on the side of lucidity, the Assistant Judge had fallen into the same mistake as the Subordinate Judge with regard to the proper meaning of the last paragraph of s. 83 of the Land Revenue Code. He seemed to think that an agreement or usage with regard to enhancement of rent must be proved not in respect of the right to enhance but in respect of the exact percentage of increase or number of times by which the assessment could be enhanced, and if no such usage could be proved, he assumed that there was a right inherent in the *inamdar* to increase the rent, and that the only question for the Judge to decide was what was a reasonable enhancement. That is not the proper construction to be placed on the last paragraph of s. 83. If a tenant proves that he has fixity of tenure, then he is entitled to fixity of rent, unless the landlord can prove either by agreement, usage or otherwise that he has a right to enhance the rent. When it has been proved that he has such a right, then the question of the extent of the enhancement must be left to the Court as the final arbiter. In districts where the usage exists it is common knowledge that *inamdars* get what they can from their tenants and there is no fixed rate of enhancement. In any event the evidence in the case amply bears out that statement. I take it from the evidence led before the Subordinate Judge on remand that it was proved that the usage or custom to enhance existed in this district, but the measure of enhancement was not fixed, it varied very largely. It was, therefore, for the Court to decide what should be a reasonable enhancement of the original rent. The Appellate Court thought that five times the assessment should be paid by the tenant. We have had a number of these cases from Satara, and I do not know of any case in which the Court has allowed a higher rent than three times the assessment, unless it had been proved that a very much higher rate of enhancement was customary in the district. In this case the evidence is by no means decisive with regard to the number of times of the assessment by which rent has been enhanced. Witness Gurunath Venkatesh Kulkarni of Rampur in his cross-examination cited an instance in which the rent was raised from Rs. 1-8-0 to as much as Rs. 15, but the *inamdar* said he took as rent twice or thrice the assessment. From the *khatas* produced by the Kulkarni of Simikeri the same rate appeared to be a generous average. In the village of Ganjihal belonging to another *inamdar* four times the assessment was the highest rate of enhancement. It is not apparent, therefore, why on a consideration of the evidence the Judge enhanced the rent to five times the assessment.

I think, therefore, that the rent in the case should not be increased to more than three times the assessment. To that extent the decree of the lower Appellate Court will be amended. The appellant is entitled to his costs of the suit throughout as the plaintiff sued for possession.

Madgavkar, J.—I entirely agree. The view of both the lower Courts based on a quotation from Mr. Dandekar's Law of Land Tenures was apparently that the onus was on the tenant to prove the extent of limitation of the right of enhancement. As I understand the section, once the permanent tenancy is proved the concluding clause of s. 83 of the Land Revenue Code clearly places the onus on the landlord of proving his right to enhance the rent In the present case he has tried to prove the right by usage in the case of other *inam* villages and other permanent tenants in the same village. I, therefore, concur in the order proposed by my Lord the Chief Justice.

Z. K. *Decree amended.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1500 OF 1922.

April 23, 1925.

Present:—Mr. Justice Phillips.

MARATH VEETIL KALLIANI AMMA AND OTHERS—DEFENDANTS NOS. 1 TO 8—APPELLANTS

versus

COCHIN SIRCAR, REPRESENTED BY ITS *Dewan Rao Bahadur* P. NARAYANA MENON AVERGAL AND OTHERS—PLAINTIFFS AND DEFENDANT NO. 9—RESPONDENTS.

Malabar Law—Anubhavam *grant, nature of*—Anubhavam, *meaning of*—*Construction of deed*—*Subsequent conduct of parties, relevancy of.*

In Malabar the word '*anubhavam*' may be used with reference to tenure of land, and it will then *prima facie* import an irredeemable tenure, or it may be used with reference to specific money or grain rent charged on the land, and in that case it will not imply any tenure in favour of the grantee. [p. 316, col. 2.]

Vythilingam Pillai v. *Kuthiravattah Nair*, 29 M. 501; 16 M. L. J. 358; 1 M. L. T. 290, *Mana Vikrama* v. *Karnavan Gopalan Nair*, 30 M. 203, *Puthur Tarwad Karnavan* v. *Muthigallur Kumaran Rarichan*, 43 Ind. Cas. 379, followed.

Where the remuneration mentioned in an *anubhavam* deed is a definite quantity of grain out of the produce of the lands, a strong presumption arises that only a rent charge was granted. [*ibid.*]

Although the circumstances attending the execution of a document may be looked at to construe its contents in order to ascertain the intention of the parties at the time, subsequent assertions by the parties with reference to that document cannot affect its meaning. [p. 317, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, South Malabar, at Palghat, in A. S. No. 140 of 1920 (A. S. No. 549 of 1920, on the file of the District Court, South Malabar), preferred against the decree of the Court of Additional District Munsif, Palghat, in O. S. No. 376 of 1919, (O. S. No. 435 of 1918 on the file of the Principal District Munsif, Palghat).

Mr. *K. Krishna Menon*, for the Appellants.

Messrs. *C. V. Ananthakrishna Aiyar* and *C. V. Mahadeva Aiyar*, for the Respondents.

JUDGMENT.—The question at issue in this appeal is whether the demise evidence by Ex. VII creates a perpetual or irredeemable tenure of the land. Both the lower Courts have found that it does not do so, but it is contended that although the lower Appellate Court has applied the principles laid down in decisions of this Court, it has failed to have regard to any other circumstances in the case. The relevant portion of the document is as follows:—

"The *pattam* being one hundred and twenty *paras* of paddy, out of the *pattam* of 120 *paras* of paddy, deducting 60 *paras* allotted for *anubhavam* and deducting 30 *paras* for assessment out of the remaining 60 *paras*, the balance payable yearly is 30 *paras* of paddy."

The document is not described as an *anubhavam* deed, nor is there any mention of *anubhavam* tenure. In construing these documents the law has been laid down in *Vythilingam Pillai* v. *Kuthiravattah Nair* (1) as follows:—

"The point to be borne in mind with regard to '*anubhavam*' is that it may be used with reference to tenure of land, and it will then *prima facie* import an irredeemable tenure, or it may be used with reference to a specific money or grain rent charged on the land and in that case it will not imply any tenure in favour of the grantee."

That case has been followed in *Mana Vikrama* v. *Karnavan Gopalan Nair* (2) and *Puthur Tarwad Karnavan* v. *Muthiyallur Kumaran Rarichan* (3). In this last case it was held that where the remuneration mentioned in the deed is a definite quantity of grain out of the produce of the lands, a strong presumption arises that only a rent charge was granted. In this case, therefore, where the *anubhavam* is recited as relating solely to the amount of 60 *paras* of the produce there is a strong presumption that only 60 *paras* is of the permanent nature. It is suggested that the last recital in the document "you should pay also one *fanam* per year as *adimakazhicha*" shows that it is a permanent tenure of land. The rent fixed for the land is 30 *paras* of paddy and this one *fanam* per year as *adimakazhicha* must be something else, and I think that it could only refer to the nominal payment fixed in respect of the *anubhavam* of 60 *paras*, otherwise, there would really be no meaning in this last clause. The final question that remains is, whether this very strong presumption has been rebutted by the appellant. It is contended that the subsequent conduct of the parties forms very strong evidence as to the meaning of the document. I am unable to go so far as

(1) 29 M. 501; 16 M. L. J. 358; 1 M. L. T. 290.
(2) 30 M. 203.
(3) 43 Ind. Cas. 379.

this. Although the circumstances attending the execution of a document may be looked at to construe the contents of the document in order to ascertain the intention of the parties at the time, subsequent assertions by one of the parties with reference to that document cannot affect its meaning. Had there been agreement between the parties during a long series of acts which could only be explained by regarding the document as an irredeemable tenure, there might be some force in the contention, but here it appears that the landlord always maintained that the lease was to be renewed. The fact that the tenants set up a permanent right cannot affect the meaning of the document. I may add that the Subordinate Judge has dealt with this evidence and it is a question of fact whether such evidence is sufficient to rebut the original presumption, and, therefore, the finding should not be interfered with necessarily in second appeal. The lower Appellate Court has adopted the right principles of law in construing the document, and I think its decision is correct.

A further point is taken that the notice to quit was insufficient. Both the lower Courts have found that it was sufficient, and apart from that, it is found that the tenant denied his landlord's title, when he was asked to take a renewal. In the face of that, no further notice would be necessary.

The second appeal accordingly fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST EXECUTION OF DECREE APPEALS NOS. 54 AND 55 OF 1925.

October 20, 1925.

Present:—Mr. Ashworth, A. J. C., and Mr. Neave, A. J. C.

PIRTHIPAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BHASKOR AND OTHERS—DEFENDANTS AND MUKESHAR NATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 14 (3)—Partition suit—Commissioner appointed to make partition—Report, order varying—Appeal, whether lies.

No appeal lies against an order by a Court passed under O. XXVI, r. 14 (3), C. P. C., confirming or varying the report of a Commissioner appointed to make a partition.

Dulhin Golab Koer v. *Radha Dulari Koer*, 19 C. 463; 9 Ind. Dec. (N. S.) 753, referred to.

Execution appeal from an order of the Subordinate Judge, Gonda, dated the 14th August 1925.

Mr. *S. M. Ahmad* (for Mr. *Mohd. Siddique*) and Mr. *L. S. Missra*, for the Respondents.

JUDGMENT.—These purport to be appeals from orders passed in a partition case. The Court had given a preliminary decree declaring the rights of the parties in the property to be partitioned. It had then appointed a Commissioner for apportioning the property in accordance with the preliminary decree. The Commissioner made recommendations as to the property to be apportioned to each party. The parties objected to his proposals and the Court has accepted or varied these proposals. These appeals are from the order of the Court doing so.

The appeals were admitted by a Single Judge of this Court, but we are of opinion that it was by some oversight No appeal will lie against an order by a Court confirming or varying a report of a Commissioner to make a partition passed under O. XXVI, r. 14 (3). Order XLIII r. 1 provides from what orders an appeal shall lie and orders under O. XXVI, r. 14 (3) find no place there. The ruling in *Dulhin Golab Koer* v. *Radha Dulari Koer* (1) has been cited to us in support of a right to appeal. That ruling merely decides that there should be a right of appeal against a preliminary decree in a partition case. It does not decide that there can be an appeal on a Court's decision regarding the apportionment made by a Commissioner in pursuance of the preliminary decree. To allow an appeal in such a case would be tantamount to allowing an appeal against a judgment instead of against the decree based on a judgment. For these reasons we dismiss these appeals with costs.

Z. K. *Appeals dismissed.*

(1) 19 C. 463; 9 Ind. Dec. (N. S.) 753.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 223 OF 1923.

July 31, 1925.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Madgavkar.

GANGARAM HARI TELI AND OTHERS —DEFENDANTS—APPELLANTS

versus

GANESH PANDURANG GHANEKAR—PLAINTIFF—RESPONDENT.

Bombay Land Revenue Code (Act V of 1879), s. 83—Permanent tenant—Enhancement of rent—Fruit trees, rent, whether can be charged for.

A tenant who is allowed fixity of tenure under s. 83 of the Bombay Land Revenue Code cannot be regarded as a tenant to be rack-rented. [p. 319, col. 1.]

Where a permanent tenant improves his land by growing fruit trees thereon, the assessment on the land will be increased, and consequently the landlord's rent will be increased. But the landlord cannot get rent based on the assessment and in addition rent for the fruit trees also. [*ibid.*]

Second appeal from the decision of the District Judge, at Ratnagiri, in Appeal No. 144 of 1921, confirming that of the First Class Subordinate Judge, at Ratnagiri, in Civil Suit No. 125 of 1920.

Mr. *G. S. Rao*, for the Appellant.

Mr. *P. B. Shingne*, for Respondents Nos. 1 and 2.

JUDGMENT.—The plaintiffs sued to recover possession of the plaint lands and to recover costs and rents for three years before suit 1917-18 to 1919-20. They claimed that the defendants were annual tenants, the tenancy being duly terminated on March 31, 1920, by a notice sent on 24th December 1919. The rent claimed amounted to half the profits for rice lands, for grass lands, and for fruit bearing trees, and one-third profits for *warkas* lands, this being alleged to be the practice for Dharekari villages like the plaint one. The case comes from Ratnagiri, but plaintiff is not a *khot* but an ordinary landlord.

The Trial Court held that the defendants were perpetual tenants, and that plaintiffs were entitled to enhance to a reasonable extent, and that reasonable enhancement was four times the assessment for two years in suit, and for the others in which there was famine, only twice assessment was decreed.

But in addition to the decree for enhancement at four times the assessment, the Judge also decreed to the plaintiffs rent for fruit trees which were grown by the tenants on the land, and with regard to one jack-tree in Thikan Gayal, he held that the defendants were only annual tenants.

The defendants appealed. The only variation in the decree which the Appellate Judge made was in the order of costs. The Trial Judge had directed the defendants to pay plaintiffs costs and to the extent of half the costs of Pleader's fee and plaint Court-fee, whereas the Appellate Judge directed that parties should bear their own costs in the suit and in the appeal.

It would appear from the evidence that in this village there has been a constant conflict between the plaintiffs and their tenants. The plaintiffs have not admitted that the tenants had any right to any fixity of tenure. In some cases suits were filed and the rights of the parties were declared, and the rate of enhancement fixed by the Court or by compromise. It is difficult to gather from the judgment of the Appellate Judge what in these particular cases he considered would be a reasonable enhancement. It is quite true that that judgment only related to the suit years, thus leaving it open to the plaintiffs at the end of the period to again claim enhanced rent at any number of times the assessment which they might be pleased to fix themselves. But the Appellate Judge thought $3\frac{1}{3}$ times the assessment, which was the average for three suit years as fixed by the Trial Judge, would be a fair rate for enhancement. As a matter of fact the Trial Judge thought four times was a fair rate. It was only because the crops were poor in 1918-19, that a lower rate was fixed for that year. It is not a fact then that the Judge in the Trial Court considered that $3\frac{1}{3}$ times the assessment was a fair rate for enhancement. And it would appear from the words in the judgment of the lower Appellate Court "After all the margin between $3\frac{1}{3}$ and 3 times the assessment is very narrow" that he did not desire to interfere with the judgment of the Trial Court because the difference was so small only one-third of the assessment. As I pointed out in the argument one thing is perfectly certain that if this judgment stands, the plaintiffs will certainly contend that it was decided by the Courts that four times the assessment was a reasonable rate for enhancement.

It has been urged before us that what is a reasonable rate is question of fact. But even if one looks at the question from that point of view, I am by no means clear that the District Judge did not think that three times the assessment was a reasonable rate. Considering that error, as I have just point-

ed out, in the reasoning of the judgment of the lower Appellate Court, I do not think that plaintiffs should recover from the tenants for the suit years, or in any one year, more than three times the assessment. It must be remembered that these defendants and other tenants have been in occupation according to the evidence, of their lands for so long that the origin of their tenure cannot be ascertained. For that reason they have been allowed fixity of tenure, and for that reason also, I am of opinion they are not to be considered as tenants to be rack-rented. But in addition to the rent of the land the Judge had allowed rent for fruit trees. He admits that these trees have in most cases been planted within thirty years last, and no usage with regard to charging rent for them has grown up, there being disputes practically since they began to bear fruit. Now, if a tenant improves his land by growing fruit trees the assessment will be increased, and consequently the landlord's rent will be increased. But the landlord cannot also get rent based on the assessment and in addition rent for the fruit trees. For that there can be no possible warrant. Then as regards the jack tree, we cannot agree with the decision of the Court below. The Appellate Judge says: "It is different however with regard to the jack-tree. Exhibit 8 in appeal No. 156 of 1921 deposes 'I had taken on rent one jack-tree in Thikan Gayal, cannot say from whom.' It is clear that if he had taken it from a permanent tenant he would have said so." There is no reason why any exception should be made with regard to the one particular jack-tree, which will come within our decision that the tenants are not liable to pay additional rent for the fruit trees.

The result will be that the plaintiffs are given a decree for rent at twice the assessment for 1918-19 and three times the assessment for the other years, and as plaintiffs have claimed that defendants were annual tenants, and sought to recover possession and on that question have lost, they will have to pay the costs of the suit throughout. The same decision will govern the other companion appeals, except S. A. No. 226 in which the decree of the lower Court is confirmed with regard to plot B and the land called 'Dehan Mala,' held to belong to the plaintiffs.

The cross-objections are dismissed with costs.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1642 OF 1922.

April 24, 1925.

Present:—Mr. Justice Devadoss.

NALAKAKKAN AMBALAM—PLAINTIFF—APPELLANT

versus

Sri KALLALAGAR DEVASTHANAM THRGUGH ITS MANAGER R. KRISHNASWAMI IYENGAR—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 46 (5)—Devasthanam—*Person improperly appointed manager whether landholder—Occupancy rights, grant of, validity of.*

Where there is a proper manager or trustee of a *devasthanam*, a person who is appointed improperly in his place cannot be treated as the real trustee and allowed to validly represent the *devasthanam*. A person so appointed is not a landholder who is the owner of the estate for the purposes of s. 46 (5) of the Madras Estates Land Act and a grant by him of occupancy rights in non-*ryoti* land belonging to the *devasthanam* is not valid and does not bind the institution. [p. 320, col. 1.]

Second appeal against the decree of the District Court, Madura, in A. S. No. 146 of 1921, preferred against that of the Court of the Deputy Collector, Melur Division, in Summary Suit No. 14 of 1920.

Mr. *Ramasami Iyer*, for the Appellant.

JUDGMENT.—The first point urged in this second appeal is that the District Judge was not justified in finding that the land in dispute was old waste on the ground that the defendant *devasthanam* did not raise the question specifically in the written statement. No doubt the written statement does not raise the question, but there is evidence on record to justify the finding of the learned District Judge and this being a question of fact, I am bound by that finding. Even though the point was not specifically raised in the written statement, in the pleading or in issues, yet both the parties seem to have adduced evidence as regards that and the matter was evidentially argued before the learned Judge and he came to the conclusion that the land was old waste. That being so, I do not think the plaintiff has been prejudiced by the finding of the Judge.

The next point urged by Mr. Ramasami Iyer is that the plaintiff acquired occupancy right by reason of s. 46 of the Estates Land Act. His contention is that one Sundararama Sastri was the trustee at the time and he took a *nazzar* of Rs. 175 and granted the land to the plaintiff with occupancy right. There is nothing specific in the evidence to show that Sundararama Sastri gave occupancy right. Granting for the

sake of argument that he did intend to give occupancy right to the plaintiff, the question is whether he had the right to dispose of the *devasthanam* land in a manner prejudicial to the interests of the *devasthanam*. Sundararama Sastri happened to be the acting manager on account of the suspension of the manager one Ananthakrishna Naidu. Ananthakrishna Naidu filed a suit contesting the validity of the suspension order and the suspension of Ananthakrishna Naidu was held to be illegal by the Civil Courts. During the pendency of the proceedings in the Civil Court Sundararama Sastri placed the plaintiff in possession of the plaint land. That he received a *nazzar* is not seriously disputed though the defendant does not admit that proper *pattahs* were tendered to the plaintiff. But the real question is whether Sundararama Sastri had the right to grant occupancy right over the *devasthanam* lands in favour of the plaintiff. Under s. 46 the landlord could confer occupancy right in respect of non-*ryoti* land on receiving $2\frac{1}{2}$ times the rent. But cl. (5) of s. 46 says "The sums payable under this section for the acquisition of the occupancy right shall be paid to the landholder who is the owner of the estate or part thereof, and any application or proceeding under this section shall be made only to or against such landholder." Though the term landholder may for certain purposes include Sundararama Sastri who was collecting the rents and who was recognized by the Collector and the Board, yet in order to enable the *ryot* to get occupancy right under s. 46 the act must be the act of the landholder who is also the owner of the estate. Under the definition of the term "landholder" one need not be the owner of the estate in order to be the landholder, for a person authorised to collect rents of the whole or portion of the estate by virtue of any transfer from the owner is landholder within the meaning of the term landholder used in s. 3. But there are certain things which can be done only by the landholder who is also the owner. Section 200 is an example of this. I, therefore, hold that though Sundararama Sastri was landholder for certain purposes he was not the owner of the estate and he could not, therefore, have given occupancy right to the plaintiff. The argument of Mr. Ramasami Iyer is that somebody must represent the *devasthanam* and, therefore, he must be taken to be the owner. This contention overlooks the fact that Sundararama Sastri could not properly represent the *devasthanam* as its manager for the time being, as the suspension of Ananthakrishna Naidu was held to be invalid by the Civil Courts. When there is the proper manager or trustee, a person who is appointed improperly in his place cannot be the real trustee and cannot represent the estate. That being so, the act of Sundararama Sastri in favour of the plaintiff could not confer any right as against the *devasthanam*. In the result the appeal is dismissed with costs.

V. N. V.
Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 2056 OF 1923.

May 1, 1925.

Present :—Mr. Justice Page.

RAMJOO MAHOMED—PLAINTIFF

versus

HARIDAS MULLICK AND OTHERS—DEFENDANTS.

Registration Act (XVI of 1908), ss. 2 (7), 17 (1) (d), (2) (v), 49—Evidence Act (I of 1872), s. 91—Construction of document—Agreement to lease premises—Present demise—Intention of parties—Registration, whether necessary—Unregistered agreement, admissibility of—Oral evidence, whether can be adduced.

In order to come within the purview of s. 17 (2) (v) of the Registration Act an agreement must at least be one under which the parties have agreed upon the terms which are to be included in the formal document by which, if and when it is executed, a transfer of an interest in the property will be effected. Otherwise the agreement will amount merely to a contract to enter into a contract as to the terms of which latter contract the parties are not already agreed, and such an agreement is not known to the law and is not recognized by it. [p. 324, col. 1]

Although under an agreement to demise the term of the lease is to commence at a future date or a formal document is to be subsequently executed between the parties, it does not necessarily follow that the agreement will not operate as a present demise of the premises. Whether an agreement amounts to a present demise or not depends upon the intention of the parties which is to be gathered from the language in which the agreement is couched. [p 324, col. 2; p. 325, col. 1.]

The plaintiff sent the following letter to the defendant :—"I do hereby agree to take by our personal settlement your house and premises No. 7, Bowbazar Street on a lease for 21 years under following terms :—

(1) Four thousand rupees *salami*.

(2) Rent Rs. 400 per month.

(3) Both taxes, owner and occupier, should be paid by me.

(4) Thorough repair will be done every five years.

(5) The period of lease will be settled from 1st of December 1921." To this the defendant replied that he confirmed the plaintiff's letter and that all terms would be settled on the agreement. Neither of the letters was registered. Subsequently the defendant sold the premises to other persons and the latter served a notice on the plaintiff to vacate the premises. Plaintiff thereupon brought a suit for specific performance of the agreement to lease the premises to him contained in the two letters:

Held, (1) that the agreement contained in the letters amounted to a present demise of the premises and created an immediate interest therein and that the letters being unregistered were inadmissible in evidence by reason of the provisions of s. 49 of the Registration Act; [p. 325, col. 2.]

(2) that oral evidence of the terms of the agreement was barred by the provisions of s. 91 of the Evidence Act; [p. 326, col. 1.]

(3) that the letters could not be admitted in evidence even for the purpose of proving the terms of the agreement in order to enable the plaintiff to claim specific performance of the agreement. [p. 329, col. 2.]

[Case-law referred to.]

Messrs. *C. Bagram*, *S. R. Das (Jr.)* and *Nagendra Nath Bose*, for the Plaintiff.

Messrs. *H. D. Bose M. N. Kunjilal*, *B. C. Ghose* and Dr. *B. Roy Chowdhury*, for the Defendants.

JUDGMENT.—In this suit the plaintiff claims specific performance of an alleged agreement to lease certain premises known as No 7, Bowbazar Street, Calcutta, and, in the alternative, damages for breach of the said agreement.

It appears from the evidence that on the 19th November 1921 an interview took place between the plaintiff and the first defendant, who was then the owner of the said premises, as the result of which the terms of the alleged agreement to lease the said premises were embodied in the following two letters:

Calcutta, 19-11-1921,
No. 7 Bowbazar Street.

Babu Haridas Mullick, of 46, Hidaram Banerji Lane.

Dear Sir,

I do hereby agree to take by our personal settlement your house and premises No. 7, Bowbazar Street on a lease for 21 years under following terms:—

(1) Four thousand rupees *salami*.
(2) Rent Rs. 400 per month.
(3) Both taxes, owner and occupier, should be paid by me.
(4) Thorough repair will be done every five years.
(5) The period of lease will be settled from 1st of December 1921.

(Sd.) Ramjoo Mahomed.

Calcutta 19-11-1921,
46, Hidaram Banerji's Lane.

To Ramjoo Mahomed, Esq.,
No. 7, Bowbazar Street.

Dear Sir,

I do confirm your letter dated 19th November 1921. All terms will be settled on the agreement.

Yours faithfully,
(Sd.) Haridas Mullick.

At all material times both before and after the execution of these two letters, the plaintiff was in possession of the said premises. Neither of the letters of the 19th November 1921 was registered pursuant to the provisions of the Registration Act (XVI of 1908). On the 2nd March 1923 the first defendant sold the said premises to the other defendants whom I will call the Nan defendants, and on the 23rd April 1923, the Nan defendants served a notice on the plaintiff to quit the premises at the end of May 1923.

The defendants, *inter alia*, pleaded that the said letters did not amount to a concluded agreement to lease the said premises, but, in the events that have happened, I have not heard the defendant's evidence on that issue. In the course of the trial the two letters of 19th November 1921 were tendered in evidence on behalf of the plaintiff. Counsel for the defendants thereupon contended that if the said letters did not amount to a concluded agreement for a lease the plaintiff's claim must fail; on the other hand, if the letters were tendered as documents embodying the terms of a concluded agreement to let the said premises for a term of 21 years as alleged, they contended that the said letters, not having been registered, were inadmissible under s. 2 (7), 17 and 49 of the Registration Act.

"Section 2 (7)—'Lease' includes a counterpart, *kabuliyat*, and undertaking to cultivate or occupy, and an agreement to lease."

"Section 17 (1)—The following documents shall be registered.....

(*b*) other non-testimentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of Rs. 100 and upwards, to or in immoveable property,

(*d*) Leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent."

"Section 49.—No document required by s. 17 to be registered shall (*a*) affect any immoveable property comprised therein, or (*b*) confer any power to adopt, or (*c*) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."

Counsel for the plaintiff urged that the said documents were admissible on the following grounds:—

(*i*) That the agreement contained therein did not amount to a present demise of the said premises, or create an immediate interest therein, but merely created a right to obtain a formal lease, and was within the exception set out in s. 17 (2) (v):

(*ii*) That the documents in question were evidence of an agreement which was capable of being specifically performed to which the doctrine laid down in *Walsh* v. *Lonsdale* (1) applied:

(*iii*) That they were not adduced as evidence of any transaction affecting immoveable property, but as evidence of a personal obligation by the first defendant to execute a lease for the breach of which the plaintiff was entitled to damages.

In support of his first contention Counsel for the plaintiff relied upon the decisions in *Panchanan Basu* v. *Chandi Charan Misra* (2) and *Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (3). In *Panchanan Basu's case* (2) Jenkins, C. J., stated:—

"In my opinion, the *solehnama* here does not amount to a lease within the meaning of cl. (*d*) of s. 17 of the Registration Act. On a fair reading of the document, I think that no immediate interest was created, there was no present demise, and the document was merely an agreement to create a lease on a future day, the terms of which were to be defined by documents to be thereafter executed. The case, therefore, seems to me to fall within cl. (*h*) of s. 17 of the Registration Act."

In *Hemanta Kumari's case* (3) Lord Buckmaster observed:—

"The Registration Act of 1908 provides that 'lease' includes an agreement to lease, and by s. 17 enacts that leases must be registered, the penalty for non-registration being imposed by s. 49, which provides that, if not registered, no document shall affect immoveable property which it comprises or be received as evidence of any transaction affecting such property. If the document in question can be regarded as a lease within the meaning of this definition it could not be received in evidence. Their Lordships are of opinion that it cannot be so regarded. An 'agreement for a lease', which a lease is by the Statute declared to include, must, in their Lordships' opinion, be a document which effects an actual demise and operates as a lease.....Until the happening of that event it was impossible to determine whether there would be any lease or not. Such an agreement does not, in their Lordships' opinion, satisfy the meaning of the phrase 'agreement for a lease', which, in the context where it occurs and in the Statute in which it is found, must in their opinion relate to some document that creates a present and immediate interest in the land."

It becomes necessary for the Court, therefore, to determine the meaning of the term "present demise." It is well-settled that whether an agreement amounts to a present demise or not depends upon the intention of the parties which is to be gathered from the language in which the agreement is couched. "The single question is, what was the intention of the parties using those expressions? Was it, that this agreement should confer the legal interest; or was it not in their contemplation that there should be another instrument to give that legal interest?" [Per Lord Kenyon, C. J., in *Doe* v. *Ashburner* (4)]. And "if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties" [Per Tindal, C. J., in *Doe d. Pearson* v. *Ries* (5).]

Now, the term "present demise" or "actual demise" has a definite legal meaning, and in order to ascertain the true construction which is to be placed upon the term it is necessary to refer to some of the cases in which the meaning to be attributed to the words "present demise" has been explained. The earliest case to which I need refer is *Maldon's case* (6), in which the words

(1) (1882) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109.

(2) 6 Ind. Cas. 413; 37 C. 808; 14 C. W. N. 874.

(3) 53 Ind. Cas. 534; 47 C. 485; 46 I. A. 240; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 22 Bom. L. R. 488 (P. C.).

(4) (1793) 5 T. R. 163 at p. 167; 101 E. R. 93.

(5) (1832) 8 Bing. 178 at p. 181; 1 M. & Scott 259; 1 L. J. C. P. 73; 131 E. R. 369.

(6) (1589) Cro. Eliz. 33; 78 E. R. 299.

"you shall have a lease of my lands in D for 21 years, paying therefor 10 shillings per annum; make a lease in writing, and I will seal it" were held to be a good lease by parol; and that the making of it in writing was but for further assurance.

In *Baxter* v. *Browne* (7) the agreement was:

"On the 28th of November 1760, the said John Abrahall and Percival Lloyd entered into an agreement...with the defendant Browne, whereby they agreed (*inter alia*), 'with all convenient speed to grant a lease to the said Browne of, and *they did thereby set and let to him*, all that, etc.' to hold for 21 years from Candlemas then next, at the rent of £200 per annum, payable half yearly to the lessors."

It was held that this was a good lease *in præsenti*, with an agreement to execute a more formal and perfect lease in future. In *Barry* v. *Nugent* (8) the form of agreement was:

"Be it remembered that J. Barry hath set and by these presents doth demise, etc., unto R. F. etc. for 21 years to commence the 5th May or 1st November, whichever first happens after the said F. B. recovers the said land from M. O. The said R. F. covenanting and agreeing on the foregoing conditions to pay J. B. £ 110 yearly and every year during the said term, etc leases with power of distress, and clauses for re-entering, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as J. B. recovers the said lands from M. O., etc."

The Court held that the document operated as a present demise, as did the Court of King's Bench in *Poole* v. *Bentley* (9) in which the agreement in suit was contained in a "Memorandum of an agreement this 12th of June 1806 between J. Poole and P. Bentley. The said J. Poole hereby agrees to let unto the said P. Bentley, and the said P. Bentley agrees to take of the said J. Poole, all that piece of land (describing it) for the term of 61 years from Ladyday next, at the yearly rent of £120 free and clear of all taxes etc., the said rent to be paid quarterly, the first quarter's rent within 15 days after Michaelmas 1807. And that for and in consideration of a lease to be granted by the said J. Poole for the said term of years, the said P. Bentely agrees, within the space of four years from the date hereof, to expend and lay out in five or more houses of a third rate or class of building £ 2,000: and the said J. Poole agrees to grant a lease or leases of the said land and premises as soon as the said five houses are covered in: and the said P. Bentley agrees to take such lease or leases, and to execute a counter-part or counter parts thereof. This agreement to be considered binding till one fully prepared can be produced."

Lord Ellenborough, C. J., observed :—

"The rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the instrument, must govern the construction: and here their intention appears to have been that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a present legal interest in the term, which was to be binding upon both parties: though when a certain progress was made in the buildings, a more formal lease or leases, in which perhaps the premises might be more particularly described for the convenience of underletting or assigning, might be executed."

In *Doe* v. *Groves* (10) where by an instrument dated 7th March 1798 *A* agreed to let to *B* certain premises from the 5th April 1798 it was held that the words amounted to a present demise. Lord Ellenborough, C. J., observed :—

"If by the terms of this agreement it had been provided that there should be no entry until a lease was executed, I should have had considerable doubts. But as the case stands it does appear to me that the instrument must be considered as a present lease from the 5th of April 1798. From that period it has the operation of a demise, not depending upon the contingency of the party's granting a future lease, which was a stipulation only for the better security of the lessee. It falls, therefore, within the case of *Poole* v. *Bentley* (9): and in *Barry* v. *Nugent* (8) the Court thought, notwithstanding it was agreed that leases with the usual clauses were to be drawn, that such a stipulation did not affect the words of present demise. Here the lessee might never have the benefit of an executed lease: in the *interim*, therefore, this was an agree-

(7) (1775) 2 Black W 973; 96 E R. 573.
(8) (1782) 3 Dougl. 179; 99 E. R. 601.
(9) (1810) 12 East 168; 104 E. R. 66.
(10) (1812) 15 East 244; 104 E. R. 837.

ment to operate as a present demise, commencing immediately from the 5th of April; though a more formal lease was afterwards to be granted."

In *Doe d. Pearson* v. *Ries* (5) Tindal, C. J. in the course of his judgment observed: "'Agrees to let and agrees to take' have been held words of present demise from the case of *Goodtitle d. Estwick* v. *Way* (11) to the present time."

Bosanquet, J., added:—"The question is, whether it was the intention of these parties that the lessor of the plaintiff should take an immediate interest, or wait till the execution of a future lease. However desirable it may be to find some certain criterion for ascertaining the intention of parties upon such occasions, the difference between instruments is so great that none such has yet been discovered. The stipulation to grant a future lease has been considered insufficient for that purpose, for though a circumstance to be looked at, it is of itself inconclusive. The language adopted in the present instrument has always been held to import a present demise, and that inference is borne out by the acts of the parties."

In *Gore* v. *Lloyd* (12) Baron Alderson laid down the rule to be "that you must look at the whole of instrument to judge of the intention of the parties as declared by the words of it, for the purpose of seeing whether it is an agreement or a lease. And, looking at the whole of this instrument, it appears to me that it was not intended to give an immediate right to the party to be from that moment and before the execution of any lease, a tenant from a future day, but that the true construction of the instrument is, an agreement between the parties that at a future time one of them shall become the tenant, provided certain things are intermediately done by the landlord or his agent, so as to put the premises into a certain state, which the agreement describes .....Where, indeed, by an agreement of this sort, one person agrees to take certain premises at a certain rent from a certain time, and both parties sign the paper; looking at the whole of such an instrument together, nobody can doubt, that, though it contains no words of demise by the party who signs it as landlord, such an instrument would amount to a lease, because you cannot give effect to the signature, unless by supposing that there is an implied agreement to demise, besides the express words by which the tenant agrees to take.....It appears to me, therefore, that there is an obvious distinction between the two cases, and that, upon the whole, this instrument is not an agreement of demise, but it is an agreement that there shall be, under certain circumstances, at some future time, if certain things be done, a demise; it is an agreement between the parties, the terms of which, undoubtedly, were to regulate the future tenancy, if a future tenancy should exist."

See also per Sargent, C.J., in *Purmanand-das Jiwandas* v. *Dharsey Virji* (13).

Now, I do not intend in this case to consider the terms which an agreement must contain in order to come within s. 17 (2) (v) of the Registration Act, but, in my opinion, such an agreement must at least be one under which the parties have agreed upon the terms which are to be included in the formal document by which, if and when it is executed, a transfer of an interest in the premises will be effected. Otherwise the alleged agreement will amount merely to a contract to enter into a contract as to the terms of which latter contract the parties are not already agreed. Such an agreement is not known to the law: see *per* Parker, J., in *Von Hatzfeldt Wildenburg* v. *Alexander* (14) and Lord Stendale, M. R., in *Rossdale* v. *Denny* (15). It is not necessary for me, however, to embark upon a discussion of the meaning of this sub-section, because, having regard to the language used in the letters, I am clearly of opinion that the terms of the agreement therein contained amounted to a present demise of the said premises. In my judgment a lease of the premises was thereby created, although "if there be words of present demise, it is immaterial whether the instrument be called a lease, an agreement, or a memorandum of agreement" [per Park, J., in *Doe d. Pearson* v. *Ries* (5) at page 184*].

The defendants contended that the words "all terms will be settled on the agreement" indicate that the matter was still in the stage of negotiation, and that on to the 19th November 1921 the parties had not

(11) (1787) 1 T. R. 735; 99 E. R. 1349.

(12) (1844) 12 M. & W. 463; 13 L. J. Ex. 366; 152 E. R. 1279; 67 R. R. 402.

(13) 10 B. 101; 5 Ind. Dec. (N. S.) 453.

(14) (1912) 1 Ch. 284 at p. 288; 81 L. J. Ch. 184; 105 L. T. 434.

(15) (1921) 1 Ch. 57 at p. 66; 90 L. J. Ch. 204; 124 L. T. 294; 65 S. J. 59; 37 T. L. R. 45.

*Page of (1882) 8 Bing.—[Ed.]

agreed as to what the terms of the lease should be. If that contention were held to be sound, and no concluded agreement for a lease had been arrived at, the plaintiff's case must fail. But, having regard to the language that was used, I am of opinion that the parties intended that the two letters should transfer to the plaintiff an immediate interest in the premises, and that if a formal lease were to be executed the further document should be settled on the terms set out in the plaintiff's letter, and would only be executed by way of further assurance.

Mr. Bagram, in support of his contention that the letters were admissible, relied upon the decision of Mr. Justice Fletcher in *Satyendra Nath Bose* v. *Anil Chandra Ghosh* (16) and urged that as the term was to commence on a date subsequent to that upon which the agreement was made it was not a present demise. In the course of his judgment Fletcher, J., observed :—

"The agreement is dated the 16th September 1906 and provides for the grant of a lease to the plaintiff for a period of five years commencing from the next day, *i. e.*, 1st *Assin* 1313, *B. S.* On the day that the agreement was executed it was not to operate, nor could it have operated, as a persent demise to the plaintiff; and the agreement also provides that the plaintiff should get 'proper *kabuliyat* registered at his own costs soon.'"

I regret that I am unable to acquiesce in the reasoning upon which that decision appears to be based. It is clear from the decisions to which I have referred that, although the term is to commence at a future date or a formal document is to be executed, it does not necessarily follow that the agreement will not operate as a present demise of the premises. With all due deference Mr. Justice Fletcher appears to have proceeded upon a mistaken view of the meaning which is to be attributed to the term "present demise", and to have based his conclusion on unsound premises. Neither in *Hemanta Kumari Debi's case* (3) nor in *Panchanan Bose's case*(2) could the agreement in suit on any reasonable interpretation of its terms be regarded as a present demise. But it is to be observed that Lord Buckmaster stated that "if the document in question can be regarded as a lease within the meaning of this definition, it could not be received in evidence." In the *Port Canning and Land Improvement Co.* v. *Katyani Debi* (17) which was an appeal in a suit for enhancement of rent, Mr. Ameer Ali, in delivering the judgment of the Privy Council, observed:—

"In support of her contention that the tenure then created was non-enhancible, the defendant produced a memorandum executed by Eduljee Cowasjee, which she alleged set out the terms of the contract. To the reception in evidence of this memorandum the plaintiff company objected, contending that, as it was unregistered, it was inadmissible under ss. 17 and 47 of the Indian Registration Act. The Subordinate Judge overruled the objection holding that it was neither a lease nor an agreement for a lease, but only a memorandum relating to a previous and completed transaction by which the tenure-holders had obtained possession of the lands. The learned Judges of the High Court take the same view. Their Lordships are unable to concur with the judgment of the High Court on this point in face of the admission by Ramtrahi Chakravarti, one of the tenure-holders, that he got into possession under the memorandum, which he regards as his lease. Being unregistered, it is inadmissible in evidence, and no effect can be given to it."

See also *Purmanandas Jiwandas* v. *Dharsey Virji* (13), *Narayanan Chetty* v. *Muthiah Servai* (18), *Durga Prasad Singh* v. *Rajendra Narain Bagchi* (19), *Nanak Chand* v. *Muhammad Zahur-ud-Din* (20).

I hold, therefore, that the agreement contained in the two letters of the 19th November 1921 amounted to a present demise of the said premises, and created an immediate interest therein. The two letters have not been registered, and, therefore, are inadmissible as evidence by reason of the provisions of s. 49 of the Registration Act.

The plaintiff further contended that, inasmuch as the agreement was contained in more documents than one, none of the documents need have been registered. In my opinion there is no substance in this contention. In *Port Canning Land, Investment,*

(16) 5 Ind. Cas. 38; 14 C. W. N. 65.

(17) 53 Ind. Cas. 522; 24 C. W. N. 369; 37 M. L. J. 578; 17 A. L. J. 1061; 1 U. P. L. R. (P. C.) 91; (1920) M. W. N. 160; 11 L. W. 296 (P. C.).

(18) 8 Ind. Cas. 520; 35 M. 63; 9 M. L. T. 142; 21 M. L. J. 44; (1910) M. W. N. 743.

(19) 4 Ind. Cas. 713; 37 C. 293; 10 C. L. J. 570.

(20) 73 Ind. Cas. 927; 4 L. 44; 5 L. L. J. 257; (1924) A. I. R. (L.) 27.

Reclamation and Dock Co. v. *Smith* (21) Sir Montague E. Smith, in delivering the judgment of the Privy Council, observed :—

"A question was raised, whether the letters did not form an agreement which should have been registered under the Indian Registration Act; but their Lordships think that the High Court was perfectly right in holding that the letters did not require registration. They do not amount to a lease or an agreement for a lease, but are evidence of a contract of a special character, not coming within any of the definitions found in the Registration Act."

I gather from that judgment that if the documents in question had come within the provisions of the Registration Act their Lordships would have held that it was incumbent upon the party producing them to prove that they had been duly registered: see also *Boyd* v. *Kreig* (22) and *Morgan* v. *Fernandez* (23).

It is conceded by learned Counsel on behalf of the plaintiff that if these documents are inadmissible in evidence it is not open to him to adduce oral evidence of the terms of the said agreement by reason of s. 91 of the Evidence Act. Counsel further contended that the documents in suit were not tendered as evidence of any transaction affecting the premises. But, in my opinion, it is so clear that an agreement which creates an immediate interest in immoveable property "affects" such property within s. 49 of the Registration Act, that I do not think it necessary to discuss the plaintiff's contention to the contrary. It is, I think, enough that I should mention that such a contention was raised : See *Narayanan Chetty* v. *Muthiah Servai* (18). Indeed, it can only be on the assumption that the premises in suit were affected by the agreement that the plaintiffs impleaded the Nan defendants who are assignees of the reversion from the 1st defendant. Counsel for the plaintiff then contended that the equitable doctrine propounded by Jessel, M. R., in *Walsh* v. *Lonsdale* (1) formed part of the law in India, and that even if the documents in question were inadmissible as evidence of a present demise under s. 49, these documents were admissible as evidence of the terms of an agreement which was capable of being specifically performed to the same effect under which agreement the plaintiff was in possession of the premises: See *Bibi Jawahir Kumari* v. *Chatterput Singh* (24), *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (25), *Nemai Charan Dhabal* v. *Kokil Bag* (26), *Kedar Nath Joypooria* v. *Poorasundari Dasi* (27), *Syam Kishore De* v. *Umesh Chandra Bhattacharjee* (28). Now, it is unnecessary in this case to discuss to what extent the doctrine of *Walsh* v. *Lonsdale* (1) can be held to apply to a transaction relating to land in India. I am inclined to agree with Wallis, C. J., that the words "agreement to lease" which were included in the definition of a lease at least so far back as the Registration Act of 1866, long before the enactment of the Transfer of Property Act, were intended to guard against the possibility that the Courts in India might otherwise extend the same degree of recognition to agreements to lease that is extended to them pursuant to equitable principles in England: *per* Wallis, C. J., in *Swaminadha Mudaliar* v. *Kamaswami Mudaliar* (29). But in this case the matter does not arise for consideration. I am clearly of opinion, however, that an unregistered document inadmissible under s. 49 cannot be admitted as evidence to prove the terms of an agreement to the same effect in circumstances to which the doctrine of *Walsh* v. *Lonsdale* (1) may be applicable. I agree with the argument of Dr. Rash Behary Ghose in the case of *Nemai Charan Dhabal* v. *Kokil Bag* (26) "that the case is really one in which the plaintiff is endeavouring to evade the operation of the Registration Law, and by falling back upon a pretended anterior oral agreement to use and give effect to two documents, which, if they exist, cannot be received in evidence, and which, if they could be received in evidence, could not legally, being unregistered take effect as against registered documents relating to the same property". In the case of *Sanjib Chandra Sanyal* v. *Santosh Kumar Lahiri* (30), Mr.

(21) 1 I. A. 124 at p. 143; 21 W. R. 315; 3 Sar. P. C. J. 359 (P. C.).

(22) 17 C. 548; 8 Ind. Dec. (N. S.) 905.

(23) 33 Ind. Cas. 439; 30 M. L. J. 519; 3 L. W. 370; (1916) 1 M. W. N. 373; 19 M. L. T. 377.

(24) 2 C. L. J. 343.

(25) 5 B. 145; 3 Ind. Dec. (N. S.) 96.

(26) 6 C. 534; 7 C. L. R. 487; 3 Shome L. R. 252; 3 Ind. Dec. (N. S.) 347.

(27) 6 Ind. Cas 634; 11 C. L. J. 548.

(28) 55 Ind. Cas. 154; 24 C. W. N. 463; 31 C. L. J. 75.

(29) 62 Ind. Cas. 354; 44 M. 399 at p. 402; 40 M. L. J. 161; 13 L. W. 327; (1921) M. W. N. 145; 29 M. L. T. 152.

(30) 69 Ind. Cas. 877; 49 C, 507 at p. 522; 26 C. W. N. 329; (1922) A. I. R. (C.) 436.

Justice Rankin observed that "the decisions of the Judicial Committee in the case of *Hemanta Kumari Debi* v. *Midnapore Zemindari Co.* (3) and *Port Canning and Land Improvement Co.* v. *Katyani Debi* (17) make it impossible for me to hold that the agreement in this case can be put in evidence or that its terms can be specifically enforced. If I admit the document at all, it seems to me that I would be receiving it as evidence of a transaction affecting the property. If upon its true construction, it is meant to take effect as a present demise, I cannot treat it as something else or as evidence of a transaction different from this in nature and so avoid the Statute. My opinion is that against the prohibition of the Statute no estoppel avails and that there is nothing in *Walsh* v. *Lonsdale* (1) or the cases under the Statute of Frauds to cover the plaintiff in this case". I am of the same opinion; see also *Ulfatunnissa* v. *Hosain Khan* (31) and *Narayanan Chetty* v. *Muthiah Servai* (18). Counsel further contended that at any rate the letters were admissible as evidence of an agreement to grant a lease for the breach of which the plaintiff seeks to recover damages. He urged that in such circumstances the document would not be adduced as evidence of a transaction affecting the premises, but as evidence of an agreement under which the defendant contracted a personal obligation to grant a lease. In support of this contention Counsel referred to the case of *Rajah of Venkatagiri* v. *Narayana Reddi* (32). This was a decision of the Full Bench, and was cited with approval by Fletcher, J. in *Satyendra's case* (16) and by Mookerjee, J., in *Hemanta Kumari Debi's case* (33). This case, no doubt, supports the view which Counsel for the plaintiff urged upon me. The suit was brought to recover damages for breach of an agreement to lease certain premises to the plaintiff, and in support of his claim for damages certain documents were tendered for the purpose of proving a personal obligation to grant a lease which the defendant had undertaken. Among the documents which were tendered were documents which affected the property within the meaning of s. 49 and were, therefore, inadmissible as evidence of a transaction affecting the premises. The Full Bench held that such documents were admissible in evidence in order to give effect to the agreement into which the defendant had entered with the plaintiff: "The other unregistered documents that have been put in showing the terms of the lease, have not been put in to enforce the lease, in which case they would not have been admissible as evidence as they would have been evidence of a transaction affecting immoveable property, but they must be deemed to have been put in simply as evidence of the character of the breach of agreement by the defendant, and as a basis for calculating the measure of damages, neither of which things can, in the least, affect the land lying in the village of Valamaid." In my opinion, with all respect to the learned Judges who were parties to that decision, the reasoning upon which it is based cannot be reconciled with the *ratio decidendi* of the later Full Bench decision of the Madras High Court in *Narayanan Chetty's case* (18). I apprehend that the meaning which the Full Court attributed to the provisions of s. 49 in *Rajah of Venkatagiri* v. *Narayana Reddi* (32) is in conflict with the construction which consistently has been placed upon s. 49 by the High Courts of India for over 50 years. Upon the principle of *stare decisis* I should not be disposed to re-agitate the meaning which is to be attributed to the language used in s. 49, even if I were at liberty to do so, and regarded the prevailing opinion as being inaccurate: see *Achoo Bayamah* v. *Dhany Ram* (34), *Stri Seshathri Ayyengar* v. *Sankara Ayen* (35), *Guduri Jagannadhan* v. *Rapaka Ramonna* (36), *Woodoy Chand Jana* v. *Mundul* (37), *Luchmeepat Singh Doogur* v. *Mirza Khyrat Ali* (38), *Raju Balu* v. *Krishnarav Ramchandra* (39), *Marten* v. *Sheo Ram Lal* (40), *Mattongeney Dossee* v. *Ramnarain Sadkhan* (41), *Krishto Lall Ghose* v. *Bonamalee Roy* (42), *Venkathayudu*

(31) 9 C. 520; 12 C. L. R. 209; 4 Ind. Dec. (N. S.) 995.
(32) 17 M. 456; 4 M. L. J. 198; 6 Ind. Dec. (N. S.) 316.
(33) 28 Ind. Cas. 879; 19 C. W. N. 47 at p. 351; 22 C. L. J. 44.
(34) 4 M. H. C. R. 378 at p. 379.
(35) 7 M. H. C. R. 296.
(36) 7 M. H. R. C. 348.
(37) 9 W. R. 111.
(38) 12 W. R. F. B. 11; 4 B. L. R. F. B. 18.
(39) 2 B. 273; 2 Ind. Jur. 762; 1 Ind. Dec. (N. S.) 607.
(40) 4 A. 232; A. W. N. (1882) 18; 2 Ind. Dec. (N. S.) 858.
(41) 4 C. 83; 2 C. L. R. 428; 2 Ind. Dec. (N. S.) 54.
(42) 5 C. 611; 5 C. L. R. 43; 2 Ind. Dec. (N. S.) 997.

v. *Papi Reddi* (43), *Hurjivan Virji* v. *Jamsetji Nawroji* (44), *Purmanandhas Jiwandas* v. *Dharsey Virji* (13), *Ulfatunnissa* v. *Hosain Khan* (31), *Narayanan Chetty* v. *Muthiah Servai* (18), and *Streeramulu Naidu* v. *Ramaswami Mudaliar* (45). The Full Bench decision of the Madras High Court in *Swaminadha Mudaliar* v. *Ramaswami Mudaliar* (29) is not an authority in the plaintiff's favour, for the decision in that case turned upon whether the document tendered in evidence was to be regarded as a present demise or not and Wallis, C. J., stated that "if the Court determined that question in the affirmative, we are still bound by the decision in *Narayanan Chetty's case* (18)."

The case of *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraju* (46), in my opinion, was wrongly decided, and must be taken to have been overruled by the Full Bench in *Narayanan Chetty's case* (18). It is not inapposite in this connection to refer to the manner in which a change was made in the language of s. 49 of the Registration Act of 1866 by the amending Act of 1871. Section 49 of the Act of 1866 ran as follows:—

"No instrument required by s. 17 to be registered shall be received in evidence in any civil proceeding in any Court, or shall be acted upon by any public servant as defined in the Indian Penal Code, or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act."

Now, to the decisions in *Vellaya Padyachy* v. *Moorthy Padyachy* (47) and in *Achoo Bayamah* v. *Dhany Ram* (34) Scotland, C. J., was a party, and in a dissenting judgment in the latter case his Lordship observed "that it appears to me that s. 49 should be read as if it had expressly said that no instrument should be received in evidence, etc., for any of the purposes specified in s. 17 unless registered. Upon this construction it is that I consider it in accordance with the intention of the Legislature to hold that an instrument which has the two-fold operation of a simple contract or bond to pay a debt and a collateral mortgage security for the debt, as well as an instrument which purports to be an assignment of such contract and security, is admissible in evidence for the purpose of proving the separate liability under the simple contract in respect of which registration was not required by s. 17;" and in the same year Peacock, C. J., in the case of *Luchmeeput Singh Doogur* v. *Mirza Khyrat Ali* (38) said "we are of opinion that the document is admissible as a bond, simply for the purpose of enforcing against the obligor personally the payment of the money secured by it; but that, without registration, it is not admissible as evidence to prove that the obligee was entitled to the security of the land. There are many cases under the Stamp Law, which enacts that documents are not to be admitted in evidence unless they are stamped, in which such documents have been admitted for collateral purposes." In consequence of these two judgments, [see *Guduri Jagannadham* v. *Rapaka Romanna* (36)] s. 49 was amended in 1871 so that the language should be that which is now found in s. 49 of the Registration Act of 1908. In 1878 the meaning to be attributed to s. 49 of the Act of 1871 fell for determination in the case of *Mattongeney Dossee* v. *Ramnarain Sadkhan* (41). In the course of the argument of Mr. W. C. Bonnerjee learned Counsel referred to the passage in the judgment of Peacock, C. J., to which I have adverted, upon which Garth, C. J., observed:—"But in the case you have cited, the document was divisible in its nature, consisting partly of a bond, and partly of a mortgage; the loan and pledge cannot be separated in the document before us." In the course of his judgment the learned Chief Justice stated "the Court, [that is, in *Luchmeeput Singh Doogur* v. *Mirza Khyrat Ali* (38)] seems to have considered that the general words 'no document shall be received in any Civil Court' ought not to be read in their widest sense, but only as rendering the document inadmissible in evidence for the purpose of affecting the mortgaged property. The words of the present Act are different. Section 49 says, that 'no document required by s. 17 to be registered shall (without being registered) be received as evidence of any transaction affecting any immoveable property comprised therein.' Now, in this case, the document is not divisible. It discloses one transaction only, and that the transaction which the plaintiff must necessarily prove for the purpose of making out

(43) 8 M. 182; 3 Ind. Dec. (N. S.) 126.
(44) 9 B. 63; 5 Ind. Dec. (N. S.) 42.
(45) 42 Ind. Cas. 948; 33 M. L. J. 596.
(46) 17 M. L. J. 218.
(47) 4 M. H. C. R. 174.

his case . . . the transaction was single and indivisible, and we think it is impossible to say, having regard to the words of s. 49, that the instrument was admissible in evidence for the purpose of proving that transaction." In my opinion, the true interpretation to be placed under s. 49 is set out in the judgment of Muttusami Ayyer, J., in *Sambayya* v. *Gangayya* (48) in which his Lordship stated that "the test, therefore, is whether the transaction evidenced by the particular instrument is single and indivisible, or whether it really evidences two transactions which can be severed from each other, the one as creating an independent personal obligation, and the other as merely strengthening it by adding a right to proceed against immoveable property. But it should be remembered that it is not enough that there is an obligation to pay a sum of money, but that it is also necessary that the obligation should have independent existence, and be in no way contingent or conditional on the breach of some obligation relating to immoveable property created by the same instrument, for the contingency or the condition and the obligation would then be parts of one indivisible transaction." Mr. Bagram upon the assumption that the law was correctly stated by Ayyer, J., urged that upon the true construction of the letters of the 19th November, the words "all terms will be settled upon the agreement" amounted to an independent personal obligation undertaken by the first defendant to execute a lease in his favour. But these words standing by themselves are altogether too vague and indefinite to bear any intelligible meaning. In order to prove the contract for the breach of which the claim for damages is preferred the plaintiff must needs prove that a valid agreement to lease on the terms set out in the two letters was concluded between the parties; otherwise, *ex concessis* his claim must fail. But to admit the letters for that purpose would be to receive them as evidence of a transaction which, in my judgment, affects immoveable property, and to do so would be to act in direct violation of the provisions of s. 49. The matter, however, does not rest there, for assuming that it were to be open to the defendant to adduce in evidence the two letters of the 19th November, I ask myself what is the breach of the agreement therein contained of which the plaintiff complains. If the plaintiff claims damages upon the ground that the defendant has failed to grant him a lease, the answer is that the terms of the documents amount to a lease. If his complaint is that the defendant has refused or neglected to execute a formal document of demise, the answer is that no such document has been tendered to the defendant for signature, and that a formal document would possess no more potency or validity than the two letters the terms of which must needs be embodied therein. If the plaintiff contends that the breach of the agreement upon which his claim to damages is founded is that the defendant has failed to register the two documents or a formal document to the same effect, the answer is that the defendant undertook no such obligation [see *Hurjian Virji's case* (44) and s. 32 of the Registration Act]. Further, inasmuch as the plaintiff himself was entitled and in a position to obtain registration of the lease contained in the two documents of the 19th November, and nevertheless elected not to do so, what damages has he suffered by any act or omission in that behalf on the part of the defendant? Any damage which he suffered by reason of the non-registration of the said documents would appear to be the result of his own negligence, and any loss which thereby may have accrued to him is due to his own default.

Lastly, it is contended that, inasmuch as the defendant No. 1 admitted in his written statement that the letters in question were executed, the plaintiff is entitled to specific performance of the agreement therein contained, or to such other relief as in the circumstances may be meet and just, without tendering the documents as evidence, or proving the terms of the said agreement. In para. 6 of the plaint it is alleged that "on the 19th November 1921 the plaintiff wrote and addressed a letter to the first defendant whereby he agreed to take a lease of the said premises for 21 years upon payment of a *salami* of Rs. 4,000, and a monthly rent of Rs. 400 increasing by Rs. 25 per month per every seven years of the said period of lease both owner's and occupier's share of the rates and taxes payable to the Corporation being payable by the plaintiff, thorough repairs to be executed in respect of the said premises every five years, such lease to commence from 1st

(48) 13 M. 308; 4 Ind. Dec. (N. S.) 926.

December 1921. The first defendant on the 19th November 1921 wrote and addressed a letter to the plaintiff whereby he confirmed all terms which were contained in the aforesaid letter of the plaintiff of even date to the said first defendant." The alleged admission is contained in para. 2 of the written statement which runs as follows: "This defendant admits having received the letter dated 19th November 1921 written by the plaintiff as also having written a reply on the same date to the plaintiff but as to the contents and anything therein contained, this defendant will refer to the original letters when produced." In my opinion, all that the defendant admitted in para. 2 of the written statement was the execution of one letter and the receipt of another on the 19th November 1921. He did not admit the contents of the letters, or that the same were stated correctly in para. 6 of the plaint. On the contrary he required the plaintiff to produce the documents if he desired to prove or establish the contents thereof. The admission to be found in para. 2 of the written statement does not, in my opinion, entitle the plaintiff to claim any relief in the premises without adducing in evidence the documents in question: See *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (25), *Venkatrayudu* v. *Papi Reddi* (43), *Sambayya* v. *Gangayya* (48), *Bisheshar Lal* v. *Bhuri* (49).

In these circumstances it becomes unnecessary for me to consider whether, and if so, on what conditions, the plaintiff would be entitled to adduce such letters in evidence having regard to the provisions of the Stamp Act.

For the above reasons, in my opinion, the suit fails, and must be dismissed with costs on scale No. 2.

Z. K. *Suit dismissed.*

(49) 56 Ind. Cas. 595; 1 L. 436; 2 U. P. L. R. (L.) 147.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 200 OF 1923.

June 29, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

ASVATH NARAYAN ASTAPUTRE—PLAINTIFF—APPELLANT

versus

CHIMABAI GOPALRAO SADEKAR—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), Ch. III, s. 35—Transfer of Property Act (IV of 1882), s. 58—Construction of document—Sale or mortgage—Contingent sale—Circumstances surrounding transaction, whether can be considered—Consideration, inadequacy of, effect of.

Plaintiff borrowed Rs. 100 from the defendant and executed a deed in favour of the defendant which was described as a sale-deed and which recited that the plaintiff had borrowed the money and promised to repay it within two months together with interest and that if he failed to re-pay it during the stipulated time, then certain property belonging to him would be considered to have been sold to the defendant in full satisfaction of the amount due and that no right or interest in that property would remain to the plaintiff:

Held, that the deed executed by the plaintiff evidenced a contingent sale of the kind contemplated in Ch. III of the Contract Act, that is to say, it operated as an actual sale subject to the condition that it was not enforceable if the plaintiff paid a certain sum within a certain time; if he made that payment the sale would be void under s. 35 of the Contract Act: if he did not make that payment the sale would become enforceable under that section. [p. 333, col. 2.]

For the purpose of determining the question whether a document is a deed of mortgage or a deed of sale the Court must consider the terms of the document itself and the surrounding circumstances, so far as they appear in evidence and are relevant, in order to determine whether the real intention of the parties in executing the document was to enter into a mortgage transaction or a sale transaction. One of the main tests in considering the question is the relation of the consideration mentioned in the document to the real value of the property transferred. If the former sum is grossly inadequate then it affords an indication that the vendor did not intend to sell the land out and out. But before this view can be taken there must be reliable ground for holding that there has been an inadequacy of price. [p. 331, cols. 1 & 2.]

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 182 of 1922, reversing that of the Subordinate Judge, at Belgaum, in Civil Suit No. 301 of 1920.

Mr. *G. N. Thakor*, (with him Mr. *Nilkant Atmaram*), for the Appellant.

Messrs. *A. G. Desai* and *D. R. Manerikar*, for the Respondents.

JUDGMENT.

Fawcett, J.—The only point that arises in this second appeal is whether the lower Appellate Court has erred in holding that the document Ex. 50 was a sale, and not a mortgage, transaction. In taking this view it differed from the Trial Court which held the document to be a mortgage that could be redeemed by the plaintiff, who brought this suit for redemption within sixty years from the date of the document. The document has been translated in the judgment of the Trial Court as follows:—

"We have borrowed from you the sum of Rs. 100 (in words Rs. one hundred) for our necessity. Be it so. The rate of

interest agreed on this is half-an-anna per rupee per mensem. Be it so. Now the period to re-pay the same is fixed to be within two months from to-day, during which period we shall re-pay you the aforesaid principal and the interest also and we shall take back this deed. If for any reason we fail to pay the amount during the stipulated time, then in lieu of the aforesaid sum, the Government land Survey No. 93, 5 acres 21 *gunthas* assessed at Rs. 12, together with the *pimpal* tree standing in my *khata*, is sold to you for the aforesaid amount in full satisfaction. Be it so. Accordingly you should occupy and use the land and go on paying the Government assessment. No right, title and interest in the said land remains to me. We shall give a *rajinama* to Government and get the *khata* of the land transferred from my name to that of yours. We shall not fail therein. This sale-deed is, therefore, executed while in sound state of mind.

Signed on 17th February 1894 of the Christian Era Shake 1785 Rudhirodgarinam Samvatsara *Magh Shudh* 10th Mark of Havappa Bin Umana Advekar."

It is to be remarked that the words in this document translated as "is sold to you" do not give full force to the words in the vernacular, which contain the word "Lagchat." This has the meaning of an "absolute" sale, as noted by the translator in the translation that has been prepared for the purpose of this appeal. On its face, therefore, the document is one by which, in the event of the executant Huvappa not paying the sum of Rs. 100, with interest at the rate mentioned in the document, within two months from the date of the document, the land mentioned in it was absolutely sold to Nageshappa Naik. The document has the heading "sale deed" and in its concluding sentence it is also referred to as a sale-deed. It has also been pointed out that the stamp paid on the document is one that was correct for a sale-deed under the Indian Stamp Act then in force *viz.*, Act X of 1862, whereas a mortgage-deed or an agreement to sell only required a stamp of annas eight. But the appellant's Counsel is, of course, correct in saying that, the above considerations are not in themselves conclusive; and although we have to give them due weight, the main thing we have to consider is the terms of the document itself and the surrounding circumstances so far as they appear in evidence and are relevant, in order to determine whether the real intention of the parties in executing this document was to enter into a mortgage transaction or a sale transaction.

There are two considerations, which are relied upon by the Subordinate Judge in his judgment as indicating that the document evidences a mortgage and not a sale, that can first be disposed of. The first of these is that, as the land is described in the document as assessed at Rs. 12, it might reasonably be expected to bring in an income of Rs. 40 to 50, and it would be absurd to suppose that such land would be sold for Rs. 100 only. It is, of course, true that one of the main tests in considering a question like that now before us is the relation of the consideration mentioned in the document to the real value of the property transferred, and if the former sum is grossly inadequate, then it affords an indication that the vendor did not intend to sell the land out and out. But of course, before this view is taken, there must be reliable ground for holding that there has been an inadequacy of price such as I refer to. In the present case no evidence has been adduced to show what were the net profits from the land that were realized or probably realizable in or about the year 1864, when the document was executed. The Court in considering the question of probable net profits can of course take into consideration the assessment of the land. For it has long been an important element in fixing assessments in this Presidency that it bears a certain relation to the fertility and other circumstances of the land, and as a rough valuation the capital value of a piece of land is often taken as so many times the assessment. But I think that while this may be a fairly safe method of calculating net profits of land that has been assessed at the original survey of about 1880 onwards, it would be very dangerous to hold this equally applicable to assessments fixed some time prior to 1864. I should first of all like to know what were the principles that guided the survey officers in fixing assessments on land at that time. In the absence of some evidence or work of reference to indicate this, I should hesitate to hold that it is a safe basis to go upon in a case like the present. It is to my mind not unlikely that the assessment of Rs. 12 in force at the time of this document was relatively heavier

than what would have been imposed, if the assessment had been fixed on the principles followed in the original survey, with due regard to local conditions and prices at the time when the assessment was fixed. Thus the plaint shows that at the date of the suit the same land was assessed at Rs. 16 or only Rs. 4 more, and that seems to me to give some indication that the land was somewhat over assessed in 1864. Consequently, I do not think that the Subordinate Judge was justified in holding that the land could not have been intended to have been sold for Rs. 100, plus the interest of Rs. 10, in 1864.

Then, secondly, the Subordinate Judge has relied upon the question of possession as being in plaintiff's favour. He says: "Lastly the land was to be the vendee's (I use the term for the sake of convenience) only if there be a default in the payment of the principal sum and interest, it was then only that the *rajinama* was to be given and *khata* changed and the *khata* of the land stood in the name of the son of Huvanna." This last statement is one which is not supported by any evidence on the record. On the contrary, it seems to me to be contradicted by the extracts from the Record of Rights, Exs. Nos. 51 to 56, which show that this land at a partition had gone to the share of a member of the Nagesh family, who sold it in 1902, and that in 1909 the vendee Nageshrao brought a suit to set aside the sale and succeeded in it. That does not seem to have been controverted by the appellant's Pleader in the appeal to the District Judge. It was apparently taken as a fact that Nageshrao had come into possession of the property sometime about the execution of the deed. Therefore, this point, in my opinion, also goes out.

The main contention for the appellant is that the document says that there was a debt due to Nageshappa on which interest was to be paid and that the circumstances show that the main idea was to give the land as security for the loan. But against this is the fact that, as the document stands, there was no mortgage on the land in respect of the debt during the two months period referred to in the document. If it had been intended that the land should be a security for this debt during those months, then there would be nothing easier than to express that by a few words. I cannot accede to the contention put before us that there was an implied mortgage, as I think very much stronger circumstances are requisite for the Court to read such an implication into the terms of the document. Then coming to what was to happen on the expiry of the period of two months in default of payment, the document says that the land is to be absolutely sold to Nageshappa, he is to carry on the *rahivat* of the land and the *khata* is to be transferred to his name. Certainly so far, words could hardly be clearer to show that the intention was to have an absolute sale. It is suggested that this is merely an ostensible sale, and that the case is one falling under cl. (*c*) of s. 58 of the Transfer of Property Act, namely, a mortgage by conditional sale. It is, however, to my mind quite clear that the case cannot fall under any of those cases mentioned in this particular clause. It is not one where the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute. This is a case where, as a matter of fact, there is no mortgage of the property by the terms of the document during the two months' period. Even if there had been a condition that within a certain period from the sale taking effect the sale should become absolute unless this debt of Rs. 100 and interest were paid, it still could not be held to be a case covered by this cl. (*c*) for the reason given in *Kandula Venkiah* v. *Donga Pallai* (1) which points out that to bring a case under this cl. (*c*) there must be an ostensible sale to begin with. Nor is the case one that can be held to fall under either of the two other cases mentioned in cl. (*c*), namely, on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller. I think that at the most it could only be treated as an anomalous mortgage of the kind referred to in s. 98 of the Transfer of Property Act. But if that view is accepted, the further difficulty faces the plaintiff that according to the Madras High Court there is no right of redemption under s. 60, which can be relied upon as superseding the express terms of the contract [see *Patte Muhamad* v. *Sheikh*

(1) 57 Ind. Cas. 724; 43 M. 589 at pp. 599, 603; (1920 M. W. N. 349; 28 M. L. T. 56; 13 L. W. 133.

Davood (2).] But I do not consider it necessary to go into that particular point because I think there are no sufficient grounds for holding that this document can be treated as a mortgage transaction.

The appellant's Counsel relied upon the decision in *Kola Venkatanarayana* v. *Vuppala Ratnam* (3) which relates to a document somewhat similar to the one in the present case. There the deed contained a promise to pay the principal with interest by a certain date and it was provided that if there is failure to pay accordingly, the land shall be given up as if it was a sale. It was held that this document was a mortgage by conditional sale, but unfortunately in so far as the judgment of the Court proceeds upon the case being one falling under s. 58 (c) of the Transfer of Property Act, it is distinctly overruled by the subsequent case already mentioned, and this ruling was in fact cited in one of the referring judgments at page 593*. The authority of this case is further affected by the contrary decision of the same High Court in *Butchiraju* v. *Ramalingamurty* (4). A similar document was there held not to be a mortgage but to be a sale. That case has been distinguished in *Kola Venkatanarayana* v. *Vuppala Ratnam* (3) on the ground that the document was described by a certain vernacular term, which denoted that there was a mortgage with an option to treat the transaction as a sale in certain events. But no such consideration can apply to the present case where, as already mentioned, the document itself is described as a sale-deed and the wording several times mentions that it is a sale. Then I may also refer to the reasoning of Batchelor, J., in *Narayan Ramkrishna* v. *Vigneshwar Ganp Hedge* (5) in support of my view that this document cannot be treated as in any way a mortgage by conditional sale under s. 58 (c) of the Transfer of Property Act, inasmuch as the preliminary requirements of a mortgage under s. 58 are not satisfied.

It is perhaps unnecessary to go into that part of the District Judge's judgment, which discusses whether any interest in the land was transferred by this document but I differ from him for the following reasons. He holds that it could not have transferred any interest for the purpose of securing payment of the money advanced. No doubt, so far as it is a contract for sale, it did not create any interest in or charge on the property, in view of the express provisions of s. 54 of the Transfer of Property Act. But the document does not say that, if the amount is not paid on the due date, the executant will execute a regular sale-deed in favour of Nageshappa, or words to that effect, but it states that on the default in payment, the land is actually sold in consideration of the amount due. Taking the wording of the document as it stands, it seems to me that the proper construction to put on it is that it evidences a contingent sale of the kind contemplated in Ch. III of the Indian Contract Act. It is an actual sale subject to the condition that it is not enforceable if the executant Huvanna Advekar pays a certain sum within a certain time. If he made that payment the sale would be void under s. 35 of the Indian Contract Act. If he did not make that payment, the sale was one which became enforceable by law under the same section. Therefore, I do not support this part of the District Judge's argument. But I am of opinion that there is nothing which shows that the intention of the parties was that the land should merely be taken by Nageshappa by way of security for re-payment of Rs. 100 plus interest. I think that the District Judge is correct in holding that the parties intended that there should be an actual sale and that no sufficient grounds have been shown for our interfering with his decree. I would, therefore, dismiss the appeal with costs.

Madgavkar, J.—The question in this appeal is whether the deed Ex. 50, is a mortgage or sale. The answer must be sought in the terms of the deed itself and the evidence of surrounding circumstances to show in what manner the language of the document is related to existing facts: *Narasingerji Gyanagerji* v. *Parthasaradhi* (6).

The word "mortgage" is not to be found

(2) 30 Ind. Cas. 569; 39 M. 1010; 18 M. L. T. 209; 29 M. L. J. 525; (1915) M. W. N. 852.
(3) 29 M. 531.
(4) 14 M. L. J. 337.
(5) 34 Ind. Cas. 414; 18 Bom. L. R. 250 at p. 255; 40 B. 378.

*Page of 43 M.—[Ed.]

(6) 82 Ind. Cas. 993; 47 M. 729; (1924) A. I. R. (P. C.) 226; 20 L. W. 701; 10 O. & A. L. R. 1172; 47 M. L. J. 809; (1924) M. W. N. 915; 40 C. L. J. 481; 27 Bom. L. R. 4; 29 C. W. N. 246; 51 I. A. 305; 26 P. L. R. 18; 23 A. L. J. 161; L. R. 6 A. (P. C.) 41; 1 O. W. N. 684 (P. C.).

in the deed whereas the word "sale" is stated three times, and it is registered as a sale and not as a mortgage. The period of re-payment is two months under the deed itself and refers to a prior debt and it is not apparent that the debt was continued thereafter. Whether the possession passed is not clear from the evidence and the Trial Court is in error on the point. The present suit is only brought after two transfers.

There is no sufficient evidence of inadequacy of price. The argument in the judgment of the Trial Court is in effect a surmise. It is difficult to appreciate its reference as to prices, the values and the land settlement in 1865, about which there is no evidence on the record. Without referring to any of the numerous other cases it appears to me that the terms most resemble the document in *Butchiraju* v. *Ramalingamurty* (4). I agree, therefore, that the document is in terms and appears to have been intended to be a sale and not a mortgage by conditional sale. The appeal, therefore, fails and must be dismissed with costs.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 40 OF 1925.

October 22, 1925.

Present:—Mr. Ashworth, A. J. C.

Babu NARESH PRATAB SINGH—APPLICANT

versus

SITLA PRASHAD TEWARI AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XLVII, r. 1—Review, order refusing to grant—Revision, whether lies.

An application to revise an order refusing to grant a review would be entertained only in the most exceptional cases.

Application for revision against an order of the Munsif, Havali, Fyzabad, dated the 23rd September 1924, refusing to review an order of that Court, dated the 7th November 1923.

Messrs. *Naimatullah* and *Naimullah*, for the Applicant.

Mr. *S. M. Ahmad*, for Mr. *H. N. Das*, for Opposite Party Nos. 2, 3 and 4.

Mr. *S. M. Ahmad*, for Opposite Party Nos. 1 and 5.

ORDER.—This is an application in revision in respect of an order of the lower Court refusing to review a certain judgment. The ground for refusing to review its judgment given by the lower Court is that its judgment was a considered one, but based on the misapplication of certain rulings. The lower Court did not consider that in review it could revise its considered finding even if wrong. I am of the opinion that the applicant has failed to make out that the judgment of which a review was sought was wrong because of any obvious mistake on the part of the Judge who wrote it. Apart from this, it is common ground that the applicant can appeal against the decree. It would, in my opinion, very seldom be proper for this Court in revision to compel a Court to review its judgment. There are three general remedies against a decree. One is review, one is appeal and one is revision. In this particular case it is clear that an appeal is the proper course, and that it would be most inconvenient to set a precedent of allowing revision against an order refusing a review. I am not prepared to say that in no case should an application for revision against an order refusing review be granted, but any such cases must be of very rare occurrence and this is not one of them. The application is, therefore, dismissed with costs.

Z. K. *Application dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 54 OF 1925.

August 5, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

D. PUDUMJEE & Co.—APPELLANT

versus

N. H. MOOS—RESPONDENT.

Companies Act (VII of 1913), ss. 87, 109—Money borrowed by Company—Charge created on existing and future property—Registration, absence of, effect of—Person allowed to act as Director, authority of—Outsider dealing with Company, whether bound to search register.

A limited Company which carried on the business of newspaper proprietors, printers, publishers, advertisers and contractors negotiated a loan with the respondent and executed an agreement which recited that the borrowers were possessed of, or otherwise well and sufficiently entitled to, "the unexpired residue of

the term of 20 years in the land and building thereon situate at Dalal Street, Fort, Bombay, and more particularly described in the Schedule hereto and the engine, boiler, machinery, plant, printing presses, foundary types, implements, tools specified in the list hereto annexed and marked B and all furniture, papers, stock-in-trade and other moveable property fixed now lying and being or which may hereafter be fixed and lying and being on the said premises." The agreement then went on to recite the advance of the loan at a demand promissory note and provided that on the Company executing within two months from the date of the agreement a first mortgage "of the said property" the lender shall extend the time for re-payment to one year. It was also provided that pending the execution of the mortgage-deed the Company shall put the lender in possession of all its property (except the lease-holds and the goodwill) and that the Director or governing Director of the Company shall hold possession of the same on behalf of and as agent of the lender, and that the borrowers shall not sell, assign, transfer, hypothecate or otherwise deal with the same or any part thereof or with the business of the Company or the lease-hold premises or any of them without the consent in writing of the lender personally :

Held, that the agreement did not operate to create a pledge of the Company's existing properties but was intended to create a floating charge on all the properties of the Company, present and future, except the lease-holds and the goodwill, within the meaning of s. 109 of the Companies Act, and, that the charge not having been registered in accordance with the provisions of that section was void for want of registration.[p. 337, col. 1.]

Persons contracting with a Company are bound to know the constitution of the Company and its powers as given by Statute and the Memorandum and Articles of Association. The appointment of the Directors, however, is a part of the indoor management of the Company, and outsiders dealing with the Company are not under a duty to search the register of Directors kept under s. 87 of the Companies Act to find out whether a person who has been permitted to act as a Director of the Company for a certain length of time is also a Director *de jure*. [p. 337, col. 2; p. 338, col. 1.]

Appeal against the judgment of Mr. Justice Kemp, dated the 27th March 1925.

Mr. *Coltman*, for the Appellant.

Mr. *Kanga*, Advocate-General, (with him Sir *Chimanlal Setalvad*), for the Respondent.

JUDGMENT.

Coyajee, J.—This is an appeal from a judgment and order of Mr. Justice Kemp, dated March 27, 1925. The material facts are these:

On February 9, 1922, the respondent, who is the Receiver in High Court Suit No. 688 of 1917, lent and advanced to F. F. Gordon, Ltd., the sum of Rs. 2,00,000 under circumstances more fully stated hereafter. An order for winding up the said Company was made on September 1, 1922, and an Official Liquidator was appointed. On January 17, 1923, the Receiver claimed to be ranked as a secured creditor for the said sum of Rs. 2,00,000. The claim was investigated by the liquidator on March 29, 1923, and he was of opinion that it was a just one; he, therefore, "allowed the same as a preferential claim subject to the sanction of the Court to the extent of moveables" on the ground that the Receiver was a pledgee in possession. On April 7, the liquidator applied for directions, and Mr. Justice Kemp, after hearing Counsel for the petitioning creditors, made an order in these terms:—"The Receiver to rank as a secured creditor in respect of the security for the amount of his principal debt and interest." The petitioning creditors now bring this appeal.

F. F. Gordon, Ltd., was a private Company registered under the Indian Companies Act, 1913, on March 3, 1916. Its issued capital was Rs. 2,00,200, consisting of 2,002 fully paid up shares of the nominal value of Rs. 100 each. Two thousand shares were held by Mr. F. F. Gordon, and the remaining two by Mr. H. P. Byramjee. The main object of the Company was to carry on the business of newspaper proprietors, and of newspaper and general printers and publishers, advertisers, and advertising agents and contractors, and to acquire and take over as a going concern the business of newspaper proprietors and printers then carried on by F. F. Gordon and Co. at the Advocate of India Printing Press in Bombay. Under the articles of the Company Mr. Gordon was its first governing Director. In 1917, he left India and never returned. On September 9, 1920, Mr. Gordon executed a power-of-attorney (Ex. B) in favour of Mr. James Cunningham to act for him as "managing Director" of the Company and as editor of the Advocate of India, and in connection therewith to do "all things which may be necessary to manage the business."

The Company found itself in need of money. On February 6, 1922, Cunningham as the Managing Director wrote a letter (Ex. C) to the said Receiver intimating that they were prepared to mortgage to him the plant, machinery, goodwill of the concern and the building lease as security against the loan of Rs. 2½ lacs which was being negotiated.

On February 9, three documents came into existence and they are important: (1) a resolution over the signature of Cunningham as "Chairman of the Board" authorising him to carry out the arrangement set forth therein and to execute the pro-

missory-notes, the agreement and all other documents as might be necessary to carry out the same (Ex. D); (2) a demand promissory-note for Rs. 2,00,000 in favour of the Receiver, signed by Cunningham as Director, and constituted attorney for Mr. Gordon, and in his personal capacity (Ex. F.) and (3) an agreement between the Company and the Receiver, Cunningham signing it as the Managing Director (Ex. G). On the same day, Cunningham wrote to the Receiver stating that he had taken possession of the machinery, presses and all moveable property comprised in the said agreement as the Receiver's agent and would continue to hold the same as his agent (Ex. E).

On these facts, the Receiver claims that he is entitled to a preferential charge over the moveables of the Company on the ground that he is a pledgee in possession.

The petitioning creditors, on the other hand, contend, briefly, as follows:—(1) There is no pledge because there was no complete or effective transfer of possession; (2) Mr. Gordon himself had no authority to borrow money on a pledge; and in any event Mr. Cunningham had none; (3) the charge was intended to operate as a floating security on all its moveable property, present and future, and was void against the liquidator and also against the other creditors of the Company, inasmuch as the prescribed particulars of the charge together with the said agreement or its copy were not filed with the Registrar for registration, as required by s. 109 of the Indian Companies Act, 1913.

The first question for consideration then is--what is the nature of the transaction between the Receiver and Mr. Cunningham? For this purpose, a reference to the agreement (Ex. G) is necessary. It recites that:—

"The borrowers are possessed of or otherwise well and sufficiently entitled to the unexpired residue of the term of 20 years in the land and building thereon situate at Dalal Street, Fort, Bombay, and more particularly described in the schedule hereto and the engine, boiler, machinery, plant, printing presses, foundry types, implements, tools specified in the list hereto annexed and marked B and all furniture, papers, stock-in-trade and other moveable property fixed now lying and being or which may hereafter be fixed and lying and being on the said premises."

It then recites the loan of Rs. 2,00,000 on a demand promissory-note; and provides that on the Company executing within two months from the date of the agreement a first mortgage "of the said property" the Receiver shall extend the time for re-payment to one year. By the 7th clause, which is material, it is provided:—

"That pending execution of the mortgage-deed the borrowers shall put the lender in possession of all property of the borrowers (except the leaseholds and the goodwill) and the Director or governing Director of the borrowers shall hold possession of the same from to-day for and on behalf of and as agent of the lender and the borrowers shall not sell, assign, transfer, hypothecate, or otherwise deal with the same or any part thereof or with the business of the Company or the leasehold premises or any of them without the consent in writing of the lender personally."

The eighth clause required the Company forthwith to make an entry of the said agreement in their register of mortgages. This requirement was intended to satisfy the provisions of s. 123 of the Act; and an entry (it is admitted) was made accordingly. By the tenth clause it was provided that the borrowers should pass such resolutions of the Board and execute such documents for the proper security of the lender as his Solicitors might require.

The agreement (Ex. G) shows, in my opinion, that the parties intended to create a charge upon all the Company's property, present and future, "except the leaseholds and the goodwill." The recitals make it clear; the seventh clause speaks of "all property of the borrowers (except the leaseholds and the goodwill)," and the eighth clause is appropriate to a transaction of such a nature. The transaction was intended to improve the business, and not to put an end to it. The business of the Company was to continue to be carried on in the ordinary way. Its continuance involved the using up of various goods forming part of the Company's stock-in-trade including paper, type, etc. The document does not speak only of the goods then existing; it contemplates also the possibility of some of those goods being used up and others taking their place: *Illingworth* v. *Houldsworth* (1). This is not a case of specific goods being marked off

(1) (1924) A. C. 355; 73 L. J. Ch. 739; 20 T. L. R. 633; 55 W. R. 113; 91 L. T. 602; 12 Manson 141.

and given over to the Receiver. The possession contemplated in cl. 7 was a temporary arrangement until a mortgage was executed. In the opinion of the learned Judge, however, the seventh clause created merely a pledge of the then property of the Company, except the lease-holds and goodwill. He says:—

"I think there was no necessity to go through any further formalities to evidence the handing over of possession, though the Receiver's Counsel, who, however, did not put the Receiver in the box, says such formalities were performed."

On the question of transfer of possession, the parties are not in agreement. The petitioning creditors say:—

"As a matter of fact, the Company continued to carry on its business to the knowledge of the Receiver in the ordinary course, and to deal with and use up its stock of paper and other stock-in-trade, alleged by the said Receiver to have been pledged with him, in the ordinary course of business as if there was no pledge, and practically ignored the alleged pledge and treated the said goods as their own. None of the goods alleged to have been pledged was earmarked or set apart. The same continued to be on the Company's premises. It is not contended that the Receiver was given any right to go to the Company's premises and remove the goods at any time." (Paper Book, Part I, p. 10.)

Mr. Gordon died in Edgland in February 1922, and his sister, Miss Gordon, who claims to be the sole beneficiary under his Will, arrived in Bombay in July 1922. Differences soon arose between her and the Receiver (see the correspondence Ex. H), and then, sometime after July 28, the Receiver's Board as pledgee in possession (Ex. R) was affixed to the Company's buildings. In the circumstances, the appellants are, I think, right in contending that there was no complete and effective transfer of possession.

In my opinion the parties did not create a pledge of existing properties; they intended to create a floating charge on all the properties of the Company, "except the leaseholds and the goodwill," within the meaning of s. 109 of the Indian Companies Act, 1913; but the charge is void for want of registration.

On the question whether Mr. Gordon himself had power to make a pledge, I am inclined to think he had. But the pledge was made not by him but by Mr. Cunningham. And I agree with the learned Judge in holding that neither was the latter a properly appointed Managing Director under the articles, nor could Mr. Gordon appoint him as his constituted attorney to act as such in his absence.

The Receiver, however, contends that Cunningham being permitted to carry on the Company's business as the Director, persons dealing with the Company were entitled to assume that he was the Director *de jure*; it did not matter to them that in fact he had not been duly appointed, for that was part of "the indoor management": *Mahony* v. *East Holyford Mining Co* (2). The appellants reply that: (1) s. 87 of the Indian Companies Act requires every Company to keep a register of the names of its Directors, to file with the Registrar a copy of it, and from time to time to file with him notice of any change among its Directors; the Receiver was, therefore, effected with notice of such register, and if he had only taken the trouble to see it, he would have found that Cunningham was not a Director; and (2) the Receiver had notice of the defect in Cunningham's authority, the promissory-note (Ex. F.) being sufficient to put him on his guard.

The evidence adduced in this case establishes the fact that Cunningham was acting as the Managing Director of the Company from June 1920. He carried on its business, signed cheques, signed the correspondence, and corresponded with the appellants themselves as the Managing Director. He was, therefore, permitted to be in actual possession of the Directorship, and the Receiver was entitled to assume that he was the Director *de jure*. Was the Receiver then bound to search and look into the register (s. 87)? No doubt, persons contracting with a Company are bound to know, or are precluded from denying that they know, the constitution of the Company and its powers as given by Statute and the memorandum and articles (Halsbury's Laws of England, Vol. V, s. 495). Are they also affected with notice of all that is contained in the register of Directors kept as required by s. 87 of the Act, which corresponds to s. 75 of the Companies (Consolidation) Act, 1908, (8 Edw. VII, c. 69)? We are not referred to any direct authority on this question. In my opinion, notwithstanding the provisions of s. 87, the appointment

(2) (1875) 7 H. L. 869; 33 L. T. 338; Ir. R 9 C L 306.

of a Director still remains part of "the indoor management" of the Company. It would hardly conduce to facility of business if outsiders were compelled to search the register and find for themselves whether a person who was permitted to act as a Director of the Company for some length of time, was also its Director *de jure*. The Receiver was, therefore, entitled to deal with Cunningham as if he was a duly appointed Director.

The next question is, whether the Receiver had notice of the defect in Cunningham's authority. The learned Judge says:—

"The only argument on which the Receiver's position as thus considered can really be assailed is that he did not go into the witness-box to swear he had no knowledge of the flaw in Cunningham's authority; but to this there is the obvious reply that the Receiver would scarcely deliberately close his eyes to the possibility of a flaw in the title when as an officer of the Court he was making so large a loan from the estate of which he was Receiver."

With great respect, that reply is not obvious. Nevertheless, I think, the appellants' contention is sufficiently answered by the learned Judge in the preceding paragraph of his judgment. The contention was that the promissory note, (Ex. F), should have put the Receiver on his guard. That note was signed by Mr. Cunningham as the Director and also as the constituted attorney of Mr. Gordon; nonetheless he signed it as the Director. And there is, so far as I can see, nothing in that note which would lead the Receiver to doubt Cunningham's authority to sign it as the Director.

The result is that the charge which the parties intended to create was void to the extent indicated in s. 109 of the Act.

As regards ground No. 11 of the memo of appeal, which relates to interest accruing due after the date of the winding up, it is sufficient to say that, as pointed out in the course of the arguments, the liquidator had allowed the claim to the extent of Rs. 2,00,000 only (see Paper-Book, Part I, p. 4.), and, therefore, that question did not arise in these proceedings.

I would, for these reasons, allow the appeal.

Macleod, C. J.—I agree generally with the judgment of my brother Coyajee. The document of February 9, 1922, did not create a pledge of specific assets belonging to the Company in favour of the Receiver, but created a floating charge on all the Company's assets, and was, therefore, compulsorily registrable under s. 109 of the Indian Companies Act.

I feel doubtful whether, owing to the peculiar constitution of the Company and in particular to the nature of the Memorandum and Articles of Association, the Receiver was not put on inquiry as to the powers of Cunningham to execute the agreement, but it is not necessary to form a definite opinion on that question.

The respondent must pay the appellants' costs in both Courts.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 9 OF 1923.

August 6, 1924.

Present:—Justice Sir Charles Gordon Spencer, KT., Officiating Chief Justice, and Mr. Justice Srinivasa Iyengar.

A. L. A. R. R. M. ARUNACHALAM CHETTIAR AND OTHERS—DEFENDANTS NOS. 1 TO 4—APPELLANTS

versus

B. Raja RAJESWARA SETHUPATI *alias* MUTHURAMALINGA SETHUPATI AVERGAL THROUGH HIS AUTHORIZED *Dewan* S. TIRUMALAI IYENGAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Limitation Act (IX of 1908), s. 19, Sch. I, Arts. 116, 120—Construction of decree—Decree based on compromise declaring liability to pay amount found due on taking accounts—Suit to recover amount, whether maintainable — Limitation — Acknowledgment—Statement that payment has not been paid as accounts have not been settled, effect of.

The parties to a suit agreed to compromise their disputes and obtain a declaratory decree in the suit and a deed of compromise was drawn up. The decree embodied the terms of the compromise wholesale and provided *inter alia* that accounts should be looked into and the amounts found due should be paid. There was no actual taking of accounts, no amount was fixed as being due from one party to the other and no final decree was passed. In a subsequent suit instituted by one of the parties within six years of the date of the decree to recover from the other party moneys due by the latter on the basis of the accounts:

Held, (1) that the previous decree was only declaratory in character and was not executable and that the present suit was not, therefore, barred by the provisions of s. 47 of the C. P. C.; [p. 341, col. 1.]

(2) that the decree governed the relations between the parties superseding the compromise deed; [p. 341, col. 2.]

(3) that the suit being one to enforce the obligations arising under a decree, Art. 120 of Sch. I to the Limitation Act applied and the suit was, consequently, within time [p. 341, col. 2.]

Periasami Mudaliar v. *Seetharama Chettiar*, 27 M. 243; 14 M. L. J. 84, relied on.

A compromise decree has got the features and characteristics both of a compromise and a decree and a suit based on the declarations contained in such a decree may, therefore, appropriately be regarded as a suit upon a decree and not a suit on the contract contained in the compromise. [*ibid.*]

Whether an earlier contract is superseded by a later contract on account of a certain alteration in the terms of the contract depends on whether the parties intended to rescind the original contract. It is, however, possible to vary a term of an original contract by a subsequent parol contract in such a way as to keep alive the original contract. [p. 339, col. 2.]

British and Beningtons Ltd. v. *N. W. Cachar Tea Co.*, (1923) A. C. 48; 92 L. J. K. B. 62; 128 L. T. 422; 28 Com. Cas. 265, relied on.

A statement by a lessee that arrears of rent have not been paid up for the sole reason that accounts have not been settled amounts to an acknowledgment of liability within the meaning of s. 19 of the Limitation Act so as to save the bar of limitation. [p. 339, col. 2; p. 340, col. 1.]

Appeal against a decree of the Court of the Subordinate Judge, Ramnad at Madura, in Ordinary Suit No. 75 of 1919.

Messrs. *K. V. Krishnaswamy Iyer* and *V. Rajagopala Iyer*, for the Appellants.

Mr. *A. Krishnaswamy Iyer*, for the Respondents.

JUDGMENT.

Spencer, Offg. C. J.—This suit was brought by the Rajah of Ramnad in his capacity as hereditary trustee of certain *Devastanams* to obtain from the lessees, who are the firm of A. L. A. R. an account of the income of the village of Ekkakudi for *Fasli* 1322 and for payment of the amount due according to the accounts or such amount as may be due even if the lessees are not liable to render accounts.

Two questions have been argued before us: (1) Whether the suit is maintainable, or does the plaintiff's remedy lie in execution of the decree in O. S. No. 71 of 1902; and (2) whether the suit is barred by limitation.

The compromise of the parties was embodied wholesale in the decree of the Court in O. S. No. 71 of 1902 which is Ex. A (2). One of its terms is that the parties should obtain a declaratory decree. Another term declares that in the matter of looking into the accounts, the amounts found due should be paid. In that suit there has been no taking of accounts and no final decree fixing the amounts due in rupees and annas. The terms of the decree which a Bench of this Court in A. S. Nos. 373 and 374 of 1919 held to be capable of execution, are not identical with the terms of Ex. A (2). I do not think that this decree, Ex. A (2), is executable for the reliefs which are sought in the plaint in the present suit.

On the question of limitation it is not disputed that the plaint, having been presented on 7th July 1919, the re-opening day after the Madura Sub-Court's vacation, is in time if the plaintiff has six years under Art. 116 from the date of the decree, which was 15th July 1913 or from the date of the surrender deed, Ex. A, which was 4th July 1913. The surrender deed was registered, but the parties' rights under it became merged in the decree which was not registered. There was an alteration of three months into two months in the later document in respect of the time for looking into the accounts of 1922. Whether an earlier contract is superseded by a later contract on account of a certain alteration depends on whether the parties intended to rescind the original contract. (See s. 62 of the Contract Act). It is possible to vary a term of an original contract by a subsequent parol contract in such a way as to keep alive the original contract. [See *British and Beningtons Ltd.* v. *N. W. Cachar Tea Co.* (1).] In the present case I think that it is the decree which governs the relations between the parties and the registered surrender deed was only a step towards obtaining that decree. It, therefore, seems to be impossible to apply Art. 116 to the facts of this case. We have the authority of a Full Bench in *Periasami Mudaliar* v. *Seetharam Chettiar* (2), for saying that Art. 120 is the proper Article for suits to enforce obligations arising out of decrees. But the fact must not be lost sight of that Art. 120 is a residuary Article and can only be applied when no other Article is found suitable. In ordinary suits upon accounts the limitation period to recover money is three years under Art. 64 and unless it is shown that that Article will not apply to the claim as set out in the plaint the plaintiff cannot get six years under Art. 120.

The next question is whether the limitation period has been extended by an acknowledgment under s. 19. In Ex. B a

(1) (1923) A. C. 48; 92 L. J. K. B. 62; 128 L. T. 422; 28 Com. Cas. 265.

(2) 27 M. 243; 14 M. L. J. 84.

letter of 16th June 1916 from Subramania Iyer styling himself as the agent to the lessees of the Ramnad Samasthanam, he states that the arrears have not been paid up for the sole reason that the *devastanam* accounts have not been settled. I understand this to be an acknowledgment that *devastanam* accounts have to be settled and that the arrears found to be due upon settling accounts will then be paid up. The writer of this document, Subramania Iyer, had a general power-of-attorney (Ex. C) executed in his favour by the defendants in which he is described as the agent of all of them carrying on all correspondence necessary and conducting all proceedings relating to the transactions concerning the *devastanam chatram* lands. It is argued that as Ekkakudi was under the personal management of the lessees the authority did not extend to that village so as to make him an agent of his principals capable of giving an acknowledgment of liability in respect of the rent due from Ekkakudi. I have read Ex. C and I find no words to limit the agent's power to those villages which he actually managed. I am, therefore, of opinion that the acknowledgment under Ex. B was sufficient to extend the period of limitation to three years from that date. The suit is, therefore, in time and the appeal fails and is dismissed with costs.

Srinivasa Iyengar, J.—I agree with learned Chief Justice, but having regard to the importance of the two questions argued by the learned Vakil for the appellants in this case, I wish to add a few observations of my own. The bar to the suit by reason of the provisions of s. 47 of the C. P. C. depends on the terms of the previous decree, the question being whether the previous decree was executable in its nature. There was really no argument on the terms of the decree itself addressed to us by the learned Vakil for the appellants, and it seems to me that he merely contented himself with referring to the judgment of Abdur Rahim and Oldfield, JJ., in A. S. Nos. 373 and 374 of 1919 on the file of this Court. During the hearing of this appeal, everyone proceeded on the footing as though the decree before the learned Judges in those appeals was exactly similar in terms to the decree before us. But it was only accidentally that I discovered this morning that the decree which these learned Judges had before them was materially different in terms. Reading the decree in O. S. No. 89 of 1912 which was being construed by the learned Judges, I find that it is possible to construe that decree as not only containing a direction for taking the accounts, but also a direction to pay the amounts that may be found due on the taking of the accounts. In the decree before us, a *razinama* which was in Tamil is bodily engrafted and the Court did not even attempt to make a translation of the *razinama* into the English language. The translation which has been placed before us is inaccurate in material particulars. In para. 4 of Ex. A (2) which is the decree from the translation, it would appear that there is a kind of direction for the taking of the accounts because the words are "Accounts should be looked into within two months". But in the original decree which is in the Tamil language, reference to the taking of the accounts is contained in a subsidiary clause and it cannot be construed as including a direction for the taking of the accounts. In this state of things it seems to me to be unnecessary to consider the decision of the learned Judges, in the other two appeals with regard to the document before us. Construing the present decree, I have no hesitation in coming to the conclusion that the decree is not executable. No doubt the words referring to the liability of the defendants to pay would be consistent with the decree being either directory or declaratory. But what we do find is that the decree proceeds to say that, if on the taking of the accounts, a balance should be found payable by the plaintiff to the defendants, the defendants should be entitled to recover it from the plaintiff. It could possibly not have been contemplated that the decree should include a direction executable in its nature in favour of the defendants to recover such moneys from the plaintiff. Mr. K. V. Krishnaswamy Iyer argued, no doubt, it may be that defendants would not be able to have execution of the decree because they were not entitled to it, not having pleaded a set-off or counter-claim and having regard also to the form or the suit; but that is no reason why the decree should not be properly construed as containing an executable direction. For the purpose of seeing whether the decree is executable or not, referring to the liability of the defendants

to pay the plaintiff, if the balance should be in their favour being in terms identical with the liability of the defendants to pay the plaintiff if the balance should be in his favour, we cannot but regard it as being merely declaratory in its nature.

With regard to the question of limitation, the learned Vakil for the appellants submitted that it was barred by limitation because it was a suit for compensation for breach of a contract not in writing registered, that the suit was based upon the terms of the agreement and the compromise decree should be treated for the purpose of the present suit merely as a compromise. Mr. A. Krishnaswami Iyer, the learned Vakil for the respondent, put his case on three grounds. He stated that the suit was really a suit for compensation for breach of a contract in writing registered, namely, the deed of surrender and that, therefore, he had six years within which to institute the suit. It is clear that there was a variation of the contract as set out in the deed of surrender, a variation though only of one term regarding the period within which the account should be taken but nonetheless a variation. Under s. 62 of the Contract Act, a contract which is altered by the consent of the parties need not be performed which, I take it, means that the contract which is to be performed is not the old contract, but the contract as altered. Therefore, a contract, the performance of which could be enforced, would only be the contract as altered and that contract is not entirely in writing registered. Therefore, the contention that the suit should be deemed to be a suit on a contract in writing registered cannot be upheld. Further having regard to the circumstance that the deed of surrender itself contemplated the *razinamah* being entered into between the parties and such *razinamah* being made the rule of Court, it cannot be suggested that the parties contemplated that they should be bound by the terms of the deed of surrender even after they execute the *razinamah* by and between themselves and that is embodied in the decree.

The second ground on which he stated that the suit was not barred by limitation was by reason of the acknowledgment contained in Ex. B. I agree with the learned Chief Justice that that is sufficient to save the bar of limitation.

The third ground on which he said that the suit was saved from limitation was that the suit should be deemed as one on a decree, namely, the compromise decree in the previous suit. No doubt a compromise decree has got the features and characteristics both of a compromise and a decree and the question really is whether the suit is based on the declarations contained in a previous decree and should, therefore, appropriately be called a suit upon a decree or a suit in the contract contained in the compromise. Suits on decrees have been recognised in the case reported as *Periasami Mudaliar* v. *Seetharama Chettiar* (2) and the Legislature has also recognised what are called suits upon judgments. They are called suits upon judgments, I take it, because the English lawyers who were responsible for the enactments were more acquainted with the term judgments according to the English procedure than with the term decrees. In the Presidency Small Cause Courts Act, s. 19, suits on any judgment of a High Court are excluded from the jurisdiction of the Presidency Small Cause Courts and in the Provincial Small Cause Courts Act. Similarly a suit upon a foreign judgment as defined in the C. P. C., or upon a judgment obtained in British India is excluded. If decrees can be declaratory in their nature and suits can be instituted for the purpose of enforcing the rights and obligations declared by such decrees, I think the most appropriate term to be applied to such suits would be that they are suits upon judgments or decrees. But for perhaps, s. 47, C. P. C., there may be many such suits. The compromise having become merged into the decree, the suit based upon a compromise so merged into the decree should properly be denominated only as a suit upon a decree. Article 64 cannot apply because it is an Article for the recovery of money on accounts stated between the parties; and it seems to me that Art. 115 cannot apply because the suit is not merely on a contract between the parties. In the absence of any other appropriate Article to be applied to such a suit as this, the proper Article to be applied is, as was held in *Perisami Mudaliar* v. *Seetharama Chettiar* (2), Art. 120. Applying that Article, the suit is in time. I, therefore, agree with the learned Chief Justice that the appeal fails and should be dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

REFERENCE No. 1 OF 1925.

July 16, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

RAGHUNATH RITHKARAN—

PLAINTIFF—APPELLANTS

versus

THE IMPERIAL BANK OF INDIA, LTD.—DEFENDANT.—RESPONDENT.

Bill of exchange—Payment under mistake of fact—Notice to payee, absence of—Amount paid, whether can be recovered.

Where a person accepts the position of a drawee of a Bill of Exchange and honours the bill under a mistake of fact, he establishes for the time being a mutual relationship between himself and the person to whom the payment is made and this relationship casts upon him the duty to inform the latter within a reasonable time that he has accepted that position under a mistake of fact. Where such person gives no notice to the person to whom the payment has been made for a long time after the discovery of the mistake, he is not entitled to recover the amount of the payment on the ground that the payment was made under a mistake of fact. [p. 344, col. 1.]

Mr. *Munshi*, for the Appellant.

Mr. *Coltman*, for the Respondent.

JUDGMENT.

Macleod, C. J.—This is a Reference from the Small Causes Court, Bombay, under s. 69 of the Presidency Small Cause Courts Act, 1882. The occasion for the reference was due to the fact that there was a difference of opinion between the Judges of the Full Court.

The plaintiffs filed Suit No. 2024-30524 of 1924 in the Small Cause Court to recover from the defendant, the Imperial Bank of India, the amount of Rs. 1,000, which the plaintiffs had paid to the defendant on December 22, 1921, under a mistake of fact. On that day four *hundis* were presented to the plaintiffs by the defendant for sums aggregating Rs. 7,000. They were all written by the same person. Two of the *hundis* were drawn by Dhanraj Suganchand for Rs. 1,000 each. One of these was as a matter of fact not drawn on the plaintiffs. But by the carelessness of the plaintiffs this fourth *hundi* was treated as having been drawn on them, and so it was honoured. The plaintiffs on the same day made entries in their *hundi* Nondh of these four *hundis*, and it should then have discovered that one of the *hundis*, out of the two which were debited to the account of Dhanraj Suganchand, was not drawn on the plaintiffs. No memo of account was sent to Dhanraj Suganchand until the following November In his reply of November 10th 1922, he complained that he had been debited with Rs. 1,000 in excess of the true amount. Even then it was not until August 9th 1924, that notice was sent to the defendant demanding back Rs. 1,000. The case came before the Chief Judge who said :—

"It is the essence of all negotiable instruments that in the case of any mistake whatsoever, notice without any delay has to be given to the party from whom the amount is sought to be recovered, the reason being obvious, as in the meantime the position of the party may have been prejudiced. This has not been done in this case, and on this ground, if not on any other ground plaintiffs' suit must fail. But even on the facts, I find plaintiffs have no case. Four *hundis* no doubt written in a similar hand are brought to them. Still the party taking down the particulars did not take even the ordinary precaution of reading the address of the drawee and took it for granted that the drawees were themselves, because defendant's man said so. This sort of want of precaution in a business man could not absolve him, especially where the party to whom the payment is made has suffered by such absence of caution."

A rule was obtained from the Full Court, and after arguments, the Chief Judge adhered to his previous opinion.

The Third Judge Mr. Chitre held that money paid under a mistake of fact could be recovered, provided there was no laches on the part of the party paying, and that there might be cases where on account of mutual relations between the parties, the party paying the money, though under a mistake of fact, was, by breach of duty, disentitled from recovering, referring to the case of *Durrant* v. *Ecclesiastical Commissioners* (1).

The question really in this case is whether on the facts there was any duty lying on the plaintiffs to inform the bank within a reasonable time that they had paid the *hundi* under a mistake of fact that they were drawees, when as a matter of fact they were not, and no case is cited before us which is directly in point.

The plaintiffs relied upon *Durrant* v. *Ecclesiastical Commissioners* (1). In that case the defendants became owners in possession of the tithe of the parish of Crimple-

(1) (1881) 6 Q. B. D. 234; 50 L. J. Q. B. 30; 44 L. T. 348; 29 W. R 443; 45 J. P. 270.

sham on April 10, 1874. The names of the persons for the time being occupying the respective hereditaments subject to tithe were put down in the collecting book of the tithe owners agent, which was used by the collector at the tithe audit. When Hodgkinson, one of these two persons, gave up his tenancy of the land in his occupation including a land called Stanks, the name of the plaintiff was substituted in the collecting book of the then Collector for that of Hodgkinson in respect of all the lands, including Stanks. From that time until April, 1874, the Collector for the lessees, and afterwards the Collector for defendants, gave notices to the plaintiff, as an occupier of lands in the parish, to pay the tithe for the lands that appeared by the collecting book to be occupied by him, without any knowledge on his or their part that the plaintiff did not occupy the land called Stanks, or that the plaintiff was not liable to pay tithe for the same, being guided simply in the notices of audit by the list above mentioned. The plaintiff paid his tithe according to the notices, in ignorance that the amount specified in the notices included the tithe for Stanks not occupied by him. The tenant of Stanks, who was liable under an agreement with the landlord to pay tithe, was not asked to pay for that land until after the plaintiff, in April, 1877, accidentally discovered that he was paying tithe for land not in his possession, and refused to pay it any more. The question for the opinion of the Court was whether, under these circumstances, the plaintiff was entitled to recover back any and what part of the tithe so paid by him to the defendants? Pollock, B, in giving judgment said (page 236*):—

"I agree in the decision arrived at by the County Court Judge in favour of the plaintiff. If the mistake, which was common to both parties, had been discovered within a certain time after the payment the defendants could have obtained the tithe from the tenant. The fact that the mistake was not discovered in time prevents this, and so alters the position of the defendants; but there is no conduct on the part of the plaintiff such as would disentitle him from recovering in this action. In *Cocks* v. *Masterman* (2) the ground of the decision was that the banker should bear the loss, because he had not done that which bankers are bound to do, given notice of the forgery of the cheque when it became due. This and other similar cases proceed upon the ground of some mutual relation between the parties creating a duty on the part of the plaintiff, breach of which disentitles him from recovering. No such state of facts exists here, and the plaintiff, having paid the money under a mistake of fact, is entitled to recover it back."

It is to be noticed on the facts of that case that the plaintiff could not derive from the notices served upon him any knowledge that he was being charged with tithe for land which was no longer in his occupation. What would have been the result if the notices had contained the actual mention of the lands alleged to be in his possession, including the lands called 'Stanks,' cannot be concluded from the judgment. But it was certainly said that "there is no conduct on the part of the plaintiff such as would disentitle him from recovering in this action." It might be inferred from those words that there might have been conduct on the part of the plaintiff which would disentitle him from recovering. I do not think that the facts in that case bear any resemblance to the facts in this case, as the question here is whether there was any relationship between the parties which would have cast a certain duty on the plaintiff, which, if he did not perform, would conclude him from recovering.

The defendant relied upon the decision in *London and River Plate Bank* v. *Bank of Liverpool* (3) where it was held that:—

"When a bill becomes due and is presented for payment, and is paid in good faith and the money is received in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although indorsements on the bill subsequently prove to be forgeries."

Reference was made in the judgment to the decision in *Cocks* v. *Masterman* (2) where the simple rule was laid down in clear language for the first time that (page 11*):—

"When a bill becomes due and is presented for payment the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at

(2) (1829) 9 B. & C. 902; 4 Man & Ry. 676; 8 L. J. K. B. (o. s.) 77; 109 E. R. 335; Dawson & Lloyd 329; 33 R. R. 363.

*Page of (1881) 6 Q. B. D.—[*Ed.*]

(3) (1896) 1 Q. B. 7; 65 L. J. Q. B. 80; 73 L. T. 473.

*Page of (1896) 1 Q. B.—[*Ed.*]

once, it may be the money can be recovered back; but if it be not, and the money is paid in good faith, and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back."

Reference was also made to *Imperial Bank of Canada* v. *Bank of Hamilton* (4) where a cheque for five dollars certified by the Bank of Hamilton's stamp was fraudulently altered to 500 dollars and paid by the Bank of Hamilton to the Imperial Bank of Canada, a holder for value, under a mistake of fact, which was not discovered till the next day. The Imperial Bank of Hamilton sued to recover back 495 dollars from the Imperial Bank of Canada. It was held that notice of forgery was unnecessary, and the cheque for five dollars was not dishonoured; and accordingly the stringent rule laid down in *Cocks* v. *Masterman* (2) to the effect that notice of dishonour of Bill of Exchange must be given on the due date, did not apply. The rule could not be extended to other cases where notice of the mistake was given in reasonable time, and no loss had been occasioned by delay.

In my opinion the fact that the plaintiffs accepted the position as drawees of the *hundi*, established for the time being mutual relationship between themselves and the bank, which cast upon them the duty to inform the bank within a reasonable time, that they had accepted that position under a mistake of fact. There can be no doubt that there had been gross carelessness on the part of the plaintiffs. They certainly had, when they noted the particulars in the *hundi nondh*, an opportunity of noticing that they were not the drawees mentioned in the *hundi* in question. Then in the ordinary course of business they should have notified to the drawer that he had been debited with the amount of the *hundi*, when the mistake would have been discovered, as is shown by the fact that when the drawer was notified of the debit made against him, he at once repudiated it. And then the further delay in sending notice to the bank has not been explained. If, as a matter of fact, the plaintiffs had three years from the date they discovered the mistake, then the question of delay would be immaterial. If the plaintiffs are to be responsible for the delay, it must be delay which took place within a short time after the payment was made. It would seem contrary to all principles of Common Law that in cases of negotiable instruments mistakes of this kind should not be notified within a reasonable time. The fact that the party assumed the liability which was not cast upon him by the document which was presented to him for payment, must, I think be taken as a ground for holding that he was bound to notify the mistake within a reasonable time to the holder of the document. I think, therefore, that the decision of the Chief Judge of the Small Cause Court was correct, and the case should be returned to the Small Cause Court with this expression of our opinion. The defendants will be entitled to the costs of the Reference.

Coyajee, J.—I am of the same opinion. The case stated for our opinion proceeds on the assumption that this is a suit for money founded on mistake. Where money is paid under mistake or ignorance of fact, the rule is that the person to whom it has been paid must re-pay it. In this case, however, the plaintiffs have, by their conduct, made it impossible to restore the parties to their original position; and this fact, in my opinion, affords a good defence to the suit. The material facts are these. On December 22, 1921, the defendant bank presented to the plaintiffs a *hundi* for payment. The plaintiffs paid the amount without reading the *hundi*; had they read it they would have found that it was not drawn upon them and that they were, therefore, not liable to pay. They discovered their mistake in November 1922, and it was not until August 9, 1924, that they gave notice of the mistake to the defendant bank and called upon it to re-pay the money. The plaintiffs took about eleven months to discover their mistake. The *hundi*, after it was paid, was retained by the plaintiffs and it is difficult to understand how, but for their own carelessness, the mistake remained so long undetected. Then, after the mistake was discovered, they remained inactive for a period of about twenty months. This long and unaccountable delay has made it impossible for the parties to be restored to their original position. By their own negligence—or, as they prefer to put it, by a mistake of fact—the plaintiffs accepted the position of drawees of the *hundi*; they paid the money and retained. These facts are sufficient to cast upon them the duty of giving notice of their mistake to the defendant bank within a reasonable time. It may

(4) (1903) A. C. 49; 72 L. J. P. C. 1; 51 W. R. 289; 87 L. T. 457; 19 T. L. R. 56

be conceded that the stringent rule laid down in *Cocks* v. *Masterman* (2) is not applicable to this case. But the plaintiffs were bound to give the defendant bank information of their own mistake in accepting the position of drawees of the *hundi*, within a reasonable time. Their failure to do so has, in my opinion, disentitled them from recovering the money in this suit.

Z. K. *Answer accordingly.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 303 OF 1924.

July 24, 1925.

Present:—Mr. Findlay, Officiating J. C.

Haji WALI MOHAMAD—PLAINTIFF—APPELLANT

versus

BENGAL NORTH-WESTERN RY. CO., EAST INDIAN RY. CO., AND BENGAL NAGPUR RAILWAY CO.—DEFENDANTS—RESPONDENTS.

Railway Company—Carriage of goods—Risk Note—Exemption from liability—Burden of proof—Wilful neglect, meaning of.

If a Risk Note executed by a consignor exempts a Railway Company from all liability in respect of loss of the goods except in a certain special case, such as wilful neglect of the Railway Administration or theft by or due to the wilful neglect of the servants of the Railway Company, in case of the loss of goods, the burden lies on the consignor to prove that there was wilful neglect by the Railway Company or its servants or theft by its servants. [p. 346, col. 1.]

The term "wilful neglect" implies an intentional and purposeful omission to do a certain act. It is an even more extreme term than "gross and culpable negligence" implying that an individual deliberately refrains with his eyes open from doing an act or taking a step which it is his duty to take. [p. 346, col. 2.]

Appeal against the decree of the District Judge, Bhandara, dated the 9th April 1924, in Civil Appeal No. 85 of 1923.

Mr. *M. B. Niyogi*, for the Plaintiff.

Mr. *J. C. Ghosh*, for the Respondents.

JUDGMENT.—The plaintiff-appellant Haji Wali Mohamad sued the Bengal North Western Railway Co., East Indian Railway Co., and Bengal Nagpur Railway Co., for Rs. 1,570 being the value of part of a consignment of *gur* sent from Pachrukhi on 7th February 1922 for delivery to him at Railway Station Tirora on the Bengal Nagpur Railway. Some 244 packages of *gur* were, however, short delivered when the remainder of the consignment was received by him on the 22nd of May 1922. The consignment was carried *via* Asansol on the East Indian Railway Co.

The main facts of the case are clear from the judgments of the two lower Courts. The Judge of the First Court held that the plaintiff had given due notice of the suit, that there had been a strike of the majority of the Indian servants of the East Indian Railway Co., at Asansol from 14th February 1922 to 11th April 1922, that the consignment had been delayed at Asansol because of this strike, that the 244 packages had been lost at Asansol about or subsequent to the 15th of February 1922, and that the loss was due to the wilful neglect of the East Indian Railway Co. and was not due to an unforeseen event or to a running train theft. The First Court accordingly passed a decree for Rs. 759 with proportionate costs.

The defendants appealed to the Court of the District Judge, Bhandara, and that Court held that due notice of the suit had not been given to the East Indian Railway Co. under s. 77 of the Indian Railways Act; in any event, therefore, the District Judge was prepared to absolve the East Indian Railway Co. from the plaintiff's claim. On the real merits of the case, however, he held that although the suit had originally been filed as one of damages for non-delivery of a part of the consignment, the plaintiff had subsequently admitted that the loss of the goods occurred while they were in possession of the East Indian Railway Co. In any event, he held it proved that the loss had occurred at Sansol. Accordingly it was for the plaintiff-appellant to prove that the loss was due either to the wilful neglect of the Railway Administration or to theft by, or to the wilful neglect of, his servants. The District Judge, therefore, differed from the First Court's finding that the mere fact of the Railway staff at Asansol having struck work amounted to wilful neglect. He accordingly dismissed the plaintiff's suit, and the latter has now appealed to this Court.

I have been referred by Counsel for the appellant to the findings of the First Court in paras. 12 and 13 of its judgment to the effect that there was some delay in locking up the wagons at Asansol, and it has been suggested that the District Judge cofirmed these findings on

appeal. But the District Judge's finding was directly to the contrary, *viz.*, that there had been no unreasonable delay on the part of the Railway staff at Asansol. As is obvious from the record, a state of something approaching anarchy prevailed there, a mere fraction of the staff was on duty, and it was a matter of physical impossibility for such a fraction to carry out in the normal way their duties. Even the local Police force proved inadequate and military Police had to be requisitioned. There is, therefore, in my opinion not only a total absence of proof that there had been wilful neglect on the part of the Railway Co., but any reasonable view of the evidence must be that such servants as remained on duty were doing all they could to cope with an impossible position.

In the present case the goods were sent under Risk Note Form H, wherein the Railway Cos. were to be held free from all responsibility for loss of the consignment except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration, or to theft by or to the wilful neglect of the servants. I have been referred to the decision in *Hanumant Rao* v. *G. I. P. Railway Company* (1) in this connection. But in the present case there was a clear admission made by the plaintiff on 12th June 1923 that the loss, we are concerned with, had occurred at Asansol. The case quoted, therefore, is of little help in the present one. Clearly the decision of Mittra, A. J. C., in the *Agent, G. I. P. Railway, Bombay,* v. *Karaylal* (2) applies here. The Risk Note we are concerned with exempted the Railway Co. from all liability except in certain specified cases and the burden was clearly on the plaintiff of proving that there had been wilful neglect by the Railway Co. or its servants or theft by its servants. The case in *East Indian Railway Co.*, v. *Jogpat Singh* (3) is similarly inapposite here on the question of onus in view of the plaintiff's admission that the loss had occurred at Asansol. Even if the burden of proving the negative, *viz.*, that there had been no wilful neglect on the part of the Railway Co., or its servants, had rested on the defendants, the evidence on record as to the extraordinary conditions, which existed during the strike, would have been ample to have discharged the onus which rested on them, and I fully agree with the District Judge that there has been a total failure to show that there was any wilful neglect on the part of the Railway Co., by which the loss of the *gur* in question was caused. The question of the East Indian Railway Co., not having been served with notice, therefore, becomes a some academical one, but I can see no reason for differing from the finding of fact which the District Judge arrived at in this connection. Clearly, the notice was not given within six months of the date of the delivery of the balance of the consignment. The Bengal North-Western Railway Co., would have undoubtedly been liable, in any event, for the plaintiff's claim had he succeeded in the main part of the case: *cf. Bengal and North-Western Railway Co.* v. *Haji Mutsaddi* (4) but, as I have already shown, the plaintiff fails in the main part of the case.

I may add as regards the term "wilful neglect" which has been alluded to in the course of argument, that this term implies an intentional and purposeful omission to do a certain act. It is an even more extreme term than gross and culpable negligence. It implies that an individual deliberately refrains with his eyes open from doing an act or taking a step, which it is his duty to do or to take. There has been nothing approaching even *prima facie* proof of any such wilful neglect in the present case. On the contrary, the evidence shows that the residuum of the Railway servants on duty were doing all they could to cope with an impossible and exceptional position of affairs at Asansol, a position of affairs which had become so serious as regards the breach of the public peace that recourse to the armed Police became necessary.

I find myself, therefore, in complete agreement with the judgment of the lower Appellate Court. The appeal fails and is dismissed with costs. I see no reason why the appellant should not bear the respondents' costs in this Court and I order accordingly. Costs in the lower Courts as already ordered.

G. R. D. *Appeal dismissed.*

(1) 72 Ind. Cas. 333; 19 N. L. R. 56; (1923) A. I. R. (N.) 223.
(2) 48 Ind. Cas. 294; 14 N. L. R. 122.
(3) 79 Ind. Cas. 126; 51 C. 615; 28 C. W. N. 1001; (1924) A. I. R. (C.) 725.
(4) 7 Ind. Cas. 160; 7 A. L. J. 833.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 647 OF 1921.

July 16, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

RAMCHANDRA TRIMBAK MANTRI—PLAINTIFF—APPELLANT

versus

DATTU RAMA PATIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bombay Land Revenue Code (Act V of 1879), s. 83—Landlord and tenant—Origin of tenancy—Permanent tenancy—Presumption.

Where it is found that the land comprised in a tenancy was waste land belonging to the ancestor of the landlord in a certain year and that it was not cultivated at that time by any tenant, the presumption laid down in s. 83 of the Bombay Land Revenue Code cannot be raised in respect of such land. [p. 347, col. 1.]

Second appeal from the decision of the District Judge at Satara, in Appeal No. 233 of 1923, reversing a decree of the Joint Subordinate Judge at Islampur, in Civil Suit No. 778 of 1918.

Mr. *Bahadurji* (with him Mr. *A. G. Desai*), for the Appellant.

Mr. *G. S. Rao*, for the Respondents.

JUDGMENT.—The finding of the two lower Courts on the issue remanded under this Court's judgment of March 25, 1924, is in the negative, that is to say that the defendants have failed to prove under the provisions of s. 83 of the Bombay Land Revenue Code that they are entitled to the presumption mentioned therein, so that they cannot be held to be permanent tenants with a duration of tenancy co-extensive with the duration of the tenure of their landlord. This negative finding is based on certain documentary evidence which, in the opinion of both the lower Courts, shows that the land in question was waste land belonging to the plaintiff's ancestor in about the year 1851 and that it was not cultivated by any tenant, whether the predecessor of defendants Nos. 1 to 5 or not, until at any rate some years later. This conclusion is not objected to by Dewan Bahadur Rao for the respondents. But he contends that the finding is not sufficient ground for saying that satisfactory evidence of the commencement of the tenancy is forthcoming. He relies upon the decision in *Sidhanath* v. *Chiko* (1), confirmed in appeal in *Chikko* v. *Shidnath* (2). He points out that the finding in that case was that the tenancy must have begun in the year 1805 and that the decision, therefore, only amounts to saying that, when a particular year can be indicated as that in which the tenancy began, the case is excluded from those in which a presumption can be drawn under s. 83 of the Bombay Land Revenue Code. He points out that, if so, this is in conflict with the decision to which I was a party in *Narayan* v. *Pandurang* (3) and that the assumption in Pratt, J.'s judgment that in *Sidhanath* v. *Chiko* (1): "the time from which the tenancy was proved to have commenced was found not to be a particular year, but a period in or after the year 1805," is not justified by the record in that case. The latter comment appears correct, but that does not, in my opinion, affect the main consideration on which the decision in *Narayan* v. *Pandurang* (3) was based. In both the judgments of Pratt, J, and myself the main reason for holding that the presumption could not be drawn was that a certain period was proved within which the tenancy must have commenced, and that there was no good ground for saying that a particular year was the outside limit contemplated by the Legislature in s. 83, in regard to proof of the commencement of a tenancy. As I have said in that case, I can see no logical basis for saying that you are justified in taking a number of months, but not justified in taking a number of years as sufficient. Dewan Bahadur Rao has suggested that the fact that the ordinary tenancy contemplated by the Bombay Land Revenue Code, is an annual tenancy, supplies a reason for taking a year as the extreme period contemplated by the Legislature. But there is nothing in s. 83 to confine it to the case of annual tenancies, and if the Legislature had intended such a construction we think it would have been more clearly expressed. I adhere to my previous decision, and, therefore, upon the findings of the lower Courts I hold that the main defence of the defendants fails and that they are not proved to be permanent tenants.

It is conceded by Mr. Bahadurji for the plaintiff-appellant that the objection as to proper notice not having been given is valid and that he is not, therefore, entitled to the relief of ejectment that

(1) 63 Ind. Cas. 935; 23 Bom. L. R. 533

(2) 66 Ind. Cas. 315; 24 Bom. L. R. 226; (1922) A. I. R. (B.) 25; 46 B. 687.

(3) 76 Ind. Cas. 71; 24 Bom. L. R. 831; (1922) A. I. R. (B.) 402; 47 B. 4.

is sought in the plaint. The plaintiff, however, included in the relief sought a prayer for a declaration that he and defendant No. 6 were the rightful owners of the land. Mr. Bahadurji asks that a declaration accordingly should be given, coupled with a further declaration that defendants Nos. 1 to 5 are merely annual tenants, who can be ejected after due notice as required by the Bombay Land Revenue Code. We, therefore, allow the appeal and grant the plaintiff the declarations above mentioned. We also, in order to avoid further litigation, if possible, and as there is a prayer in the plaint as to mesne profits, award, as other relief equitable in the circumstances of the case, the plaintiff and defendant No. 6 mesne profits or rent from defendants Nos. 1 to 5 from the date of suit at the rate of Rs. 41-11-9 the rate mentioned in Exs. 47 and 48.

As regards costs, the plaintiff has succeeded on the main question that has been the subject of this litigation but he has failed in his prayer for possession for a technical reason. In the circumstances, we think that a fair order will be that the appellant should get 2/3rds of his costs throughout from defendants Nos. 1 to 5.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1273 OF 1923.

June 17, 1925.

Present :—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

MAMIN KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MOIZUDDIN KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings—Easement, suit for—Plaintiff alleging easement in favour of himself and others- Easement established in favour of plaintiff alone—Plaintiff, whether entitled to decree.

If a plaintiff comes into Court and says that he as well as other persons have acquired a right of easement over a certain land, and does not succeed in proving that the other persons have such right, there is nothing to prevent him from succeeding in his claim if he can prove that he has used the land in the way required by law for the purpose of acquisition of a right of easement. [p. 349, col. 1.]

Appeal against the decree of the Subordinate Judge, Third Court, Mymensing, dated the 24th January 1923, affirming that of the Munsif, Second Court, Netrokona, dated the 20th August 1921.

Mr. *Atul Chandra Gupta* (with him Babu *Radhika Ranjan Guha*), for the Appellants.

Babus *Braja Lal Chakravarti*, *Birendra Kumar Dey* and *Biraj Mohan Majumdar*, for the Deputy Registrar.

JUDGMENT.

Ghose, J.—This is an appeal against the judgment and decree of the Subordinate Judge, Third Court of Mymensingh, affirming the decision of the Munsif, Second Court of Netrokona. The suit was for declaration of a right of way brought by the plaintiffs for themselves and for the general public of the village on the allegation that the plaintiffs as well as the villagers had used the land in dispute as a pathway for their daily necessary purposes for over hundred years from generation to generation with their cattle openly, peacefully, without dispute and as of right. They, however, described the pathway as a *gorat* starting from a different village and leading to another over the disputed land.

The Trial Court found that there was a pathway. The Munsif says "I have no doubt on the evidence on the record that before the alleged obstruction the plaintiffs and people having homestead nearby had used the disputed land for various purposes for an indefinite length of time without any obstruction. Defendant No. 1 had admitted that the plaintiff No. 1 and others pass on the disputed land when necessary to go from one homestead to another. Hence I find that the plaintiffs had been in uninterrupted enjoyment of the disputed land over 20 years." He, however, dismissed the suit on the ground that according to his finding the plaintiffs had used the land not as of right but by sufferance only. It is difficult to understand what he meant by the word "sufferance" because easements by prescription are acquired only by sufferance of the dominent owner. The plaintiffs appealed from that decree. The Subordinate Judge affirmed the finding of the Munsif as regards the user of the disputed land as a pathway by the plaintiffs and two or three villagers. It was also found by the Subordinate Judge affirming the decision of the Munsif that this was not a *gorat*, but that this pathway over the dis-

puted land was a continuation of the *gorat* and the plaintiffs and two or three villagers used to pass over it with their cattle. This was also admitted by the defendants witness No. 1 who said that the plaintiffs had a pathway to go to the *gorat* with their cattle over the disputed land. The Subordinate Judge next considered the finding of the Munsif as to whether the plaintiffs had been able to prove that the pathway was used as of right, and having taken into consideration all the facts which were placed before him for the purpose of establishing that the user was permissive he comes to this definite conclusion that the plaintiffs' user was as of right and not of a permissive nature. On this finding one would suppose that he would pass a decree in favour of the plaintiffs but instead of doing so he dismissed the suit on the ground that the plaintiffs having brought their suit on the allegation that they as well as the inhabitants of the village had the right of user over the disputed land as a way and they having failed to establish the right of user of all the villagers the suit ought to fail even if the plaintiffs had proved that they had the right of user as claimed by them. We do not consider that the proposition enunciated by the Subordinate Judge is right. If a plaintiff comes into Court and says that he as well as other persons have acquired a right of easement over a certain land, and does not succeed in proving that the other persons had such right, there is nothing to prevent him from succeeding in his claim if he can prove that he has used the land in the way required by law for the purpose of acquisition of a right of easement. It has, however, been contended on behalf of the defendants-respondents that the land over which the right of way has been claimed is not defined and the findings of the Courts below are not definite as to the land over which the right of way has been found. From the passages I have cited from the judgment of the Munsif as well as of the Subordinate Judge it is quite clear that both the Courts found that the pathway was over the whole of the disputed land and we find that the disputed land has been depicted in the map of the Commissioner who was deputed for the purpose of holding a local enquiry in the case. It cannot, therefore, be urged that the pathway claimed is in any way indefinite. On these grounds the decision of the Subordinate Judge is set aside and the plaintiffs' suit decreed declaring that the plaintiffs have a right of way over the disputed land (shown in the Commissioner's map) as claimed by them as an easement.

The plaintiffs are entitled to their costs in all the Courts.

The cross-objection is not pressed. It is accordingly dismissed.

Greaves, J.—I agree.

N. H. *Cross-objection dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 350 OF 1924.

July 2, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

RACHAPPA CHANBASAPPA KARVIRSHETTI—DEFENDANT—APPELLANT

versus

NINGAPPA KASAPPA LAKHANNAVAR—PLAINTIFF—RESPONDENT.

Mortgagor and mortgagee—Rajinama *and* kabuliyat, *effect of—Ownership in mortgaged land, whether transferred.*

The passing of a *rajinama* by a mortgagor of land in favour of the mortgagee, and of a corresponding *kabuliyat* to Government by the mortgagee, do not necessarily imply the extinction of the mortgage and a transfer of ownership in favour of the mortgagee. The question as to the effect of the *rajinama* and *kabuliyat* in each case must depend upon its own facts. The documents are evidence the effect of which must be weighed in each case on the merits. [p. 350, col. 2; p. 351, col. 2.]

(Case-law reviewed.)

Second appeal from the decision of the District Judge at Dharwar, in Appeal No. 257 of 1922, reversing a decree of the Subordinate Judge at Hubli, in Civil Suit No. 335 of 1921.

Mr. *S. B. Jathar*, for the Appellant.

Mr. *G. N. Thakor* (with him Mr. *S. V. Palekar*), for Respondent No. 1.

Mr. *H. B. Gumaste*, for Respondent No. 3.

JUDGMENT.

Fawcett, J.—In this case the plaintiff's father mortgaged certain land to defendant No. 1's grandfather in the year 1871 with possession. Two years after that the plaintiff's father again mortgaged the same property for an additional sum of Rs. 100 to the same mortgagee. This document contains a term that the property should be enjoyed by the mortgagee for a period of 21 years in full satisfaction of the debt and after the completion of the said period, possession of the property should be restored to the mortgagor free of the mortgage charge. The plaintiff's father died in 1877. Under the term that

I have just mentioned the property should have been given back to the mortgagor about 1894. But that was not done. In 1909 the plaintiff brought a suit against the mortgagee's representatives to redeem and recover possession of the land, alleging that it had been agreed the defendants should retain possession of the land for four years more after the term of 21 years had expired, and would then surrender it to his father, but had not carried out the agreement. In that litigation the main question that arose and was decided was whether the document of 1873 was a usufructuary mortgage or a lease, and it was held that it was a usufructuary mortgage. The Trial Judge had found the deed to be a lease and dismissed the plaintiff's suit, but the two Appellate Courts held that it was really a mortgage and the case was sent back for trial on the merits. Apparently that suit was not further prosecuted by the plaintiff and it was dismissed for non-appearance. The plaintiff's present suit was brought in 1921 to recover possession and mesne profits on the ground that defendants' mortgage right had been fully discharged. The Subordinate Judge dismissed the plaintiff's suit with costs holding that the equity of redemption under the mortgage had been extinguished by a subsequent passing of a *rajinama* and a *kabuliyat*. The *rajinama* was passed by the plaintiff's father to the mortgagee in 1877 and a corresponding *kabuliyat* to Government was passed by the mortgagee. Defendants Nos. 1 and 2, who are the grandsons of the original mortgagee, and defendant No. 5, who is the purchaser of a portion of the plaint property from defendant No. 1, all set up this *rajinama* and *kabuliyat* as having extinguished this mortgage.

The District Judge in appeal from this decision held that there was no transfer of ownership by the *rajinama* and *kabuliyat* and that the equity of redemption still subsisted. No other question, he says, was proposed, and he, therefore, granted the plaintiff a decree for possession with costs and an order as to future mesne profits.

Defendant No. 5 has appealed from this decision on the ground that the *rajinama* and *kabuliyat* have in law extinguished the equity of redemption. Mr. Jathar, in support of this contention has drawn our attention to various rulings of this Court in regard to the effect of a *rajinama* and a *kabuliyat*, such as have been passed in the present case, *viz.*, *Tarachand Pirchand* v. *Lakshman Bhavani* (1), *Vishnu Sakharam Phatak* v. *Kashinath Bapu Shankar* (2), *Venkaji* v. *Gopal* (3), *Imam Ibrahim* v. *Bhau* (4), *Narso* v. *Nagava* (5) and *Chandammal* v. *Bhaskar* (6). He contends that the effect of all these cases but the last is that a legal presumption arises from the passing of the *rajinama* and *kabuliyat* that a transfer of ownership is intended to be effected, and that accordingly it operates, just as if it was a sale, to extinguish the equity of redemption. Now, no doubt, the earlier cases did rather go that way and in particular the case of *Venkaji* v. *Gopal* (3) is very similar to the present case. Also in *Narso* v. *Nagana* (5), Beaman, J., in his judgment takes the view that the passing of the *rajinama* and *kabuliyat* is fairly conclusive evidence that a transfer of ownership has, in fact, been made. But in the last named case of *Chandammal* v. *Bhaskar* (6), Sir Norman Macleod, Chief Justice, and Heaton, J., who was a party to some of the previous cases, held that it does not necessarily by itself amount to a transfer of the property, and that each case must depend upon its own facts. Speaking for myself, I think that this is certainly a more reasonable view to take than the view that the Court should at once presume that a transfer of ownership is intended if a *rajinama* and a *kabuliyat* have been passed. I do not think that there is any current of authority in this Court which would justify our holding that a legal presumption arises under s. 114 of the Indian Evidence Act such as the appellant's Pleader contends for. That section only says that the Court 'may presume' and the last ruling to which our attention has been called is distinctly against its presuming that the *rajinama* and *kabuliyat* have the effect of transferring the ownership of the property. Heaton, J., in his judgment in this case, says (page 143*) : —

"A *rajinama* and *kabuliyat* do not by any means completely take the place of a sale-deed. They only serve as documentary evidence of transfer, if that transfer can properly be inferred from the totality of facts proved; and these must usually at any

(1) 1 B. 91; 1 Ind. Dec. (N. S.) 60.
(2) 11 B. 174; 6 Ind. Dec. (N. S.) 115.
(3) 27 Ind. Cas. 613; 16 Bom. L. R. 718; 39 B. 55.
(4) 40 Ind. Cas. 68; 19 Bom. L. R. 329; 41 B. 510.
(5) 45 Ind. Cas. 492; 20 Bom. L. R. 358; 42 B. 359.
(6) 55 Ind. Cas. 619; 22 Bom. L. R. 140.

*Page of 22 Bom. L. R.—[*Ed.*]

rate comprise a good deal more than the *rajinama* and *kabuliyat* themselves."

As I have already said he was a party to some of the previous decisions, and considerable weight attaches to these remarks. He certainly does not take a view that there is any presumption of the kind I have mentioned, because he says that the totality of facts proved must usually comprise a good deal more than the *rajinama* and *kabuliyat*. In the present case the District Judge has considered the circumstances and has come to the conclusion that the passing of the *rajinama* and *kabuliyat* was probably due to the inconvenience that would arise in regard to the payment of assessment, which the mortgagee had undertaken to make, if the mortgagor Basapa continued to hold the *khata* of the land, and that there was no indication that they were intended to have any other effect. That is a conclusion which, on the view of law that I have mentioned, he was entitled to take and it seems to me an entirely reasonable one. Therefore I do not think that there is any error of law which would justify our interference with this conclusion in second appeal.

It has, however, been urged that in any case the suit is barred by limitation, because the mortgagee had given up possession in 1894, and even allowing for the extra period during which the plaintiff in the previous suit of 1909 said it was agreed that the mortgagee should remain in possession, there had been over twelve years before the present suit was brought, in which the representatives of the mortgagee had adverse possession. But this is a point which I do not think we can now go into. It is not a point that has been taken in the memorandum of appeal, and, therefore, it cannot now be urged without the leave of the Court under O. XLI, r. 2, read with O. XLII, C.P.C. If the point of limitation had arisen on the face of the plaint, then, no doubt, there is authority for saying that leave should be given as a matter of course. But in the present case it appears to me that the point of limitation cannot be properly decided without some evidence as to the circumstances in which the mortgagee continued to have possession of the land subsequent to 1894. No such evidence appears to have been given, and although the point of limitation was taken in the written statement of defendants Nos. 1, 2 and 5 no issue relating to it was raised in the Trial Court. In the Appellate Court also the District Judge said "no other question was proposed." So that it seems to me clearly a case where we should not give leave for this point to be taken, and, in any case, as it cannot be decided without the case being remanded for additional evidence, it cannot succeed in second appeal. I would, therefore, dismiss the appeal with costs.

Madgavkar, J.—In the previous litigation between the parties this Court had disallowed the contention of the present appellant that the transaction was a lease and had upheld the contention of the respondents that it was a mortgage. The appellant's possession, therefore, remains as mortgagee; and it was for him from the outset, if he relies on his possession having become adverse, clearly to plead the facts and the date when it so became. Having failed to do so, it is hardly open to him in second appeal to set up a contention of adverse possession and limitation.

As regards the *rajinama* and *kabuliyat*, I would respectfully agree with the decision in *Chandammal* v. *Bhaskar* (6). They are evidence, the effect of which must be weighed in each case on the merits. In the present case the only other circumstance in favour of the appellant is the long possession. That is largely nullified by the death of the original mortgagor in 1877 within four years of the second mortgage. In the absence of evidence as to age or knowledge of the possession in the plaintiff's son by the mortgagor, that circumstance coupled with the *rajinama* and *kabuliyat* is not enough to show that the parties intended to convert a mortgage into a sale. I agree, therefore, that the appeal fails and must be dismissed with costs.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1246 OF 1923.

January 19, 1924.

Present :—Mr. Justice Campbell.

MAYA RAM—PLAINTIFF—APPELLANT

versus

TULSI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 23, 25, 27—Suit decided on merits—Appeal—Remand, whether permissible—Procedure.

Where a suit has not been disposed of upon a preliminary point, the Appellate Court has no power to

remand the suit under r. 23 of O. XLI of the C. P. C. The Court should decide the issues arising in the suit itself or if it requires further evidence it should proceed under r. 25 or r. 27 of O. XLI of the Code.

Miscellaneous second appeal from the order of the District Judge, Amritsar, dated the 21st April 1923.

Dr. *Nand Lal*, for the Appellant.

Lala *Niranjan Dass*, for the Respondents.

JUDGMENT.—The learned Counsel on both sides agree that the learned District Judge acted contrary to law in remanding the case under O. XLI, r. 23, C. P. C. The decree was not reversed on appeal, nor was the suit disposed of upon a preliminary point and by using O. XLI, r. 23, the learned District Judge forced the respondent to come to this Court on second appeal at a most inconvenient stage. The learned District Judge stated in his order that the evidence already on the record was probably sufficient for the proper decision of the two issues to which he referred, *viz.*, Issues Nos. 4 and 5. That being so he should have decided the issue himself, or, if he required further evidence he should have proceeded under r. 25 or r. 27 of O. XLI.

I accept the appeal, set aside the order remanding the case under O. XLI, r. 23, and direct that the appeal be disposed of by the learned District Judge on all the points for decision. Costs in this Court will be costs in the appeal.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 1368 OF 1923.
June 24, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

Syed FAIZUDDIN ALI AND ANOTHER —DEFENDANTS—APPELLANTS

versus

Mirza IYAHIYA SIRAJI—PLAINTIFF AND ANOTHER—*Pro forma* DEFENDANT—RESPONDENTS.

Religious Endowments Act (XX of 1863), s. 14—Suit for declaration that resolutions passed at certain meeting are invalid nature of—Jurisdiction of Court.

A suit brought by a member of a Committee constituted under the Religious Endowments Act, against the other members for a declaration that resolutions passed at a certain meeting were invalid on account of proper notice not having been given does not fall within the purview of s. 14 of the Act but is triable under the ordinary law.

Appeal against a decree of the District Judge, Murshidabad, dated the 12th February 1923, affirming that of the Munsif, Lalbagh, deted the 3rd of September 1921.,

Mr *S. R. Das* (Advocate-General) (with him Babu *Santimoy Majumdar* and M. *Md. Nurul Haque Chowdhury*), for the Appellants.

Dr. *Sarat Chandra Basak* (with him Babus *Hemendra Kumar Das*, *Amulya Charan Sen*, *Baranasibashi Mukherjee* and *Charu Chandra Chowdhury* for Babu *Priyanath Dutt*), for Respondents Nos. 1 and 2.

JUDGMENT.

Ghose, J.—This was a suit brought by one member of a Committee of a religious endowment governed by the Religious Endowments Act XX of 1863 against two other members forming the Committee for a declaration that resolutions passed at certain meetings held on the 3rd August, 2nd October and 25th October 1920 are *ultra vires* and invalid. The findings of fact are all against the defendants. It has been found that the notice given by defendants Nos. 1 and 2 to the plaintiff of the meeting that was to be held on the 3rd August 1920 was not proper, inasmuch as there was no agenda of the business to be done at the meeting sent with the notice. The learned Judge, therefore, held that the resolutions arrived at the meeting of the 3rd August are invaild. Similarly, it is found that the other two meetings were also not legally held.

The findings of fact are conclusive and no question can be addressed to us on behalf of the appellants with regard to this. The only question that was urged before us was that having regard to s. 14 of the Religious Endowments Act the Munsif had no jurisdiction to entertain the suit in the first instance, and special reliance was placed upon the phrase 'neglect of duty' contained in s. 14 of that Act. In our opinion, this was not a suit for neglect of duty by any person with regard to a religious endowment. It was an ordinary suit for declaration that resolutions passed at a meeting were invalid on account of proper notice not being given to a member of the Committee. The case, therefore, comes under the ordinary law and the Munsif, in our opinion, had jurisdiction to entertain the suit.

This point failing, the appeal must be dismissed with costs.

Greaves, J.—I agree.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 539 OF 1924.

June 26, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

NARAYAN KESHAV VAGLE—PLAINTIFF—APPELLANT

versus

Kaji GULAM MOHIDIN—DEFENDANT—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 12—Mortgage suit by benamidar, *maintainability of—Account, mode of taking of.*

So long as a *benamidar's* transaction does not contravene the provisions of any law the Courts are bound to give effect to it and the *benamidar* is entitled to sue upon its basis. [p. 353, col. 2.]

The expression "persons, if any, through whom they claim" in s. 12 of the Dekkhan Agriculturists' Relief Act, covers not merely the legal representative of a deceased creditor or deceased debtor but also an assignee who has bought, or otherwise acquired the right, title and interest of either the original creditor or the original debtor. Therefore, the section cannot be taken to prohibit a suit on a mortgage by a *benamidar*. On the other hand, the provisions of the section must be observed by the Court in a suit by a *benamidar* just as much as in a suit by the real creditor. It is quite possible for the Court to carry out these provisions in such a case, inasmuch as the actual creditor can be examined and called upon to produce his accountt as a witness. [p. 354, col. 1.]

Second appeal against the decision of the First Class Subordinate Judge, A. P., at Ratnagiri, in Appeal No. 237 of 1923, confirming that of the Second Class Subordinate Judge, at Dapoli, in Civil Suit No. 121 of 1922.

Mr. *P. V. Kane*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

Fawcett, J.—The plaintiff has sued the defendant to recover a certain sum of money as due on a simple mortgage bond, passed in 1910 by defendant No. 1 and his father, whose other legal representatives have been joined as defendants. Defendant No. 1 opposed the suit contending that he was an agriculturist, that he and his father had no dealings prior to this bond with the plaintiff, and that the latter was a *benamidar* for one Shamdin Jagannath Marwadi, who had got the bond executed in favour of the plaintiff with the object of avoiding his liability to account under the Dekkhan Agriculturists' Relief Act in regard to the previous transactions between him and the defendant. He also pleaded that the Marwadi's dues were mostly paid off, and that no fresh consideration was paid when the bond in suit was passed. The Trial Court, on a consideration of the evidence, held that the defendant was an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act and that the plaintiff was a *benamidar* for this Marwadi, the bond being passed in the plaintiff's name as a mere cloak to avoid liability to render an account under the Dekkhan Agriculturists' Relief Act in respect of the previous dealings which the mortgagors had with the Marwadi. He accordingly dismissed the suit and ordered the parties to bear their respective costs.

The First Class Subordinate Judge, on appeal by the plaintiff, took the same view and dismissed the appeal with costs.

A second appeal has been admitted and the contention put before us is that there was an error of law in the decrees of the lower Courts for the following reasons. It has been ruled by the Privy Council in *Gur Narayan* v. *Sheo Lal Singh* (1) and in various other cases, such as, *Ravji Appaji* v. *Mahadev Bapuji* (2) and *Ramchandra Vithal* v. *Gajanan Narayan* (3), that a *benamidar* can maintain a suit on a mortgage, so that, when a mortgage is executed ostensibly in favour of *A* though really *B* is the mortgagee, *A* may sue the mortgagor on the mortgage, and the real mortgagee will be bound by the decree as *res judicata* against him. Their Lordships of the Privy Council in *Gur Narayan's case* (1) at page 574* said: "So long, therefore, as a *benamidar's* transaction does not contravene the provisions of the law the Courts are bound to give it effect." So that there is a qualification to this general principle, *viz*, that a *benami* transaction must not contravene the provisions of any law. Thus in the case of *Ramchandra Vithal* v. *Gajanan Narayan* (3) it was contended that the principle in question did not apply to that particular case, because the provisions of s. 294, C. P. C. of 1882, had been contravened in so far as the decree-holder had not obtained leave to bid or to purchase the property in question at a Court-sale. It was, however, held that there was no such bar to the principle being applied to the facts of that case Mr. Shingne for the respondent has admitted the general principle laid down in these rulings, but contends that the provisions

(1) 49 Ind Cas 146 C. 566; 46 I. A. 1; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 12 Bur. L. T. 122 (P. C.).

(2) 22 B. 672; 11 Ind. Dec. (N. S.) 1070.

(3) 56 Ind. Cas. 349; 44 B. 352; 22 Bom. L. R. 296.

*Page of 46 C.—[*Ed.*]

of the Dekkhan Agriculturists' Relief Act do not permit of a suit by a *benamidar* where the object of the suit is to prevent the application of the provisions of that Act in regard to taking an account from the commencement of the transactions between the parties. He points out the provisions of s. 12 of the Act which requires the Court, if the amount of the creditor's claim is disputed, to examine both the plaintiff and the defendant as witnesses, unless, for reasons to be recorded by it in writing, it deems it unnecessary so to do, and to inquire into the history and merits of the case from the commencement of the transactions between the parties and the persons (if any) through whom they claim, out of which the suit has arisen. It was suggested that this implies that the plaintiff should be the original creditor, and that the section does not, therefore, contemplate a *benamidar* being the plaintiff. Against this view, however; is the fact that the section cannot be supposed to prevent the plaintiff being an assignee of the original creditor. Such a case, I think, is clearly contemplated by the words "persons if any through whom they (*i. e.*, the parties) claim." That expression suffices to cover not merely the legal representative of a deceased creditor but an assignee who has bought, or otherwise acquired the right, title and interest of either the original creditor or the original debtor; and such a construction was in fact given to these words in *Annaji Waghuji* v. *Bapuchand Jethiram* (4) which was a case of an assignee from an agriculturist. Therefore, the suggestion that s. 12 must be taken to prohibit a suit on mortgage by a *benamidar* cannot, I think, be accepted; but, on the other hand, the provisions of that section have to be observed by the Court in a suit by a *benamidar* just as much as in a suit by the real creditor. It is quite possible for the Court to carry out these provisions in such a case, because the actual creditor can be examined and called upon to produce his accounts as a witness, just as well as if he was a party. If the *benamidar* in any way obstructs such an inquiry, then of course other considerations may arise. But in the present case there is no reason to anticipate any such obstruction, as the Marwadi creditor was in fact examined in the lower Court and produced certain accounts. There should, therefore, be nothing to prevent the Court from continuing the inquiry required by s. 12 by further examination of the Marwadi and his accounts from the commencement of the transactions between him and the mortgagor. Accordingly there is, in my opinion, no sufficient ground for saying that the Dekkhan Agriculturists' Relief Act itself prevents the application of the general principle laid down by the Privy Council.

It was further contended by Mr. Shingne that the agreement being made with the object of preventing the full inquiry contemplated by s. 12 of the Act, it was one in fraud of the law, and so void under s. 23 of the Indian Contract Act. That section, no doubt, covers the case of an agreement the consideration or object of which is of such a nature that, if permitted, it would defeat the provisions of any law. But in this particular case, for the reasons which I have already given, although an attempt was made to defeat the provisions of s. 12 of the Dekkhan Agriculturists' Relief Act, yet that attempt will not be successful, if the Court carries out our order. Furthermore, the agreement, which really had that object, is an agreement between the *benamidar* and the Marwadi and not the agreement contained in the mortgage bond which is the transaction with which the Court has to do. Therefore, I do not think that there is any force in that particular contention.

I would, therefore, hold that there has been an error on the part of the lower Courts in dismissing this suit and not following the particular principle which I have mentioned. At the same time, although the point was apparently taken in ground No. 3 to the memorandum of the appeal to the lower Appellate Court, these particular rulings cannot have been brought to the notice of that Court, otherwise the First Class Subordinate Judge would surely have dealt with the question that arose. Consequently, it is virtually a point taken for the first time in second appeal, and this affects the question of costs. I think, therefore, that the decree of the lower Appellate Court must be reversed and the suit remanded to the Second Class Subordinate Judge at Dapoli for considering Issues Nos. 3, 4 and 5, with this addition that the 'amount due' must cover the amount due on taking the account as between the Marwadi Shamdin and the

(4) 7 B. 520; 4 Ind. Dec. (N. S.) 351.

original mortgagors in the manner provided by s. 12 of the Dekkhan Agriculturists' Relief Act.

The appellant must bear all the respondents' costs except the costs of this appeal, which respondent No. 1 should bear.

Madgavkar, J.—The question in this appeal is whether the plaintiff-appellant *benamidar* is entitled to a mortgage decree against respondent No. 1 mortgagor agriculturist. Both the lower Courts have held that the appellant is a *benamidar* for the mortgagee, one Shamdin Jagannath Marwadi, and that the latter has assigned his right to the appellant in order to avoid liability to give accounts under the Dekkhan Agriculturists' Relief Act and on this ground have dismissed the suit.

It is argued for the appellant that a *benamidar* can sue and obtain a decree. For the respondents it is contended that an assignment, preventing the application of the Dekkhan Agriculturists' Relief Act, is in a sense a fraud on the law, and, therefore, the suit rightly failed.

It is now well-established that unless the assignment is in contravention of the law, a *benamidar* is entitled to succeed: *Gur Narayan* v. *Sheolal Singh* (1). And in so far as the *benamidar's* transaction does not contravene the provisions of the law, the Courts are bound to give it effect. It is, therefore, for the respondent to show what law, if any, the transaction has contravened. In the absence of any express prohibition of assignments of claims against an agriculturist, the view of the lower Courts is difficult to accept in its entirety. It has been held by this Court that even a mortgagee purchaser in execution of a Court sale without the leave of the Court claiming through a *benamidar* for possession need not fail: *Ramchandra Vithal* v. *Gajanan Narayan* (3). On the other hand, an agriculturist assignee is held to be entitled to the benefit of ss. 12, 13 and14 of the Dekkhan Agriculturists' Relief Act. *Annaji Waghuji* v. *Bapuchand Jethiram* (4). It has been also held by this Court that a *benamidar* can maintain a suit in his own name as the real plaintiff: *Ravji Appaji* v. *Mahadev Bapuji* (2). *A fortiori* a mortgagor agriculturist who has a right under s. 12, Dekkhan Agriculturists' Relief Act, to ask the Court to go into the entire account and ascertain the actual amount due under the account, cannot lose that right by the simple process on the mortgagee's part of an assignment, as in the present instance; and if the *benamidar* assignee is unable or unwilling to furnish such account, the suit might fail. But that is not the case in the present instance. Shamdin, the original mortgagee, is a witness in this suit, and it was the duty of the Court, as laid down by s. 12 of the Dekkhan Agriculturists' Relief Act, to examine Shamdin and his account and ascertain the amount due. The agreement as between the appellant the assignee and Shamdin, is not in contravention of the provisions of any Act. Subject to the taking of account under s. 12 from Shamdin, the appellant is entitled to a decree for such amount, if any, actually found due. I agree, therefore, with the order proposed by my learned brother.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1621 OF 1922.

April 28, 1925.

Present:—Mr. Justice Phillips.

ARULANANDAM PILLAI—PLAINTIFF—APPELLANT

versus

MALAYA PILLAI NADAN AND OTHERS—DEFENDANTS NOS. 1, 2, 4 AND 5—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 125—Mortgage by ryot without landlord's permission—Revenue sale—Suit on mortgage against purchaser—Sale, validity of—Burden of proof.

Where a person purchased certain properties in a rent sale under the Madras Estates Land Act, in a suit on a mortgage executed prior to the sale by the *ryot* but without the landlord's permission, the plaintiff contended that the rent sale was vitiated by irregularities and was invalid:

Held, (1) that the mortgage effected without the landlord's permission was not binding on the purchaser in the revenue sale, unless the sale were held to be invalid; [p. 356, col. 2.]

(2) that the burden of proving the invalidity of the sale lay on the plaintiff. [*ibid.*]

The principle that the burden is on the landlord who relies on a special procedure to prove every condition necessary for the validity of the sale is inapplicable to such a case as the above where it is the purchaser and not the landlord whose rights are sought to be limited by imposing on him a mortgage to which he would not be liable if the sale had been properly conducted [*ibid.*]

Dorasamy Pillai v. *Muthusamy Moopan*, 27 M. 94; 13 M. L. J. 479, distinguished.

Second appeal against a decree of the Court of the Additional Subordinate Judge

Madura, in A. S. No. 59 of 1921 (A. S. No. 106 of 1921, Madura District Court), preferred against that of the Court of the District Munsif, Tirumangalam, in O. S. No. 128 of 1920.

Messrs. *T. Arumarthatha Pillai* and *K. V. Srinivasa Iyer*, for the Appellant.

Messrs. *C. V. Anantakrishna Iyer* and *K. V. Venkata Subrahmanya Iyer*, for the Respondents.

JUDGMENT.—In this suit the plaintiff-appellant seeks to enforce a mortgage on the plaint land which originally was in occupation of the first defendant and which was afterwards sold in a rent sale to the third defendant and by him transferred to the second defendant. The fourth defendant is the landlord.

The mortgage was not effected with the permission of the landlord and consequently under s. 125 of the Estates Land Act it is not binding on a purchaser in a revenue sale. The second defendant is, therefore, in no way bound by the mortgage unless it is established that the revenue sale was invalid. The plaintiff made certain allegations in his plaint to the effect that the sale was invalid because it was conducted collusively and fraudulently, that there was no proper notice by beat of *tom* and *tom* and that his mortgage right was not announced at the time of the sale or in the sale proclamation.

When the issues were framed, issue No. 2 was framed on this allegation as follows:—

"Whether the rent sale under which the second defendant claims is invalid for all or any of the reasons alleged in the plaint?"

Although the issue was framed in this way, the District Munsif appears to have allowed the plaintiff to adduce evidence as to the alleged irregularities in the conduct of the sale, such as that the time and place of sale were not in accordance with the sale proclamation, and the District Munsif held that the sale was not invalid and dismissed the suit.

In appeal it was contended that the plaintiff had proved these irregularities and that was argued before the lower Appellate Court, and the lower Appellate Court held that the plaintiff had not proved these additional irregularities and decided that there was no evidence as to the exact time when the sale commenced, or as to the exact distance from the notified place of sale to the place where the sale was held.

It is now contended here that the burden is upon the fourth defendant, the landlord, to prove every condition necessary for the validity of the sale and reliance is placed on *Dorasamy Pillai* v. *Muthusamy Moopan* (1). It was no doubt held in that case that it is for the landlord, who seeks to avail himself of the special procedure by way of distress provided for by the Act, to show that the requirements of the Act have been complied with. I do not think that there is any need to question this proposition of law but even if it is applicable to the facts of this case, of which I am very doubtful, I do not think that in the circumstances, the plea can be taken now.

An issue was framed as to certain allegations and no others, and consequently the defendant had no opportunity of adducing evidence to prove that the sale was conducted properly with reference to the time and place mentioned in the sale proclamation. The plea that second defendant failed to prove all the facts necessary to prove a valid sale has never been raised until this second appeal and, therefore, if relief were to be given to the plaintiff, it would be necessary to re-try the case from the beginning. As a matter of fact the evidence in the case is not before me, but evidently the positive evidence for the plaintiff was insufficient to prove any irregularity in the sale as held by the lower Appellate Court. I see no reason now for re-trying the case *de novo*. As a matter of fact, it appears to me that in this case the fourth defendant who is the landlord, does not seek to avail himself of the special procedure by way of distress or sale provided for by the Act. It is the purchaser whose rights are sought to be limited by imposing on him a mortgage to which he would not be liable if the sale had been properly conducted. The landlord has but a very small interest in the matter, for it merely means that he has one tenant instead of another and there is nothing to show that that would benefit him in any way. The second defendant under s. 125 is entitled to the whole property free of this mortgage which the plaintiff deliberately took without getting the sanction of the first defendant's landlord, although he ought to have known that such a mortgage would not be an encumbrance binding on the property. In this view I

(1) 27 M. 94; 13 M. L. J. 479.

do not think that *Dorasamy Pillai* v. *Muthusamy Moopan* (1) is applicable. In either event, I think that the lower Appellate Court's decree must be upheld.

The second appeal is dismissed with costs of the second respondent.

V. N. V. *Appeal dismissed.*
N. H.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 113 OF 1924.
REFERENCE No. 40 OF 1923.
July 14, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

N. H. MOOS—APPELLANT
versus
THE GOVERNMENT OF BOMBAY—RESPONDENT.

Land acquisition—Acquisition of toka *lands—Re-assessment, liability to—Compensation, determination of.*

To acquire a piece of land under the Land Acquisition Act is not necessarily the same thing as to purchase the right of fee simple to it, but means the purchase of such interest as clogs the right of Government to use it for any purpose they like. Where, therefore, Government has no proprietary interest in the land to be acquired but has only a right to levy assessment, with the additional right to increase the assessment according to certain conditions, the land can be notified for acquisition and the market-value of the free-hold can be ascertained under the Act, whereupon the value of the tenant's right can be determined and the balance of the compensation money handed back to Government. [p. 357, col. 2.]

When a plot of *toka* land which is liable to be re-assessed by the Government after some years is proposed to be acquired compulsorily, the only question to be determined for the purpose of awarding compensation to the tenant is what proportion of the rack rent of the land would be taken by the Government on a re-assessment. The determination of this question is a matter of speculation but the Court is entitled to presume that the Government would deal fairly with the tenant in occupation who has been paying a comparatively insignificant rent. [p. 357, col. 2; p. 358 col. 1.]

(Case-law referred to.)

Mr. *Velinker* (with him Mr. *Khergamvalla*), for the Appellant.

Mr. *Kanga*, Advocate-General (with him Mr. *Coltman*), for the Respondent.

JUDGMENT.—In this case there had been a consent award deciding that the value of the land to be acquired was Rs. 2, 60,000. The only question then left was the apportionment of that sum between Government and the claimants who were in occupation of the land as *toka* tenants. An issue was raised whether Government were entitled to acquire their own interest in the *toka* land. In *Government of Bombay* v. *Esufali* (1), it was held that to acquire a piece of land under the Land Acquisition Act was not necessarily the same thing as to purchase the right of fee simple to it, but means the purchase of such interest as clogs the right of Government to use it for any purpose they like. Accordingly, if Government had no proprietary interest in the land to be acquired, but had only a right to levy assessment, with perhaps the additional right to increase the assessment according to certain conditions, still the land could be notified for acquisition, and the market-value of free-hold ascertained under the Act, when the value of the tenant's rights could be ascertained, and the balance of the compensation money handed back to Government. That decision was followed in *Mangaldas Girdhardas* v. *Assistant Collector, Ahmedabad* (2). We see no reason for disturbing the decision of this Court on this particular point by referring the matter to a Full Bench. The only ground relied upon for such a reference was the fact that other High Courts have taken a different view from that taken by this High Court. That, in our opinion, is not a sufficient ground to make a reference to a Full Bench, unless we are of opinion that in the interests of the public, the decisions of this Court should be reconsidered.

The next question was what proportion of the compensation money should be awarded to Government as the value of their rights to re-assess the land in 1929. That question has been frequently before this Court, and particularly in what is known as *Pasta's case* [*Madhavdas Gokuldas Pasta* v. *Government of Bombay* (3)], *Government of Bombay* v. *Moos* (4) and, lastly, *Government of Bombay* v. *Khanderao Ramchandra Talpade* (5).

Really the only question in dispute is what proportion of the rack rent of land would be taken by Government in 1929.

(1) 5 Ind. Cas. 621; 12 Bom. L. R. 34; 34 B. 618.
(2) 64 Ind. Cas. 584; 23 Bom. L. R. 148; 45 B. 277.
(3) (1912) F. A. No. 147 of 1911, decided by Scott, C. J. and Batchelor. J., on April 10, 1912 (Unrep.)
(4) 82 Ind. Cas. 641; 24 Bom. L. R. 471; (1922) A. I. R. (B.) 254; 47 B. 218.
(5) 77 Ind. Cas. 137; 25 Bom. L. R. 794; (1923) A. I. R. (B.) 417.

That, as we have always pointed out, is a matter of speculation, but we are entitled to presume that Government will deal fairly with the tenant in occupation paying up to that time a comparatively insignificant rent, since Government have declined to make any announcement what their policy will be in re assessing *toka* land in 1929. The learned Judge seemed to consider that in *Government of Bombay* v. *Khanderao Ramchandra Talpade* (5), we laid down a universal rule that the increased rate of assessment in 1929 would be 4 per cent. for the purposes of calculating the tenant's interest at the time of acquisition. We had no intention to lay down any universal rule, we merely stated that we considered that for the purposes of that particular case the prospective rate of assessment should not be higher than 4 per cent. In other cases it might be equitable to fix it at a lower rate. As a matter of fact the decision in *Khanderao's case* (5) was extremely favourable to Government.

In this case we are entitled to consider the area of the land, its position, the nature of its user, and all other circumstances which would relate to the possibility of Government fixing the assessment in 1929 at a particular figure. There was no necessity, as far as we can see for all the evidence which was taken on a purely hypothetical question in the lower Court, the only question being what would be a fair division of the rack rent between the Government and the tenant. In this case, we think 3 per cent. would be the proper rate. Accordingly on that basis, according to the table provided for us by Mr. Velinker, we alter the deduction from the value of the free-hold to a sum of Rs. 66,809. That is the money that will go to Government, while the balance of the money will go to the claimants. The claimant to get 6 per cent. interest on the difference between Rs. 78,371 and Rs. 66,809 from the date they handed over possession. Each party to bear its own costs in both Courts.

Z. K. *Decree modified.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2668 OF 1922.

June 18, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

RAM CHANDRA GOPE—PLAINTIFF—APPELLANT

versus

Srimati PARAMESWARI GOPINI AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Redemption suit—Preliminary and final decrees—Appeal against preliminary decree after passing of final decree, whether competent.

Where a preliminary decree in a redemption suit is followed by a final decree, an appeal filed against the former decree after the passing of the latter decree is not maintainable if no appeal is preferred against the latter decree.

Kulada Prosad Chowdhury v. *Ramanand Patnaik*, 61 Ind. Cas. 923; 33 C. L. J. 414; 25 C. W. N. 776; 48 C. 1036, followed.

Atul Chandra Singha v. *Kunja Behari Singha*, 30 Ind. Cas. 321; 22 C. L. J. 90, distinguished.

Lakshmi v. *Maru Devi*, 12 Ind. Cas. 664; 37 M. 29; 10 M. L. T. 437; 21 M. L. J. 1063, dissented from.

Appeal against a decree of the Additional District Judge, Noakhali, dated the 6th June 1922, reversing that of the Additional Munsif, Sudharam, dated the 3rd August 1920.

Babu *Bepin Chandra Bose*, for the Appellant.

Babus *Hem Kumar* and *Bhupendra Krishna Bose*, for the Respondents.

JUDGMENT.—The plaintiff brought a suit out of which this appeal arises to redeem a mortgage on the allegation that he had purchased the equity of redemption from the mortgagor, Parameswari. The first Court passed a preliminary decree directing the plaintiff to pay into Court Rs. 200 within seven days from the date of the judgment and that the principal defendant mortgagee would thereupon re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by defendant No. 1 and put the plaintiff in possession of the property. The plaintiff duly paid the money into Court and a final decree was passed on the 13th August 1920. On the 10th September 1920 Parameswari filed an appeal against the preliminary decree only. In that appeal she was successful and the judgment and decree of the lower Court were set aside.

It is contended on behalf of the appellant that the appeal to the lower Appellate Court is not competent as there was no appeal against the final decree. The decision of a Division Bench of this Court in th

case of *Kulada Prosad Chowdhury* v. *Ramanand Patnaik* (1) supports the contention that no appeal against a preliminary decree is maintainable when no appeal is preferred against a final decree passed before the filing of the appeal. On behalf of the respondents our attention has been drawn to a decision of another Bench of this Court in *Atul Chandra Singha* v. *Kunja Behari Singha* (2). But in that case the final decree was made after the appeal was preferred to the lower Appellate Court. It is true that in the case of *Lakshmi* v. *Maru Devi* (3), the Madras High Court has taken a contrary view but we are bound by the decision of this Court.

We accordingly decree this appeal, set aside the judgment and decree of the lower Appellate Court and restore the judgment and decree of the Munsif decreeing the suit.

The appellant will get his costs in this Court and in the lower Appellate Court.

Z. K. *Appeal allowed.*

(1) 61 Ind. Cas. 923; 33 C. L. J. 411; 25 C. W. N. 776; 48 C. 1036.

(2) 30 Ind. Cas. 321; 22 C. L. J. 90.

(3) 12 Ind Cas. 664; 37 M. 29; 10 M. L. T 437; 21 M. L. J. 1063.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1660 OF 1922.

July 22, 1925.

Present:—Mr. Justice Phillips.

PENTAKOTA SOMI NAIDU AND OTHERS—DEFENDANTS NOS. 2 TO 6—APPELLANTS

versus

PENTAKOTA SITARAMAYYA—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 6—Hindu Law—Family arrangement—Division of deceased divided brother's properties between surviving brother and sons of predeceased brother during lifetime of widow—Transfer of spes successionis*—Suit for possession by brother after widow's death, maintainability of.*

After the death of a divided brother, his properties were divided between his surviving brother and the sons of predeceased brother and were taken possession of by them without objection by the widow of the deceased who obtained a maintenance allowance under the arrangement. After the death of the widow the surviving brother brought a suit against his nephews for recovery of possession of the properties in their possession claiming as reversioner of the deceased brother:

Held, (1) that what was dealt with by the plaintiff and the defendants under the arrangement was the property itself and not a mere *spes successionis*, since actual possession of the properties was taken by the respective parties; [p. 360, col. 1.]

(2) that the arrangement was binding on the plaintiff who was a party to it and that his suit was not, therefore, maintainable. [*ibid*.]

Kanhai Lal v. *Brij Lal*, 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.), relied on.

Second appeal against a decree of the Court of the Additional Subordinate Judge, Vizagapatam, dated the 11th April 1922, in A. S. No. 15 of 1920 (on the file of the District Court, Vizagapatam), preferred against that of the Court of the District Munsif, Vizagapatam, dated the 17th October 1919, in O. S. No. 669 of 1917.

Mr. *N. V. Rajagopala Sastry*, for the Appellant.

Mr. *Y. Suryanarayana*, for the Respondent.

JUDGMENT.—The plaintiff in this case, one Somi Naidu and the father of the defendants were brothers who effected a partition in 1898. This case relates to the share which fell to Somi Naidu. He died in 1906, leaving a widow. In 1907 the plaintiff and the defendants entered into an arrangement under which they partitioned Sami Naidu's share and agreed that the defendants should pay a certain sum to the widow, who lived till 1914. She appears to have taken no objection to this arrangement. The plaintiff now seeks to recover the property allotted to the defendants under this agreement of 1907, and it is contended for the appellants that he is barred from doing so by reason of this agreement and reliance is placed on a decision of the Privy Council in *Kanhai Lal* v. *Brij Lal*. (1). In that case one Kanhai Lal who subsequently became the reversioner of a widow Ram Dei claimed whole property which fell to the widow as reversioner. Before the reversion fell in, there was a litigation between the parties, Kanhai Lal claiming to be the adopted son of one widow and setting up that her husband was divided from his brothers. These disputes were compromised in 1892 and certain properties fell to each of the disputants Kanhai Lal, Ram Dei and two other widows. It was held by the Privy Council that Kanhai Lal was debarred by

(1) 47 Ind. Cas. 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.)

his act in 1892, from claiming as reversioner. The Subordinate Judge declined to apply this decision of the Privy Council to the present case on the ground that Kanhai Lal did not enter into the compromise as reversioner, presumably holding that in this case the plaintiff entered into this arrangement, with defendant as reversioner. There is nothing in the documents, Exs. 1 or 1-A to show that plaintiff was acting in his capacity as reversioner nor is there anything to show that he intended to or did transfer his *spes successionis* as has been held by the lower Appellate Court. What was transferred was the plaint property and not only was it transferred by the document but actual possession was given by the plaintiff to the defendants and that possession has continued ever since. Even if the plaintiff's title to the property were bad, there is no legal objection to his transferring such title. He not only did this, but he also transferred his possessory title and gave effect to the latter by transferring possession. There is, therefore, no question of the transfer of a mere *spes successionis*. Had he purported to transfer only his right to the property, it, no doubt, might be regarded as the transfer of his *spes successionis* which was the only right he had then in the property. Inasmuch as he did transfer physical possession it is something more than a transfer of *spes successionis*. The Privy Council decision cannot, therefore, be distinguished on this ground. In other respects it appears to me to be clearly applicable. In *Kanhai Lal's case* (1), it was held that all the interest which he held in the property of the family in 1892, namely, when the compromise was entered into, was the mere possibility of becoming the immediate reversioner. Notwithstanding this, it was held that the compromise was not the mere transfer of a *spes successionis* and was consequently binding on Kanhai Lal. Here too the plaintiff had no other legal right to the property at the time he executed Ex. 1 but succeeding to the estate, but he had the possibility of possession of the property and purported to transfer that. Now he seeks to set aside that arrangement. That arrangement was entered into by the members of the family, and the real owner of the property was an assenting party and also received some benefit under it. It is not now open to the plaintiff to go behind that arrangement and seek to deprive the defendants of the share allotted to them. The appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

V. N. V. *Appeal allowed*

Z. K.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 29 OF 1924.

July 17, 1925.

Present :—Mr. Justice Fawcett and Mr. Justice Madgavkar.

VAMAN TRIMBAK JOSHI AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHANGI DAMODAR SHIMPI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Contract Act (IX of 1872), ss. 37, 40—Construction of document—Agreement to re-convey—Mortgage—Registration, necessity of—Legal representatives of parties, whether bound.

The predecessor-in-title of the plaintiff sold a certain house by a registered deed of sale to the predecessor-in-title of the defendant for Rs. 2,000. On the same day the vendee executed an unregistered agreement in favour of the vendor whereby he agreed to re-convey the house to the vendor provided the latter paid the purchase-money to him. The agreement contained the following recital :—"After 11 years if you pay Rs. 2,000 I shall re-convey the property. If you do not pay me in time Rs. 2,000 you have then no right for re-conveyance. There is no rent for the house and no interest for the sum. You should not require account for rent and I shall not require interest for money. I shall recover and enjoy rent in lieu of interest. You should pay me Rs. 2,000 as per term as loan without interest :"

Held, (1) that the agreement executed by the vendee in favour of the vendor was not in the nature of a mortgage but was merely an agreement to re-convey and fell within the purview of cl. (v) of sub-s. (2) of s. 17 of the Registration Act and, therefore, did not require registration ; [p. 364, col. 1.]

(2) that the legal representatives of the original parties to the agreement were bound by the terms of the agreement. [*ibid.*]

Appeal from an order of the District Judge, Nasik, in Appeal No. 22 of 1922, reversing a decree passed by and remanding the suit to the Joint Second Class Subordinate Judge at Nasik, in Civil Suit No. 250 of 1921.

Mr. *P. B. Shingne*, for the Appellants.

Mr. *G. N. Thakor* (with him Mr *S. Y. Abhyankar*), for Respondents Nos. 1 to 4.

JUDGMENT.

Fawcett, J.—This litigation arises out of a transaction on September 28, 1911. On that date one Damodar Ramchandra passed a registered sale-deed in favour of defendant

No. 1, Shankar. By the terms of that deed there was an absolute sale of the plaintiffs' property by Damodar to Shankar. On the same day the vendee Shankar passed an unregistered agreement to Damodar that he would re-convey the property to the vendor, provided the latter paid the purchase-money, namely, Rs. 2,000, to him within a period of 11 years. Damodar is now dead, and on May 12, 1921, his legal representatives, namely, the plaintiff No. 1, his daughter and plaintiff No. 2 his widow, assigned their rights under that transaction in favour of the plaintiffs Nos. 3 and 4 by a registered deed of that date. On September 2, 1921, that is to say, within the period of 11 years mentioned in the agreement of September 28, 1911, the plaintiffs Nos. 1 to 4 brought a suit to obtain specific performance of this agreement and for possession. In the plaint it is stated that the plaintiffs believed the sale transaction to be one in the nature of a mortgage. They claim that even if it is not so regarded they have a right to demand re-conveyance and possession on the strength of that agreement, which has been recorded as Ex. 12. The main contention put forward in the defendants' written statement was that the agreement to re-convey, being unregistered, was inadmissible in evidence. They also raised other objections which are sufficiently indicated by the issues that were framed. These are :—

1. Whether the agreement relied upon is admissible in evidence being unregistered?
2. Is the suit maintainable?
3. Whether the agreement is a personal contract and heirs of Damodar are not entitled to sue under it?
4 Whether the plaintiff No. 1 is not properly represented?
5. What decree will be passed?

In his judgment the Subordinate Judge states that Issues Nos. 1 and 2 were first framed for trial as preliminary issues. But the Pleader for the plaintiffs urged that the case should be tried on its merits also, and hence the other issues were framed. No evidence appears to have been adduced except the production of the requisite documents, and the question, therefore, whether Ex. 12 requires registration, was left to be decided purely upon its construction. It is in these terms:—

"*Kararnama* Shake 1833 *Aswin Shuda* 6 Thursday dated 28th September 1911 passed to Damodar Ramchandra Shet Shimpi by Shankar Mahadev Dharane to the effect that you passed in my favour and registered a sale-deed of your house bearing Municipal No. 188 in Trimbak After taking Rs. 2,000 within 10 years from the said date, I shall pass a re-conveyance of the said house and register it. I will not plead any excuse or objection. If you do not pay the said sum within 10 years, this agreement is of no effect after 10 years and after 10 years no re-conveyance will be passed. If within 10 years that is to say when the Sinhastha year is over, you re-pay the Rs. 2,000 to me, you have the right to have the house re-conveyed. After 10 years you will have right to get a re-conveyance. This agreement is passed voluntarily.

Signature of Vendee,

Attestations,

Postscript. After 11 years that is to say within one year after the coming *Sinhastha* year, if you pay the said Rs. 2,000 I shall re-convey the property. If you do not pay me in time the Rs. 2,000 you have then no right for re-conveyance. There is no rent for the house and no interest for the sum. You should not require account of rent and I shall not require interest for money, I shall recover and enjoy rent in lieu of interest. You should pay me Rs. 2,000 as per term as loan without interest. This agreement is passed voluntarily."

Signature of the Vendee.

The Subordinate Judge held that the postscript in this document clearly led to the inference that the transaction was in the nature of mortgage, and after referring to the judgment of Macleod, C. J., in *Bala Khandapa* v. *Sadashiv Hari Chivati* (1) held that the agreement, being unregistered, was inadmissible, and that the suit was not maintainable. Issues Nos. 3 and 4 he decided in favour of the plaintiffs. However on his findings as to the document Ex. 12, he ordered that the suit should be dismissed with costs.

An appeal was made by the plaintiffs to the District Court. It held that, inasmuch as the plaintiffs were suing for specific performance of the agreement to re-convey, which is not a remedy open to a mortgagor, they could, under the ruling in *Mir Gazi* v. *Miya Ali* (2) proceed towards obtaining such relief, as Ex. 12 separately considered was a document which did not require to be registered. Accordingly

(1) 61 Ind. Cas. 294;23 Bom. L. R. 1036.
(2) 28 Ind. Cas. 132; 38 B. 703; 16 Bom. L. R. 582.

the District Judge reversed the decree of the lower Court and remanded the suit for disposal on the merits, after giving both parties an opportunity to adduce further evidence.

From this order of remand the present appeal has been brought, and the first question obviously is whether the document Ex. 12 is one that is inadmissible in evidence as being a document required to be registered under s. 17 of the Indian Registration Act, and, therefore, falling under s. 49 of that Act. As I have already mentioned, the Subordinate Judge on the construction of its terms held it to be in the nature of a mortgage. The District Judge, so far as I understand his judgment, has not given a definite ruling as to whether it is a document indicating a mortgage or is merely an agreement to re-convey tacked on to an ordinary sale-deed. He thinks that, following *Mir Gazi* v. *Miya Ali* (2) a decision which has not been overruled, the Courts should treat Ex. 12 as nothing more than an ordinary agreement to re-convey, which is exempted from registration. *Mir Gazi's case* (2) was, as the judgment shows, one where the intention of the parties was to have a mortgage transaction. But it was held that the subsequent agreement separated entirely from the conveyance, was nothing more than an ordinary agreement to sell and that, as such agreements were expressly exempted from the operation of s. 17 (1) (*b*) and (*c*) by the exception now contained in cl. (v) of sub-s. (2) of the same section, there was nothing to prevent the plaintiff getting a decree for re-conveyance and possession of the property. This decision has been the subject of some comment in *Bala Khandapa* v. *Sadashiv Hari Chivati* (1), where it is stigmatised as a very extreme case. It was also remarked that it should not be the policy of the Courts to recognise transactions of this kind, which are in effect mortgages, unless they are carried into effect by proper documents, and that where the second document is one which has the effect of really changing the sale-deed into a mortgage and is for property above Rs. 99, it should be carried out by a registered document. It might, in my opinion, have been necessary to refer to a Full Bench whether the decision in *Mir Gazi* v. *Miya Ali* (2) is correct. But in the present case I do not think that this question really arises. For it seems to me that on the very clearest authority the document, Ex. 12, must be held not to evidence a mortgage transaction but to be a mere agreement to re-convey conditionally on a particular payment within a certain time, attached to an absolute sale. I refer to the Privy Council case of *Bhagwan Sahai* v. *Bhagwan Din* (3). It is a curious coincidence that the document in that case contained exactly similar stipulations to those contained in the postscript to the present document, which have been relied upon as indicating that the transaction was really in the nature of a mortgage. These are as follows:—

"There is no rent for the house and no interest for the sum. You should not require account of rent and I shall not require interest for money. I shall recover and enjoy rent in lieu of interest. You should pay me Rs. 2,000 as per term as loan without interest."

In the document, which was under consideration in the Privy Council case, there were similar terms, namely:—

"During the aforesaid term I shall remain in possession, collect the rent, enjoy the profits, and be liable for loss; the vendors shall have no concern whatever. I shall not claim interest from the vendors, nor will they demand profits from me after the expiry of the term."

Also in that case the two documents were passed on the same date. Their Lordships had to consider whether the document created a mortgage, as the lower Courts had held, purely upon a construction of the two documents. The case is, therefore, entirely on all fours with the present case, and their Lordships were very emphatically of opinion that the transaction should not be treated as a mortgage transaction, as had been held in the Courts below, but that the second document was merely a contract reserving to the vendor a right to re-purchase the property sold. It seems to me that that decision is conclusive on the dispute as to the nature of the document, Ex. 12, and that it must be held to be not in the nature of mortgage but to be merely an agreement to reconvey. It is not as if the parties had adduced any evidence, which might indicate that the transaction was clearly in the nature of mortgage—such as evidence showing that the price of Rs. 2,000 had no proper relation to the real

(3) 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.) 992 (P. C.).

value of the property sold. Consequently it is, in my opinion, unnecessary to consider the effect of *Mir Gazi* v. *Miya Ali* (2) in dealing with the present case.

The only question that can arise is whether, treating it as a mere agreement to re-convey, the document is one that requires registration as falling under cl. (*b*) of sub-s. (1) of s. 17 of the Indian Registration Act, or whether it is exempt from such registration under cl. (v) of sub s. (2) of that section. Mr. Shingne for the appellant did in fact contend that it did require registration, even treating it as a mere agreement to reconvey. Personally I think that there is considerable force in that contention. It is not a case of an isolated agreement to sell given by an owner several years after he has acquired title to the property. It is a case of a contemporaneous agreement to reconvey, forming part of the actual transaction by which the owner acquires title. And obviously it seems desirable that the records of the Registration Department should in such cases contain both the documents to show what is the real title that has passed to the vendee or mortgagee, as the case may be. But of course one cannot decide the legal point whether the document requires registration merely on a ground of expediency such as I have mentioned. There is, however, a strong consideration in favour of the view that at any rate in such a case the agreement to re-convey should be registered. For it has been ruled in *Bapu Apaji Potdar* v. *Kashinath Sadoba Gulmire* (4), that an agreement to sell attaches a fiduciary obligation to the owner who gives such an agreement, that the person in whose favour the agreement is passed has a fiduciary interest in the property, and that the owner who is given that document is a trustee, as is in fact laid down in the Specific Relief Act and the Indian Trusts Act. The effect, it was held, was to qualify the provisions of s. 54 of the Transfer of Property Act, which says that a contract for sale of immoveable property does not of itself create any interest in or charge on such property. The contrary view, which alone of all the Indian High Courts the Madras High Court once held, has since been overruled in *Vizagapatam Sugar Developement Co.* v. *Muthurama Reddi* (5). Therefore, it can be contended, in my opinion forcibly, that in such a transaction the second document is one which does not merely give a right to obtain another document such as is covered by cl. (v) but which has the effect of "limiting" the title which would have passed under the first document for sale, if it were unaccompanied by the second document, just as it limits it if it indicates that the transaction was really a mortgage. That is a question which, in my opinion, might have been properly referred for decision to a Full Bench, if there was no strong authority to the contrary. But, although most of the cases which deal with this cl. (v) are cases not of contemporaneous documents like the kind now in question but of an entirely separate agreement to sell, yet there are cases which deal with two such documents passed at the same time and where it has been held that that the second agreement does not require registration. For instance in *Sangawa* v. *Huchangowda* (6), where there was first of all a registered sale-deed and secondly an unregistered document saying "I shall without any objection give up your land at any time you may ask to give up," it was held that the second document did not require registration as, even on the assumption that in terms it fell within s. 17 (1) (*b*) or (*c*) of the Indian Registration Act, it would clearly be saved by the cl. (v) of sub-s (2) and was, therefore, admissible in evidence. That is a ruling which certainly goes against the contention I am considering. In *Rajangam Ayyar* v. *Rajangam Ayyar* (7) the Privy Council considered the effect of a memorandum of partition among the members of a joint Hindu family, which provided among other things that "from this day forward each party shall enjoy the properties in the schedule allotted to his share" and further that pending the execution of the later deed contemplated, "this itself shall be in force." The Madras High Court held that in view of these provisions the document did not come within s. 17 (2) (v) of the Indian Registration Act, but the Privy Council in their judgment at page 381* say that this document "is not one by itself creating, assigning,

(4) 39 Ind. Cas. 103; 41 B. 438; 19 Bom. L. R. 100 (F. B).

(5) 76 Ind. Cas. 886; 46 M. 919; 46 M. L. J. 528; (1924) A. I. R. (M.) 271; 33 M. L. T. 53; (1924) M. W. N. 14.

(6) 82 Ind. Cas. 533; 48 B. 166; 25 Bom. L. R. 1207; (1924) A. I. R. (B.) 174.

(7) 69 Ind. Cas. 123; 46 M. 373; 31 M. L. T. 136; 4 U. P. L. R. (P. C.) 85; 16 L. W. 615; (1922) A. I. R. (P. C.) 266; 27 C. W. N. 561; 44 M. L. J. 745; 37 C. L. J. 435; 21 A. L. J. 460; 50 I. A. 134 (P. C.).

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limiting, or extingushing any right or interest in immoveable property; it merely creates a right to obtain another document which will, when executed, create a right in the person claiming the relief," and accordingly they held that the document was admissible in evidence so far as it went. In view of that ruling it certainly seems to me hopeless to expect a Full Bench to give effect to the view to which I am personally inclined. It is more a matter which the Legislature can remedy if it thinks fit. Therefore, following the general current of authorites as to the interpretation of cl. (v), I think that we must hold that this document, Ex. 12, is a document which is exempted from registration under cl. (v) and that accordingly it is admissible in evidence.

The District Judge has ordered a remand for the decision of the suit on its merits. But the learned Counsel and Pleader for the parties in this appeal could not point out any other question that remains to be considered. The Subordinate Judge, as I have already mentioned, found the remaining two issues in favour of the plaintiffs and although Mr. Shingne did contest in his arguments the finding that the agreement Ex. 12 was one under which the heirs of Damodar had a similar right to re-purchase and to sue under it, yet it is quite clear that the Subordinate Judge's decision is the only one possible. The document itself contains nothing to indicate that the intention of the parties was that Damodar alone should have a right of re-purchase and the illustration (*a*) to s. 37 and s. 40 of the Indian Contract Act suffice to show that this is among the class of cases where, in the absence of evidence of a contrary intention, the legal representatives have a right to require performance or are bound by the promise to perform: *cf. Tod* v. *Lakhmidas Purshotamdas* (8). This is no doubt a case of purchase of immovable property and not one of the sale of goods but the same consideration applies, as there is nothing in the nature of the transaction to imply that merely a personal option was conferred. It is not a case where the document specifically limits the option of re-purchase to the vendor *and his heirs* as in *Situl Purshad* v. *Luchmi Purshad* (9) or to the vendor *and his descendants* as in *Vithoba Madhav* v. *Madhav Damodar* (10) nor is there a stipulation against assignment of the option as there was in *Jhanda Singh* v. *Wahid-ud-din* (11). Accordingly, in my opinion, there is no necessity for a remand. The questions raised in the suit have all been decided, if my view is correct, in favour of the plaintiffs; and it is obviously undesirable to extend this litigation unnecessarily. I would, therefore, pass a decree in favour of plaintiffs-respondents Nos. 3 and 4, who have acquired the right of Damodar, requiring the heirs of defendant No. 1 (appellants Nos. 2, 3 and 4) to execute a registered deed re-conveying the property in suit to them upon payment of the sum of Rs. 2,000, and providing that, if they fail to do so, action may be taken in accordance with the provisions of O. XXI, r. 34, C. P. C. I would also allow their prayer to obtain possession upon such re-conveyance.

The plaintiffs have succeeded and, therefore, defendants Nos. 1 and 2 must pay the costs of plaintiffs and their own costs throughout and defendant No. 3 must also bear his own costs, if any.

Madgavkar, J.—On September 28, 1911, the predecessor-in-title of the plaintiffs-respondents passed a registered sale-deed in favour of the predecessor-in-title of the defendants-appellants and took from the latter on the same day an ostensible unregistered agreement, Ex. 12, to re-convey the property which is worth over Rs. 100 within ten years increased by a postscript to eleven years. The respondents sued to obtain specific performance of the second agreement and for possession and were resisted by the appellants on the ground that the deed Ex. 12 was inadmissible for want of registration. The Trial Court upheld this contention but the District Court disallowed it and remanded the suit though the Trial Court had found on all the issues. Defendants Nos. 1 and 2 appeal.

The point faintly urged in appeal that the agreement is a personal contract on which the assignors cannot sue has been sufficiently disposed of in the judgment of my learned brother. On the main point as to the admissibility of Ex. 12, it is

(8) 16 B. 441; 8 Ind. Dec. (N. S.) 377.
(9) 10 C. 30; 10 I. A. 129; 13 C. L. R. 382; 7 Ind. Jur. 549; 4 Sar. P. C. J. 470; 5 Ind. Dec. (N. S.) 21 (P. C.).
(10) 46 Ind. Cas. 734; 42 B. 344; 20 Bom. L. R. 654.
(11) 36 Ind. Cas. 38; 38 A. 570; 31 M. L. J. 750; 21 C. W. N. 66; 20 M. L. T. 529; 14 A. L. J. 1189; (1916) 2 M. W. N. 570; 19 Bom. L. R. 1; 5 L. W. 189; 25 C. L. J. 524; 10 Bur. L. T. 131; 43 I. A. 284 (P. C.).

argued for the appellants that the transaction is one of mortgage and that in any case Ex. 12 limits the right under the sale-deed and, therefore, is compulsorily registrable on the grounds of policy stated by Macleod, C. J, in *Bala Khandapa* v. *Sadashiv Hari Chivati* (1). For the respondents it is contended, firstly, that the transaction is not a mortgage; secondly, that even if this Court holds it a mortgage, the second deed is not compulsorily registrable, any more than the deed in *Mir Gazi* v. *Mia Ali* (2); and, thirdly, if this Court prefers the view in the former decision to the view in the latter, the matter should be referred to a Full Bench rather than the question decided against the respondents.

The question whether registration is compulsory or otherwise depends upon whether the document Ex. 12 falls under s. 17 (1) (*b*) or whether it falls under s. 17 (2) (v) of the Indian Registration Act, that is, whether it does or does not itself create, declare, assign, limit, or extinguish any right, title and interest of the value of Rs. 100 and upwards to or in immoveable property but merely creates a right to obtain another document.

These documents are of frequent occurrences in this Province as well as in other parts of India. The question raised by them has usually been defined to be whether the two documents evidence a single transaction of mortgage by conditional sale or whether the second document evidences an agreement to re-convey, separable from the first sale and sale-deed. And the answer depends upon the intention of the parties, as expressed in the language of the documents themselves in the light of the surrounding circumstances, *Balkishen Das* v. *W. F. Legge* (12), "such as...is clearly required to show in what manner the language of the documents was related to existing facts:" *Narasingerji Gujangerji* v. *Panuganti Parthasaradhi* (13).

The answer is not always easy. The difficulty arises partly from the lack of definiteness of the intention, actual and legal, of the parties, partly perhaps from the fact cl. (1) (*b*) and cl. (2) (v) of s. 17 of the Indian Registration Act are not contradictory nor, taken together, exhaustive. There may be a third category of documents which create a right to obtain another document but do not merely create it or which also limit a right. And documents such as the one in suit may be argued to fall under it and to be excluded from the category of cl. (2) (v). Each party generally puts forward the interpretation which suits itself. Either party may be out of possession. The period, if any, specified in the second agreement may or may not have expired. Thus in the last case (4) the Madras High Court held that it was an agreement to re-convey while their Lordships of the Privy Council held it was a mortgage by conditional sale as in *Balkishen Das* v. *W. F. Legge*. (12). The other view of the transaction was taken in cases of somewhat similar documents in *Bhagwan Sahai* v. *Bhagwan Din* (3) and in *Jhanda Singh* v. *Wahid-ud-Din* (11) though in both these cases the two deeds were passed on the same day. This fact is not, therefore, of itself, decisive, any more than in the cases of *Namdev Satvashet* v. *Dhondu Sudashiv* (14) or *Muthuvelu Mudaliar* v. *Vythilinga Mudaliar* (15).

In the present case little evidence other than the document itself has been proffered. The learned Pleader for the appellant relies on para. 8 of the plaint where the plaintiffs say that they believe that the sale-deed passed to defendant No. 1 is in the nature of a mortgage. That, however, is not sufficient as the subsequent words of the same paragraph of the plaint proceed "even if it is not so regarded, yet plaintiffs have a right to demand a sale-deed and possession on the strength of the agreement." The suit is, therefore, in the alternative. The defendants appellants did not in their written statement expressly allege that the transaction was a mortgage nor did they ask for an issue on this point, nor lead evidence to show that it was a mortgage. The Trial Court, it is true, thought that words in the postscript of the agreement such as interest and rent proved the mortgage nature of the transaction. But the main object of the postscript was to increase the terms from ten years to eleven and the rest of the recital and the particular words therein are

(12) 22 A. 149; 2 Bom. L. R. 523; 27 I. A. 58; 4 C. W. N. 153; 7 Sar. P. C. J. 601: 9 Ind. Dec. (N. S.) 1130 (P. C.).

(13) 82 Ind. Cas. 993; 47 M. 729; at p. 731; 27 Bom. L. R. 4; (1924) A. I. R. (P. C.) 226; 20 L. W. 701; 10 O. & A. L. R. 1172; 47 M. L. J. 809; (1924) M. W. N. 915; 40 C. L. J. 481; 29 C. W. M. 246; 51 I. A. 305; 26 P. L. R. 18; 23 A. L. J. 161; L. R. 6 A. (P. C.) 41; 1 O. W. N. 634 (P. C.).

(14) 58 Ind. Cas. 406; 22 Bom. L. R. 979; 44 B. 961.

(15) 50 Ind. Cas. 205; 42 M. 407; 9 L. W. 365; 25 M. L. T. 332; (1919) M. W. N. 393; 36 M. L. J. 385 (F. B.).

incidental rather than an essential part of the contract. The lower Appellate Court has held that it was nothing more than an ordinary agreement to re-convey, for reasons which, apart from the reference to the decision of *Mir Gazi* v. *Mia Ali* (2) are not very clear. It appears to me on the whole that the transaction is not proved to be a mortgage.

On this view of the transaction, we are, I think, bound by the current of decisions of this Court that at least in the case of a transaction, which is not a mortgage, a deed such as Ex. 12 even though it may be argued to limit the right of the purchaser is not compulsorily registrable: *Sangawa* v. *Huchangowda* (6). Nor, as I understand the judgment in *Bala Khandapa* v. *Sadashiv Hari Chivati* (1), does the decision itself go the length argued for the appellants, its *ratio decidendi* being that the transaction in that case was a mortgage, though there are observations as to the desirability of registration which go further. But as I have held in the present case that the transaction is not proved to be a mortgage, it is not necessary to consider how far it would have been difficult for us to follow the decision of Beman, J., in *Mir Gazi* v. *Mia Ali* (2) in case it had been held to be a mortgage.

I agree, therefore, that the document Ex. 12 is admissible and the plaintiffs-respondents are entitled to the relief sought and under O. XLI this Court should pass a decree in their favour instead of the decree of remand of the lower Appellate Court.

As to the point of policy raised in arguments and touched upon in the judgment in *Bala Khandapa* v. *Sadashiv Hari Chivati* (1) as was said by Lord Davey, "Public policy is always an unsafe and treacherous ground for legal decision." *Janson* v. *Driefontein Consolidated Mines, Limited*, (16) referred to in *Shrinivasdas Lakshminarayan* v. *Ramchandra Ramrattan Das* (17). Whether these agreements to reconvey obtained from the vendee by the vendor do not incidentally cloud and unsettle the title of subsequent purchasers of the property and destroy much of the value and purpose of registration so as to render advisable an alteration in the law which would make them compulsorily registrable—these, I conceive, are matters, for the Legislature rather than for the Courts, to consider and to decide.

Z. K. *Order accordingly.*

(16) (1902) A. C. 484 at p. 500; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268; 18 T. L. R. 796.

(17) 52 Ind. Cas. 546; 44 B 6 at pp. 24, 33; 21 Bom. L. R. 788.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 55 OF 1925.

September 15, 1925.

Present:—Mr. Simpson, A. J. C.

LALTA SINGH—PLAINTIFF No. 1—APPELLANT

versus

LACHHMI KUER AND OTHERS—PLAINTIFFS AND FATEH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 5—Plaintiff, death of—Rival claimants—Order of substitution not passed separately—Substitution embodied in judgment and decree—Appeal by unsubstituted claimant, whether competent.

If a Trial Court instead of deciding the question of substitution between rival claimants to a deceased plaintiff by a separate order disposes it of in the judgment and embodies it in the decree, the procedure does not warrant an appeal by the unsuccessful claimant, as the order of substitution, if passed properly as an interlocutory order, would not have been open to appeal, and consequently the claimant being not party to suit, would have had no right to appeal from the decree as well. [p. 367, cols. 1 & 2.]

Brij Mohan Singh v. *Ram Milan Singh*, 20 Ind. Cas. 898; 16 O. C. 350, *Duni Chand* v. *Arja Nand*, 28 Ind. Cas. 687; 13 A. L. J. 381; 37 A. 272 and *Vithu* v. *Bhima*, 15 B. 145; 8 Ind. Dec. (N. S.) 97, referred to.

Parsotam Rao v. *Janki Bai*, 28 A. 109; A. W. N. (1905) 206 and *Tota Ram* v. *Ishur Das*, 9 A 445; A. W. N. (1887) 76; 5 Ind. Dec. (N. S.) 733, distinguished.

Appeal against the decree of the Third Additional District Judge, Lucknow (at Hardoi), in Appeal No. 190 of 1924, dated the 17th December 1924, reversing that of the Munsif, Hardoi, in Civil Suit No. 195 of 1922-23 dated the 21st December 1923.

Mr. *M. Wasim*, for the Appellant.

Messrs. *H. Husein* and *Manni Lal*, for the Respondents.

JUDGMENT.—The is a second civil appeal. The course which the litigation has taken is unusual. One Ganga Singh filed a suit as mortgagee against his mortgagor for possession as mortgagee. During the pendency of the suit the plaintiff died and there were two sets of claimants to be substituted. One was Lalta Singh, the

present appellant. He was Ganga Singh's brother. The others were plaintiffs Nos. 2 and 3, now respondents Nos 1 and 2 They are Ganga Singh's daughters-in-law. In their original application they claimed by survivorship. Three weeks later they set up a custom (which of course was necessary, because females are not members of a joint Hindu family) and, at the same time, they set up an oral Will. Before the case could proceed to judgment, the mortgagor admitted the claim and merely asked to be exempted from costs.

It is urged on behalf of the appellant that it was obligatory on the Munsif to have tried out the question who was entitled to represent Ganga Singh in the suit as a separate matter, and to have passed an interlocutory order on the point. If he had done so, the result would have been an order of substitution. Such an order is not appealable. However, the Munsif disposed of the question of substitution in his judgment and embodied the result in a decree. His decision was in favour of the appellant Lalta Singh. Plaintiffs Nos. 2 and 3, the daughters-in-law, filed an appeal against this decree on the sole ground that they, and not plaintiff No. 1, were the true representatives. The learned District Judge admitted the appeal, went into the merits and upset the decision.

The appellant comes here on second appeal, and his main ground is that the first appeal did not lie, that the District Judge acted without jurisdiction, and that the Munsif's decree must be restored. It is admitted by respondents' Counsel that an order of substitution of names, passed as such, is not appealable. It is an interlocutory order and the appeal must be from the final decree [*Brij Mohan Singh* v. *Ram Milan Singh* (1), *Duni Chand* v. *Arja Nand* (2).] It is urged for the appellant that, if the Munsif had followed what appellant considers to be the proper procedure, then the interlocutory order could not have been appealed, and the appeal against the decree itself could not have been made by the present respondents, because they would not have been parties to it. Their remedy would have been a separate suit, which would have been against the plaintiff, if he had obtained mortgagee possession. They could not have brought a separate suit against the defendant, because if the plaintiff failed they failed with him, he having sued in a representative capacity.

I agree that this represents correctly what would have happened if the Munsif had passed a separate interlocutory decree. But he did not do so, and the question before me is whether the District Judge had jurisdiction to pass the order which he passed. The case is very similar to *Brijmohan Singh* v. *Milan Singh* (1). In that case, as in this, a plaintiff had died and there were two claimants to represent him. The Munsif decided the question and, on the same day as his order for substitution was made, the case was settled in Court and a decree was passed in favour of those plaintiffs. Then the rival claimant appealed against the order of substitution. The appeal was admitted and the order of substitution cancelled. On second appeal it was declared that the learned Subordinate Judge had no jurisdiction because no appeal lay from an order of substitution. The only distinction between that case and the one before me is that in the present case the Munsif irregularly joined in one the order of substitution and the final decree itself. The same thing took place in *Vithu* v *Bhima* (3). In that case also the plaintiff died and rival claimants applied to take his place. The Subordinate Judge admitted both, heard the suit and then made a decree determining the rights between the co-plaintiffs. One of the two co-plaintiffs appealed, making the other alone the respondent, and the Appellate Court amended the decree and gave the appellant a decree. On appeal the order was set aside. It was said that the subordinate Judge was clearly wrong in adjudicating by his decree between the rival claims of the two co-plaintiffs in the record, and the District Judge ought not to have allowed one plaintiff to appeal against the other or to have decided the rights of the different plaintiffs *inter se*. I have been referred also to *Parsotam Rao* v. *Janki Bai* (4). On the other side I am referred to *Tota Ram* v. *Ishur Das* (5), but I cannot see that that case has any bearing on the question. I am also referred to *Ayya Mudalivelan* v. *Veerayee* (6), but that decision is distinguishable

(1) 20 Ind. Cas. 898; 16 O. C. 350.
(2) 28 Ind. Cas. 687; 13 A. L. J. 381; 37 A. 272.
(3) 15 B. 145; 8 Ind. Dec. (N. S.) 97.
(4) 28 A. 109; A. W. N. (1905) 206.
(5) 9 A. 445; A. W. N. (1887) 76; 5 Ind. Dec. (N. S.) 733.
(6) 58 Ind. Cas. 498; 43 M. 812; (1920) M. W. N. 467 12 L. W. 188; 39 M. L. J. 218.

because the result of the order in that case was that the whole of the litigation came to an end. The order, therefore, would be regarded as a decree, and as such appealable.

The appeal, therefore, must succeed, and the judgment and decree of the learned District Judge must be set aside as having been made without jurisdiction. The result will be to restore the decree of the learned Munsif. The appellant will get the costs of the appeal in this Court.

N. H. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 309 OF 1924.

July 15, 1925.

Present:—Mr. Justice Ramesam.

M. VENKATAKRISHNIER—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF RAMNAD AT MADURA AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 80—Notice of suit—Disclosure of ground of complaint—Notice, sufficiency of.

The object of requiring notice of an intended suit under s. 80 of the C. P. C. is merely to inform the defendant substantially of the ground of complaint. The notice must not be too strictly or too narrowly construed. It must not be construed as a pleading. It need not set out all the details and facts of the case which the plaintiff intends to prove. The notice must be considered sufficient if it substantially informs the defendant of the nature of the suit intended to be filed. [p. 369, col. 1.]

Jones v. *Bird*, (1822) 1 B. & Ald. 837; 106 E. R. 1397; 1 Dowl. & Ry. 497; 24 R. R. 579, *Secretary of State for India* v. *Perumal Pillai*, 24 M. 279; 11 M. L. J. 117, *Jehangir M. Cursetji* v. *Secretary of State*, 27 B. 189; 5 Bom. L. R. 30 and *Eales* v. *Municipal Commissioners of Madras*, 14 M. 386; 5 Ind. Dec. (N. S.) 270, relied on.

Second appeal against a decree of the District Court, Ramnad at Madura, in A. S. No. 199 of 1922, preferred against that of the Court of the District Munsif, Srivalliputtur, in O. S. No. 481 of 1920.

Mr. *Watrap Subrahmanya Iyer*, for the Appellant.

The Government Pleader, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff against the Secretary of State for India in Council and the President, District Board, Ramnad for certain declarations and for recovering damages. The plaintiff is the *hakdar* of the Mangammal Chatram and of certain *inam* lands attached to it. Through the said lands passes a District Board road No. 11, namely, the road from Thenkasi to Madura. The dispute between the parties relates to the eastern avenue of trees on the side of the said road. The dispute between the parties relates to the ownership of the ground of the avenue and of the trees. On a perusal of the pleadings in the case it is clear that the plaintiff says that he is the owner of the ground and avenue and as the result of it also of the trees growing on it. He also as a corollary claims the right to plant fresh trees at any place he likes on the avenue either in substitution of fallen trees or at other places. The defendants claim that the avenue is part of the road and as such the surface is vested in the District Board. But the first defendant claims the right to the sub-soil. It is obvious that the root of the difference between the parties is one relating to ownership. The right to cut the trees is merely an auxiliary of the title subject to one small exception which will be mentioned later on. The District Munsif has dismissed the suit on the ground that the notice issued by the plaintiff prior to the suit was not sufficient. On appeal the District Judge held that the only relief to which the first defendant's attention was directed was the declaration of the plaintiff's title to plant new trees on the roadside within the limits of the plaintiff's *inam* lands and to enjoy their usufruct. He held that the suit ought not to have been dismissed so far as this declaration is concerned and as for the rest, as the other reliefs were not mentioned in the notice he held the suit was rightly dismissed. In the result he partially remanded the suit for trial. Plaintiff files this second appeal.

As I already pointed out the right to cut the trees is alleged only as the result of the right to the land itself. The notice, Ex. 1, certainly alleges that the *inam* lands and the avenue trees standing on the side of the road belonged to the petitioner: see para. 2. Paragraph 9 says that the public road does not include the roads passing through the *inam* village. Paragraph 10 says that the road is subject to rights of

ndividuals. Paragraph 11 says that it s unjust to prohibit him from planting trees in his own *inam*. It is true that para. 13 mentions that he wants a declaraion as to the right to plant new trees. But for this fact that he mentioned only one declaration in para. 13, there would have been no trouble. However the question now is whether this is a proper notice according to law. In *Jones* v. *Bird* (1) it was said with reference to a similar section that the object of such a section is merely to inform the defendant substantially of the ground of complaint. This was referred to with approval in *Secretary of State for India* v. *Perumal Pillai* (2); in *Jehangir M. Cursetji* v. *Secretary of State* (3) it was said "these notices must not be too strictly or too narrowly construed. They must not be construed as if they were pleadings and that they need not set out all the details and facts of the case which the plaintiff intends to prove, and that the notice must be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed." The cases in *Jones* v. *Bird* (1) and *Secretary of Stale for India* v. *Perumal Pillai* (2) were followed. In *Eales* v. *Municipal Commissioners of Madras* (4), Collins, C. J., and Shephard, J., observed adopting the language of Pollock that "we must import a little common sense into notices of this kind", though in that case the question was regarding the address of the plaintiff. I, therefore, think that the notice is substantially sufficient in so far as the prayers resting upon the plaintiff's ownership of the land are concerned. The cause of action is stated to be the order of Government of 10th August 1916 and the attitude which the defendants have now taken up was taken up in that order. Therefore there is no surprise to the defendants.

There are only two matters which require to be specifically dealt with. One is prayer (*c*) which relates to lopping off the branches where they cause the damage creating shade. In so far as this prayer rests on plaintiff's ownership of the land and the trees there can be no objection. But the Government Pleader apprehends and rightly that the plaintiff may probably claim a right to cut off the branches even if his ownership is not established on the ground that the defendant is not entitled to cause damage to his crops by overshadowing trees. I agree with the learned Government Pleader in thinking that this cutting should not be regarded as alleged in the notice and there is no reason why the notice should be so construed as to cover a claim of this kind. Therefore prayer (*c*) of the plaint if it is urged in respect of trees found to belong to the defendant would certainly be disallowed.

The only other point which requires to be specifically dealt with is the claim for damages in prayer (*f*). It is now conceded that it is not intended to be urged against the Government the first defendant. It is enough to record this admission. So far as the District Board is concerned, the notice given to them, Ex. 2 does not mention this as one of the reliefs but in para, 3 of Ex. 2 plaintiff mentioned that some windfallen trees were sold by the Local Fund Authorities and the sale-proceeds were appropriated by them under orders of the Collector. I think this allegation of the appropriation of the proceeds relating to the ownership of the plaintiff is enough to constitute a notice to District Board. It is unnecessary to discuss the question whether the act of the second defendant in appropriating the proceeds falls within the language of s. 156 of Act V of 1884 and requires notice: *vide Syed Ameer Sahib* v. *Venkatarama* (5).

With these remarks the whole suit will be remanded to the District Munsif's Court for trial and disposal according to law. The plaintiff will be entitled to refund of Court-fees both in this Court and in the lower Appellate Court. Costs will abide the result.

The memorandum of objections of the first defendant will be dismissed with costs of plaintiff.

Case remanded.

V. N. V.
N. H.

(1) (1822) 1 B. & Ald. 837; 106 E. R. 1397; 1 Dowl. & Ry. 497; 24 R. R. 579.
(2) 24 M. 279; 11 M. L. J. 117.
(3) 27 B. 189; 5 Bom. L. R. 30.
(4) 14 M. 386; 5 Ind. Dec. (N. S.) 270.
(5) 16 M. 296; 5 Ind. Dec. (N. S.) 913.

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

July 30, 1925.

Present:—Lord Sumner, Lord Blanesburgh, Sir John Edge, Mr. Ameer Ali and Lord Salvesen.

Kuar MATA PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Kuar NAGESHAR SAHAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Reversioners, position of—Suit to challenge act of widow—Res judicata—*Civil Procedure Code (Act V of 1908), s. 11, Expl. VI—Oudh Estates Act (I of 1869), s. 13-A—Oudh Estates (Amendment) Act (III of 1910), s. 6—Bequest in contravention of provisions of Act, effect of—Personal law, applicability of—Privy Council judgments, authority of.*

Under the Hindu Law the reversioners possess individually what is called a *spes successionis*, that is to say, the bare possibility of succeeding to the estate of the last owner in case the widow dies leaving any one of them surviving entitled to take immediate possession after her, unless the husband has left the power to her to adopt a son. But the *spes* is common to all the reversioners and so is the danger from any act of the widow against the interests of the reversioners. The right to sue to set aside that common danger is given for reasons of policy and convenience to the person, who, if the widow died at the moment, would take the estate. But the result of such a suit, favourable or otherwise, affects the reversioners as a body and operates as *res judicata* in any subsequent suit brought by any of the reversioners to challenge the act of the widow. Explanation VI to s. 11 of the C. P. C. covers a case of this kind and bars fresh litigation on the same cause of action, unless the previous litigation was collusive or was vitiated by fraud or laches on the part of the reversioner then suing in conducting the suit or in asserting his reversionary right. [p. 374, col. 2; p. 375, col. 1]

Section 6 of the Oudh Estates (Amendment) Act of 1910 which adds s. 13-A to the Oudh Estates Act of 1869 is not retrospective and does not validate a bequest which had already failed. [p. 376, cols. 1 & 2.]

Where a bequest of property which is subject to the provisions of the Oudh Estates Act of 1869 is made in contravention of the provisions of the Act and the devisee obtains the property under the bequest and acquires a title thereto, the property passes out of the purview of the Act and becomes subject to the personal law of the person acquiring it. [p. 376, col. 2.]

It is not open to the Courts in India to question any principle enunciated by their Lordships of the Privy Council, although they have a right to examine the facts of a case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them, whether on account of "judicial dignity" or otherwise, to question a decision of their Lordships on any particular issue of fact. Any application for review of judgment on grounds permissible by law only lies to the Judicial Committee itself. [p. 377, col. 2.]

Appeal from the decree of the Court of the Oudh Judicial Commissioner (Mr. Daniels and Mr. Lyle, A. J. Cs.), dated the 2nd March 1922, reversing that of the Subordinate Judge, Lucknow, dated the 31st January 1920.

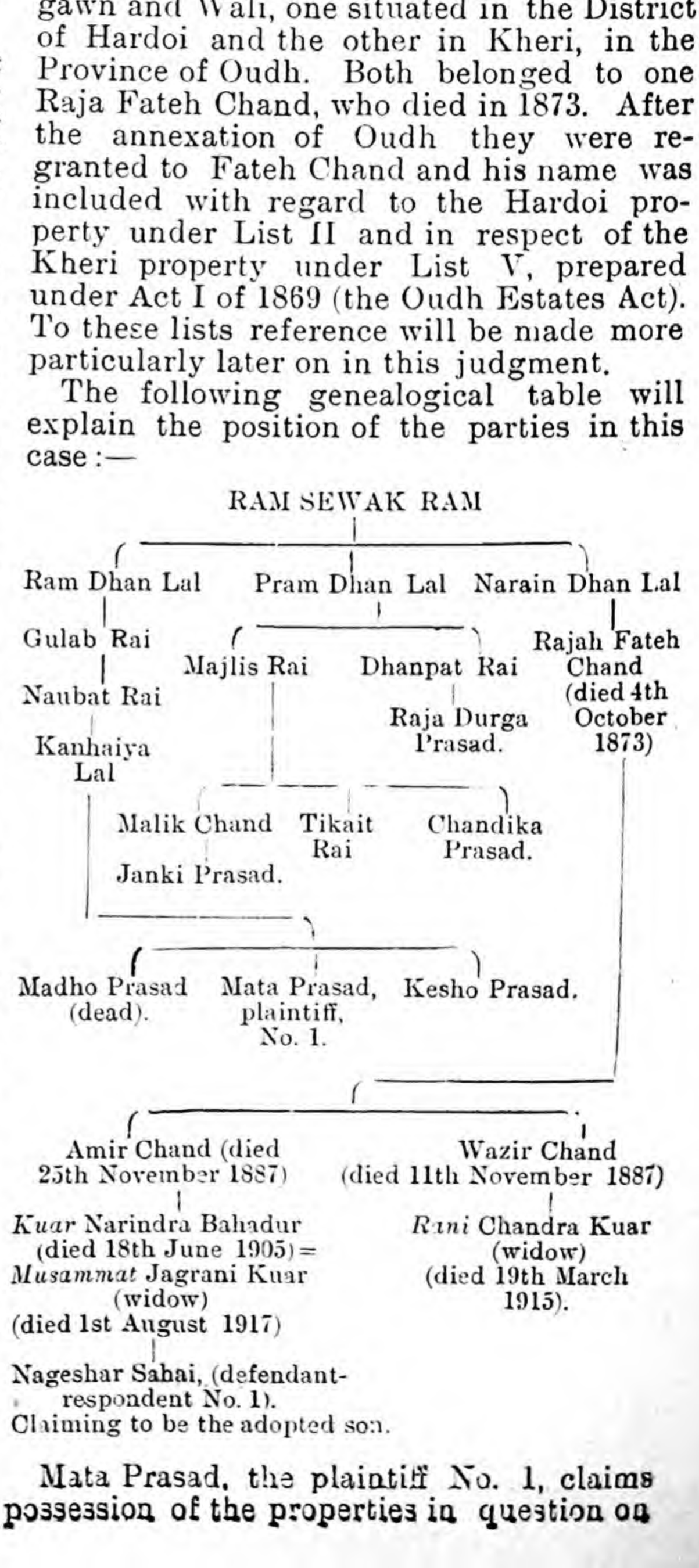
Messrs. *A. M. Dunne* and *W. Wallach*, for the Appellants.

Messrs. *De Gruyther* and *J. M. Parikh*, for the Respondents.

JUDGMENT.

Ameer Ali.—This litigation relates to two properties named respectively Baragawn and Wali, one situated in the District of Hardoi and the other in Kheri, in the Province of Oudh. Both belonged to one Raja Fateh Chand, who died in 1873. After the annexation of Oudh they were regranted to Fateh Chand and his name was included with regard to the Hardoi property under List II and in respect of the Kheri property under List V, prepared under Act I of 1869 (the Oudh Estates Act). To these lists reference will be made more particularly later on in this judgment.

The following genealogical table will explain the position of the parties in this case :—



Mata Prasad, the plaintiff No. 1, claims possession of the properties in question on

various grounds, which will be set out later. The second plaintiff is the assignee of Mata Prasad of a share in the two estates. In this judgment wherever the plaintiff is mentioned it refers to Mata Prasad.

Act I of 1869 came into force in January of that year; and in March following Raja Fateh Chand purported to make a Will, under which he devised the Kheri property, in other words the Wali estate, to his eldest son, Amir Chand; and the Hardoi property, the Baragawn estate, to the younger son, Wazir Chand. So far as appears on the record, Amir Chand and Wazir Chand appear to have been placed in possession of the two estates respectively. Raja Fateh Chand died as already stated in 1873; but the Will he had made in 1869 was never registered under the provisions of s. 13 of the Act, which requires a Will in favour of a younger son of the *taluqdar* whose name does not appear in the third or fifth of the lists mentioned in s. 8 to be registered within a certain specified time. This section will be referred to later. Consequently, it is not disputed, that the bequest to Wazir Chand, the younger son, was invalid and inoperative. He, however, remained in possession of the Hardoi estate until his death on the 11th November 1887.

Amir Chand, the eldest son of Fateh Chand, had died two months earlier, *viz.*, on the 26th September 1887; as the Will in his case did not require registration the devise in his favour was valid in law and operative.

Wazir Chand left him surviving a widow named Chandra Kuar who appears, on his death, to have taken possession of the Hardoi property. Chandra Kuar died on the 19th of March 1915.

On the death of Amir Chand, as already stated, his son and heir, named Narindra Bahadur, succeeded to the Kheri estate. In 1897 he brought a suit against the widow of Wazir Chand for a declaration of his own title as regards the Hardoi estate and for possession of the property. To the particulars of his claim their Lordships will refer more fully later on. It is sufficient at this stage to say that he based his title to the Baragawn estate on the allegation that it was subject to the provisions of Act I of 1869 and that he was entitled to it in preference to Chandra Kuar, Wazir Chand's widow. In the alternative, he alleged that, even if the estate was not governed by the provisions of the Act and was subject to the Hindu Law, pure and simple, the property devolved on him on the death of Wazir Chand his uncle as they were joint and undivided at Wazir's death. The Subordinate Judge in that case held that the property was subject to the provisions of Act I of 1869 and that the plaintiff, Narindra Bahadur was entitled to it in preference to Chandra Kuar. He accordingly decreed the plaintiff's claim. On appeal to the Judicial Commissioner's Court it was held that the property in dispute was not subject to Act I of 1869. The decree of the Subordinate Judge was accordingly reversed and the case was remanded for the purpose of deciding whether the claim of Narindra Bahadur was well-founded on the alternative ground, namely, that under the law of the Mitakshara, to which the parties were subject, he was entitled to the property.

Before the trial on the remand the parties compromised the dispute and a decree was made on the 20th December 1899, in accordance with the settlement at which they had arrived. Reference will be made later to the terms of the settlement, as one of the questions raised in the present litigation relates to the power of Chandra Kuar to enter into that compromise.

Narindra Bahadur died on the 18th June, 1905, leaving him surviving his widow, Jagrani Kuar. Shortly after his death Jagrani Kuar propounded a Will alleged by her to have been executed by Narindra Bahadur on the 23rd October 1904, giving her power to adopt a son to him.

On the 30th April 1906, one Raja Durga Prasad, claiming to be a reversioner of Narindra Bahadur, brought a suit against Jagrani Kuar in the Court of the Subordinate Judge of Kheri for a declaration that the Will propounded by her as the Will of Narindra Bahadur was a forgery and that he was entitled to the estate by virtue of his reversionary right. Durga Prasad's suit had a chequered career. His claim was dismissed by the Subordinate Judge on the ground that the Will was genuine and had been duly executed by Narindra Bahadur. The decree of the Subordinate Judge was reversed on appeal by the Judicial Commissioners, who held, chiefly as it appears, on suspicion, that the Will was not genuine. They accordingly decreed the claim of Raja Durga Prasad.

Jagrani Kuar appealed to His Majesty in Council from the decree of the Judicial Commissioners, and on the 3rd December,

1913, it was held by their Lordships on a careful examination of the evidence relating to the execution of the Will that it was fully established to be the act of Narindra Bahadur. The decree of the Appellate Court was accordingly set aside and that of the Subordinate Judge dismissing the suit of Durga Prasad was restored.

Narindra Bahadur's Will having been thus finally declared to be valid, Jagrani Kuar, in conformity with the power entrusted to her by her deceased husband, adopted on the 22nd May, 1914, the defendant Nageshar Sahai as the son of Narindra Bahadur.

On the 20th of April, 1918, the present suit was instituted by Mata Prasad and his assignee, plaintiff No. 2, in the Court of the Subordinate Judge of Hardoi for the possession of the two estates lying, respectively, in the Hardoi and Kheri Districts, with a declaration regarding Mata Prasad's title.

It is desirable to notice briefly the allegations on which the claim is founded and on which the long and ingenious arguments in the course of the trial mainly rest.

In para. 12 of the plaint it is stated that the Baragawn and Wali (Sarawa) Estates "are subject to Act I of 1869," and that the plaintiff, Mata Prasad, as the oldest member of the senior branch, is entitled to them with their appurtenances. In para. 13 he claims alternatively that even if Baragawn "be not deemed" subject to the Act, he is entitled to the same by virtue of the custom.

The reason of this alternative claim will be clear as the judgment proceeds.

He asked, accordingly, for a declaration that the adoption of Nageshar Sahai was invalid and that the Will under which Jagrani Kuar purported to make the adoption was false.

The first defendant, Nageshar Sahai, is, as already stated, the alleged adopted son of Narindra Bahadur. The other two defendants are the sons of Narindra's sister, who acquired title to certain portions of the estate under his Will. Both sets of defendants dispute the title of the plaintiff Mata Prasad. Nageshar Sahai further contends that the plaintiff's claim is barred by the rule of *res judicata* arising out of the decision in Raja Durga Prasad's case and consequently in respect of the Hardoi estate, it is not maintainable. With regard to the assertion that the Baragawn estate is subject to Act I of 1869 the defendants further contend that the Will of Fateh Chand, executed in March, 1869, under which the testator had purported to devise the Hardoi estate to Wazir Chand was never registered and consequently it had gone out of the operation of Act I of 1869 and succession so far as that property was concerned, was governed by the general provisions of the Hindu Law. They also denied the existence of any custom such as the plaintiff alleged in paras. 12 and 13 of his plaint.

In answer to the defendants' allegation that the Will of Fatch Chand was not operative as it was never registered, the plaintiff averred that if the Will of 1869 was invalid there was a prior Will made in 1860 the terms of which were formulated or embodied in the village administration papers, called *wajib-ul-arz*; and he claimed that effect should be given to that Will.

He further urged that even if the estate went out of the operation of Act I of 1869 in consequence of the non-registration of the Will it was brought back under the Act on the passing of the Amending Act III of 1910. The arguments in support of this contention have occupied a great deal of the time of the Courts in India and of this Board.

Their Lordships, however, propose to confine their attention to the principal contentions advanced before the Board.

The Subordinate Judge of Lucknow, before whom the case came on for trial raised a large number of issues which he has discussed at considerable length in his judgment. In dealing with the plea of *res judicata* based on the decision in Durga Prasad's suit he adopted what appears to their Lordships an unprecedented and irregular course; he refused in fact to be bound by the decisions of the Judicial Committee. To show the mistake into which he has fallen their Lordships consider it desirable to refer to two passages in his judgment:—

"Granting on the basis of these authorities that the widow represents the entire estate which consists of herself and the reversioners, I am unable to see how it follows that one reversioner in a suit against the widow represents the entire body of the reversioners. The commonly accepted position of the reversioners is that one does not claim through the other. Obviously, therefore, the judgment in a suit between one reversioner and any other person,

widow or some other person, does not stand as a bar to the trial of the same question as between another reversioner and the same person on the other side in another suit. I do not see how this principle is changed in this particular case before me.

The basis of this general principle is that the title of one reversioner is quite separate from and independent of the title of any other reversioner. It is all the more so in the present case as the first plaintiff's title has originated in a special legislation of the Act III of 1910 of the United Provinces Council, the Act amending Act I of 1869. He was not one of the reversioners at any rate immediate reversioners of the property at the time the suit was brought by Durga Prasad. He had no title as a reversioner. His title arose on the passing of the Act in the year 1910. It passes my comprehension how a person can be said to be debarred from setting up a title in a suit, when that title had no existence at the time at which any other litigation took place concerning the property to which the title relates. To my mind the present suit could hardly be said to be barred even if the present plaintiff No. 1 had himself been the plaintiff in place of Durga Prasad. The requirements of "litigating under the same title would be wanting for constituting the bar of *res judicata*."

The reference at the end of the passage quoted to Act III of 1910 appears futile, for the cause of action and the charge respecting the genuineness of Narindra Bahadur's Will are the same as in the previous case.

On this reasoning he refused to be bound by the decision of the Board in *Venkatanarayana Pillay* v. *Subbammal* (1).

Regarding the genuineness of Narindra Bahadur's Will, the authenticity of which was declared by the Judicial Committee in 1913 the Subordinate Judge expressed himself as follows:—

"I have never entertained any doubt on the question and I have no hesitation in holding upon this issue that the trial of the genuineness of the Will of Narindra Bahadur is not barred by the judgment in the case between Durga Prasad and Jagrani."

And again:—

"The conclusion at which the learned Subordinate Judge and their Lordships of the Privy Council arrived on the evidence in that case is not warranted by the evidence in this case which besides exposing the position of Khuda Bakhsh and Ganga Prasad, is confined to the actual execution of the Will and falls far short of the evidence produced in that case of the intention."

He held accordingly that the plaintiff's claim was not affected by the bar of *res judicata*, either as to the representative character of Durga Prasad's suit or by the Board's decision on the issue of fact relating to the genuineness of the Will of Narindra Bahadur, and that he had established his title to the Kheri estate.

He held, however, that, as the Will of Fateh Chand was inoperative as regards the Hardoi estate, not having been registered under the provisions of s. 13 of Act I of 1869 and s. 13 (*a*) of Act III of 1910 was not retrospective, the estate was not brought back under the Act of 1869 as the plaintiff contended. He held, therefore, that Mata Prasad failed to establish any title to the same. He accordingly decreed the plaintiff's claim in respect of the Kheri estate and dismissed his suit with regard to the Hardoi property.

Both parties appealed to the Court of the Judicial Commissioner of Oudh. The learned Judges of the Appellate Court were of opinion, as their Lordships think rightly, that the plaintiff's claim was in fact *res judicata* and, therefore, liable to be dismissed in respect of the Kheri property. They further held, in agreement with the Subordinate Judge that the Hardoi estate was never under Act I 1869 and was not brought back under the Act by anything contained in the later Act. They accordingly dismissed the whole suit.

From this decree the plaintiffs have appealed to His Majesty in Council. On the arguments before the Board, the first question for determination centres on defendants' plea of *res judicata* in other words, whether the proceedings in the suit of Raja Durga Prasad form a bar to the present action by Mata Prasad.

It has been contended before their Lordships, as it was before the Subordinate Judge who accepted and gave effect to the argument that the reversioners have each an independent cause of action, and as none of the reversioners derive title from the others, the result of a suit against the widow and her assignees brought by a reversioner,

(1) 29 Ind. Cas. 293; 42 I. A. 125; 38 M. 406; 17 M. L. T. 435; 28 M. L. J. 535; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1925) M. W. N. 555; 21 C. L. J. 515 P. C.).

presumptive or otherwise, does not bind the others, nor can the suit be considered as brought in a representative capacity. The same argument, though clothed in other words, was presented to their Lordships in the case of *Venkatanarayana Pillai* v. *Subbammal* (1), where the governing principle applicable to a suit brought by a reversioner in the lifetime of the widow to get rid of a common apprehended danger to the interests of the general body of reversioners, was set out at length. In re-affirming the rule enunciated in that case their Lordships desire to observe that so long ago as 1868 Sir Barnes Peacock, then Chief Justice of Bengal, indicated in the Full Bench case of *Nobin Chunder Chuckerbutty* v. *Issure Chunder Chuckerbutty*(2), the position of the presumptive reversioner seeking to get rid of any act of the widow during her lifetime which jeopardised the common interests of the reversioners. Act VIII of 1859 which was then in force governing procedure, contained no such provision as was embodied in Explanation V to s. 13, Act X of 1877, and afterwards reproduced in Explanation VI s. 11 of Act XIV of 1882 and Act V of 1908. The words "cause of action," therefore, needed judicial interpretation. Sir Barnes Peacock's *dicta* deserve attention. The main question in the case referred to was whether adverse possession as against the widow barred the rights of reversioners. The language of the Chief Justice in dealing with the point is important. He says first : " but reversionary heirs presumptive have a right, although they may never succeed to the estate, to prevent the widow from committing waste."

He then goes on thus :—

"It is said that the reversionary heirs could not sue during the lifetime of the widow, and that, therefore, they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation, by which she, without fraud or collusion, is barred. When, therefore, we construe the words 'cause of action' in the Statute of Limitation, we must consider them as referring not to a new cause of action accruing to the reversionary heirs personally and individually, but to the cause of action which accrued to the heir or representative, for the time being, of the deceased."

The principle enunciated in *Venkatanarayana Pillai* v. *Subbammal* (1) which was followed in *Janaki Ammal* v. *Narayanasami Aiyar* (3) is logically sound and "salutary," to use Lord Blanesburgh's expression in the judgment in *Kesho Prasad Singh* v. *Sheo Pragash Ojha* (4).

Reversioners possess individually what has been called a *spes successionis* the bare possibility of succeeding to the estate of the last owner in case the widow dies leaving anyone of them surviving entitled to take immediate possession after her, unless, of course, the husband has left the power to her to adopt a son. But the *spes* is common to them all ; so is the danger by the widow's act against the interests of the reversioners. The right to sue to set aside that common danger is given for obvious reasons of policy and convenience to the person, who, if the widow died at the moment, would take the estate. But the result favourable or otherwise, affects the reversioners as a body.

As pointed out in the case of *Venkatanarayana Pillai* v. *Subbammal* (1) Explanation VI to s. 11 of the C. P. C. covers exactly cases of the kind under consideration and bars a fresh litigation on the same cause of action.

The learned Judges of the Judicial Commissioner's Court in their very able judgment, have set out, in clear terms, the considerations on which the principle is founded.

It has been contended on behalf of the plaintiff that the suit by Durga Prasad was incompetent inasmuch as he was not at the time the presumptive reversioner to Narindra Bahadur. This contention could only have been advanced on a misconception of the facts. Jagrani Kuar, the defendant in that suit, appears to have taken the same objection that Durga Prasad had no right to maintain the action. The Subordi-

(2) 9 W. R. 505 at p. 509; B. L. R. Sup. Vol. 1008.

(3) 37 Ind. Cas. 161; 43 I. A. 207; 39 M. 634; 20 M. L T. 168; 31 M. L. J. 225; 14 A. L. J. 997; (1916) 2 M. W N. 188; 20 C. W. N. 1323; 18 Bom. L. R. 856; 24 C. L. J 309; 4 L. W. 530 (P. C.)

(4) 82 Ind. Cas. 962; 51 I. A. 381; 1 O. W. N. 640; 47 M. L. J. 824; (1925) A. I. R. (P. C.) 247; 10 O. & A. L. R. 1105; 40 C. L. J. 461; 46 A. 831; 23 A. L. J. 168; 27 Bom. L. R. 130; L. R. 6 A. (P. C.) 1; 29 C. W. N. 606; 21 L. W. 295 (P. C.).

nate Judge in the suit of Durga Prasad states first the ground of the claim in these terms: "The plaintiff (Durga Prasad) is one of the reversioners to Narindra Bahadur and Wazir Chand and as such his interests to the said property will suffer if the Will is allowed to stand, and so he has instituted the present suit, seeking (among others) the following declaratory relief, *viz.*, that the Will propounded is a forged document." The learned Judge then proceeds to deal with the objection, *viz.*, Durga Prasad's incompetency. Reference to the pedigree would show that the persons standing nearest in degree to Narindra Bahadur were at the time Chandika Prasad and Durga Prasad. The learned Subordinate Judge, therefore, says in his judgment: "The sale deed by Chandika Prasad in favour of the plaintiff (Durga Prasad) is evidence sufficient to show that he is unable to sue for want of funds, and, so the plaintiff is entitled to sue."

This finding was never, so far as their Lordships can see, impugned in the Judicial Commissioner's Court or before this Board.

Mata Prasad, the plaintiff in the present suit, is a remote *sapinda* of Narindra Bahadur. He was in existence at the time when Raja Durga Prasad brought his action. He was aware, as his brother Kesho Prasad swears, of the institution of the suit. There is nothing to show that the litigation between Raja Durga Prasad and Jagrani Kuar was collusive or vitiated by fraud or laches on the part of Durga Prasad in conducting the suit or in asserting his reversionary right. Nothing of the kind is proved or even alleged.

The Subordinate Judge dismissed Durga Prasad's "claim for a declaration of the forgery of the Will." But he declared it to be invalid and inoperative in respect of certain bequests in favour of the defendants other than Jagrani Kuar. On appeal to the Judicial Commissioner's Court, the decree of the Subordinate Judge affirming the due execution of the Will by Narindra Bhadur was reversed, but it was restored by this Board on the 3rd December 1913, which found the Will to have been duly executed by the defendant's husband with the power of adoption.

On a review of all the facts, their Lordships are of opinion in concurrence with the learned Judges of the Appellate Court, that the suit by Durga Prasad against Jagrani Kuar for a declaration that the Will of Narindra Bahadur was false and fabricated, was brought by him in his capacity of the presumptive reversioner, and as such the decision in that suit binds the plaintiff, Mata Prasad. His claim as regards the Kheri estate is clearly barred.

Assuming that the claim as to the Baragawn estate in the Hardoi District is not so barred, the question of the plaintiff's title to this property has to be considered from a different point. He contends, in the first place, that, even if the Will of 1869, was invalid for want of proper registration, he could fall back upon the Will of 1860, to which reference is made in the document of 1869. Beyond this there is absolutely no evidence of the fact that Fateh Chand had made any bequest to Wazir Chand in 1860. Reference has been made to a number of documents called *wajib-ul-arz*, but they are not statements by Fateh Chand himself. They contain statements by some of his agents, all of whom speak of the mode of descent customary in the family. The Hardoi estate granted to Fateh Chand was placed in List II. This list includes the *taluqkdars*, whose estates, according to the custom of the family, on or before the 13th February, 1856, ordinarily devolved upon a *single heir*. The purport of the statements contained in the *wajib-ul-arz* simply referred to the fact that the particular estate which was held by Wazir Chand was descendable to a single heir and nothing more. Whether it was descendable to a single heir or not, the bequest being invalid owing to want of registration, left the property open and out of Act I of 1869. It was conceded in the Appellate Court that unless the plaintiff could show that the property came back under Act I of 1869 by virtue of the provisions of Act III of 1910 the plaintiff had no right to the property. Section 13 of Act I of 1869 is in these terms: —

"No *taluqdar* or grantee, and no heir or legatee of a *taluqdar* or grantee, shall have power to give or bequeath his estate, or any portion thereof or any interest therein to any person not being either

(1) a person who under the provisions of this Act or under the ordinary law to which persons of the donor's or testator's tribe and religion are subject would have succeeded to such estate or to a portion thereof or to an interest therein, if such

taluqdar or grantee, heir, or legatee had died intestate, or

(2) a younger son of the *taluqdar* or grantee heir or legatee, in case the name of such *taluqdar* or grantee appears in the third or the fifth of the lists mentioned in section eight,

except by an instrument of gift or a Will executed and attested not less than three months before the death of the donor or testator, in manner herein provided in the case of a gift or Will, as the case may be, and registered within one month from the date of its execution."

The amendment which was made by Act III of 1910, called the Oudh Estates (Amendment) Act of 1910, s. 6, runs thus:—

"6. After s. 13 of the said Act, the following section shall be inserted, namely:—

13-A. No *taluqdar* or grantee, and no heir or legatee of a *taluqdar* or grantee, and no transferee referred to in s. 14, and no heir or legatee of such transferee, shall have power to bequeath his estate, or any portion thereof or any interest therein—

(1) (*a*) to a person who would have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate, at the time when the bequest took effect,

(*b*) to his daughter,

(*c*) to a son of his daughter, or

(*d*) to a younger son,

except by a Will duly executed and attested;

(2) to a person who might, in the absence of other heirs, have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate, at the time when the bequest took effect, except by a Will duly executed and attested not less than three months before the death of the testator and presented for registration within one month from the date of its execution and registered;

(3) to any person other than a person mentioned in cls. (1) and (2), except by a Will duly executed and attested not less than three months before the death of the testator and registered according to the law for the time being in force relating to the registration of assurances, but presented for such registration within one month from the date of its execution."

As the learned Judges of the Judicial Commissioner's Court point out, that section is not retrospective and does not validate a bequest which had already failed. It would be anomalous, to say the least, to suppose that the Legislature intended by Act III of 1910 to revive rights that had disappeared in consequence of the failure of the bequest in 1869 when other rights had been created in the meantime.

Section 21 of Act III of 1910 shows clearly that nothing in that Act has the effect which is contended for by the plaintiff. Section 21 says:—

Unless there is something repugnant in the saving clause, subject or context

(*a*) section 2, sub-s. (1) of this Act, with the exception of—

(*i*) clause (*b*) of the definition of the word "estate";

(*ii*) the words "a or mother" in the definition of the word "heir";

and

(*b*) sections 3, 4, 7 and 8 of this Act, shall operate retrospectively; but nothing contained in the said sections shall affect suits pending at the commencement of this Act, or shall be deemed to vest in or confer upon any person any right or title to any estate, or any portion thereof, or any interest therein, which is, at the commencement of this Act, vested in any other person who would have been entitled to retain the same if this Act had not been passed; and the right or title of such other person shall not be affected by anything contained in the said sections."

In their Lordships' opinion the contention that on the passing of Act III of 1910 the Baragawn estate became once more subject to Act I of 1869 has no substance. With the failure of the bequest the property passed out of the Act and became subject to the Hindu Law.

But it is urged that the compromise between Narindra Bahadur and Chandra Kuar was invalid, inasmuch as the widow had no right to make an assertion that the estate was subject to Act I of 1869 when it was not so. The compromise between Narindra Bahadur and Chandra Kuar bears date the 25th November 1899. Paragraph 1 recites:

"That Chandra Kuar admits that the properties in dispute are *taluqdari* properties, and succession to them will be governed by Act I of 1869 and Kuar Narindra Bahadur is entitled to hold the same as lawful heir of Raja Wazir Chand."

By para. 2 Kuar Narindra Bahadur agreed *inter alia* to Rani Chandra Kunwar remain-

ing in possession of the properties in question.

By para. 3 he further agreed that he shall not by any deed or Will alienate the said immoveable property or his rights in it as long as the said Rani Sahiba remains alive, but if he does so that alienation shall be null and void.

It is contended that Chandra Kuar had no right to enter into the compromise. Their Lordships are of opinion that the learned Judges of the Appellate Court in India are right in regarding it as a family settlement which was "prudent and reasonable" under the circumstances, to use the language of Lord Phillimore in the case of *Ramsumran Prasad* v. *Shyam Kumari* (5).

Narindra Bahadur's suit had been decided in his favour by the Subordinate Judge. On the appeal the Judicial Commissioners had reversed his judgment and remanded the case for the consideration of the second part of the claim. The matter was still open to another appeal. Under those circumstances, in order to avoid a long litigation and the creation of further burden on the family property, Chandra Kuar entered into a compromise acknowledging Narindra Bahadur's right to the inheritance after her death, he on his side binding himself not to alienate the property during her lifetime. As stated already, the settlement arrived at between the parties appears to their Lordships to have been both prudent and reasonable in the circumstances of the case, and the plaintiff has no right to question it now.

Narindra Bahadur was, in their Lordships' opinion, the nearest agnate of Wazir Chand, and if the property was subject to the provisions of the Hindu Law, as their Lordships find, whether he was joint or separate from Wazir Chand, he was entitled to the property on the death of his widow. The compromise, in fact, gave effect to this rule of the Hindu Law. The acknowledgment of the widow that the property was subject to Act I of 1869 would not affect the rights of the parties on the basis of the law governing the succession.

The adoption of Nageshwar by Jagrani Kuar, although it took place in 1914, takes effect from the death of the father, to whom he is adopted, and, therefore, there was no intervening time during which it could be said that the property was not held by anyone. It may be noted here that both the Courts in India have negatived the plaintiff's allegation of the allegation contained in paras. 12 and 13 of his plaint.

In view of the peculiar course adopted by the Subordinate Judge in dealing with this case, and in order to prevent other Courts in India from falling into the same error, their Lordships think it desirable to point out that it is not open to the Courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them, whether on account of "judicial dignity" or otherwise, to question its decision on any particular issue of fact. Any application for review of judgment on grounds permissible by law only lies to the Judicial Committee.

With these remarks their Lordships desire to express their entire concurrence with the judgment of the Judicial Commissioner's Court. They will accordingly humbly advise His Majesty that the plaintiff's appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—The Solicitor, India Office.

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

(5) 69 Ind. Cas. 71; 44 I. A. 342; 31 M. L. T. 200; 3 P. L. T. 749; (1922) A. I. R. (P. C.) 356; 1 Pat. 741; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. 175; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751; 25 Bom. L. R. 634 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 831 OF 1924.

August 12, 1925.

Present:—Mr. Justice Phillips.

Rao Bahadur M. N. GOVINDA RAO AVERGAL TRUSTEE PIRANMALAI ETC. DEVASTHANAM—PLAINTIFF—APPELLANT

versus

CHINNATHAMBI PILLAI—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 134, 144—Permanent lease of temple property—Suit by succeeding trustee—Article applicable—Starting point of limitation—Madras Estates Land Act (I of 1908), s. 26—"Bringing into cultivation", meaning of—Land lying fallow, whether "waste land".

The expression "bringing into cultivation" in s. 26, Madras Estates Land Act, means cultivating land

which had not previously been cultivated or at any rate had not been cultivated for a long period. The mere fact that land has been fallow for some years cannot constitute it as "waste land" within the meaning of that section. [p. 378, col. 2.]

A manager or trustee of a Hindu temple is not "a trustee to whom property has been conveyed in trust" within the meaning of Art. 134 of Sch. I to the Limitation Act. [p. 378, col. 2; p. 379, col. 1.]

A suit by a trustee of a Hindu temple to set aside a permanent lease of trust property by a preceding trustee is governed by Art. 144 of Sch. I to the Limitation Act and the period of limitation runs not from the date of the permanent lease but from the date of the accession of the plaintiff trustee to his office. [p. 379, col. 1.]

Mahomed v. *Ganapati*, 13 M. 277; 4 Ind. Dec. (N. S.) 905, *Sathianama Bharati* v. *Saravanabagi Ammal*, 18 M. 266; 4 M. L. J. 223; 6 Ind. Dec. (N.S.) 535 and *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar*, 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537; 21 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.), relied on.

Second appeal against a decree of the District Judge, Ramnad at Madura, dated the 27th August 1923, in A. S. No. 853 of 1921, preferred against that of the Court of the Special Deputy Collector, Manamadura, dated the 26th July 1921, in Summary Suit No. 185 of 1918.

Mr. *T. L. Venkatarama Aiyar*, for the Appellant.

Mr. *Rajah Aiyar*, for the Respondent.

JUDGMENT.—The plaintiff in this case is the manager of the Piranmalai Devasthanam and he sues to recover rent in respect of certain lands belonging to the Devasthanam which were granted on a permanent lease at a favourable rent by one of his predecessors. The lower Appellate Court has held that the suit is barred by limitation because the starting point of limitation under Art. 134 is the date of the transfer which in the present case was more than 12 years before suit. He has come to this conclusion on the ground that the lease was void *ab initio* as the trustee of the Devasthanam had no right to grant a permanent lease of the trust properties and that, therefore, the period started from the date of the lease. The appeal was also opposed by the respondent on the ground that the lease was justifiable under s. 26 of the Estates Land Act, that is to say, because it was a lease granted for the purpose of bringing waste land into cultivation. Although the lease recites that this land was overgrown, that the irrigation source was out of repair and that the land was uneven, it does not appear that the land was waste land within the meaning of s. 26. I agree with the District Judge that "bringing into cultivation" means cultivating land which had not previously been cultivated or at any rate had not been cultivated for a long period. The mere fact that land has been fallow for one, two or even for four years cannot constitute it as waste land within the meaning of that section. Otherwise land lying fallow for even one year would come within the definition.

The main question is whether the suit is barred by limitation. The lower Appellate Court has held that the permanent lease being invalid must be deemed to have been invalid from the date of the alienation and that, therefore, the limitation period must be calculated from that date, the possession of the lessee being adverse from that date. In this conclusion I think the District Judge is clearly wrong. The point was decided in *Mahomed* v. *Ganapati* (1), in a case precisely analogous to the present and it was there held that the period of limitation ran not from the date of the permanent lease but from the date of the accession of the plaintiff trustee to his office. This was followed in *Sathianama Bharati* v. *Saravanabagi Ammal* (2). In *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (3) the same point was decided with reference to a Mutt and Madadhipathi or Pandarasannadhi of that Mutt. Although in that case the religious institution in question was a Mutt a perusal of the judgment shows clearly that their Lordships draw no distinction between a Mutt as such and other Hindu religious institutions. The two cases, I have cited above, are referred to in their Lordships' judgment and referred to with approval. The basis of the decision is that ordinarily trust property belonging to Hindu Religious institutions is not vested in the so-called trustee who is not in the position of an express trustee as understood in English Law. As the property does not vest in him, Art. 134 of the Limitation Act is not applicable because the property has not been conveyed or bequeathed in trust and after-

(1) 13 M. 277; 4 Ind. Dec. (N. S.) 905.

(2) 18 M. 266; 4 M. L. J. 223; 6 Ind. Dec. (N. S.) 535.

(3) 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537; 21 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

wards transferred by the trustee, as the manager of the institution is not a trustee within the meaning of the Article. That is the view taken by their Lordships, is, I think, clear from the passage in the judgment at page 847*: "From the above review of the general law relating to Hindu and Muhammadan pious institutions, it would *prima facie* follow that an alienation by a manager or superior, by whatever name called, cannot be treated as the act of a 'trustee' to whom property has been 'conveyed in trust' and who by virtue thereof has the capacity vested in him which is possessed by a 'trustee' in the English Law."

For the respondent it is urged that *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (3) does not apply to the present case but he is not able to point out any principle on which a distinction can be drawn. Reliance is placed on another case of the Privy Council in *Subbaiya Pandaram* v. *Muhammad Mustapha Marcayar* (4), but that was a case of a specific trust, and consequently it was held that Art. 134 was applicable. I am clearly of opinion that Art. 134 is not applicable to the present suit.

It is then argued that under Art. 144, the suit would be barred, the contention being that from the date of the alienation there was possession adverse to the idol and consequently that after 12 years of such adverse possession the suit is barred. This is the view expressed in an *obiter dictum* in *Ramrup Gir* v. *Lal Chand Marwari* (5) and the proposition is sought to be supported by *Damodar Das* v. *Lakhan Das* (6). The former case seems to be directly opposed to the Madras decisions and, therefore, I need not further consider it. As regards the case in *Damodar Das* v. *Lakhan Das* (6) the facts show that the dispute was between two *chelas* or trustees and in so far as the idol was concerned it was not held that the idol had lost any rights in the property. The question decided was that one particular *chela* had by adverse possession acquired a right of management as against the representative of another *chela*. That is not the point here. The point has been dealt with in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (7). In that case property belonging to an idol had been alienated and the alienation occurred during the minority of the trustee. The contention raised there was that this minority of the plaintiff was of no avail, inasmuch as time had begun to run as against the idol. This contention was negatived by their Lordships on the ground that the idol had no power to bring a suit except through the trustee. Consequently there could be no question of a suit being barred inasmuch as it could not have been brought at an earlier date. There is, therefore, no reason why, even if Art. 144 is applied, the decision in *Mahomed* v. *Ganapati* (1) should not apply. Following that decision I must reverse the decree of the District Judge and restore the decree of the Deputy Collector with costs, throughout.

V. N. V. *Appeal allowed.*

(4) 74 Ind. Cas. 492; 46 M. 751; 21 A. L. J. 730; (1923) A. I. R. (P. C.) 175; 45 M. L. J. 588; 25 Bom. L. R. 1275; 18 L. W. 903; (1924) M. W. N. 65; 28 C. W. N. 493; 2 Pat. L. R. 104; 33 M. L. T. 285; 40 C. L. J. 20; 50 I. A. 295 (P. C.).

(5) 67 Ind. Cas. 401; 1 Pat. 475; 3 P. L. T. 352; (1922) A. I. R. (Pat.) 213.

(6) 7 Ind. Cas. 240; 37 C. 885; 14 C. W. N. 889; 12 C. L. J. 110; (1910) M. W. N. 303; 7 A. L. J. 791; 8 M. L. T. 145; 20 M. L. J. 621; 12 Bom. L. R. 632; 37 I. A. 147 (P. C.).

(7) 32 C. 129; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 31 I. A. 203; 8 Sar. P. C. J. 698 (P. C.).

*Page of 44 M.—[*Ed.*]

LAHORE HIGH COURT.

CIVIL REVISION No. 492 OF 1923.

January 18, 1924.

Present :—Mr. Justice Moti Sagar.

THE FIRM GURDITTA SHAH-HARI CHAND THROUGH MOOL RAJ AND JAGAN NATH—PLAINTIFFS—PETITIONERS

versus

RAM LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Error of law.

A mere error of law is not necessarily an illegality and is not an exercise by a Court of a jurisdiction not vested in it by law so as to entitle the person aggrieved to apply for revision.

Petition for revision of a decree of the Senior Subordinate Judge, Jhelum, dated the 8th March 1923.

Dr. *Nand Lal*, for the Petitioners.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—The sole question for determination in this case is whether the transaction in dispute was of a wagering nature. The learned Senior Subordinate

Judge has held on the authority of *Doshi Talakshi* v. *Shah Ujamsi Velsi* (1), that the transaction was of a wagering nature, and that it could not, therefore, form the basis of a suit. The plaintiff has come up for a revision to this Court and it has been urged on his behalf that the authority relied on was not applicable and that the judgment of the learned Senior Subordinate Judge was erroneous.

A preliminary objection is taken on behalf of the respondent that the order passed by the learned Judge of the Court below is not illegal, and that a revision on a mere error of law is not competent. A large number of authorities have been cited which fully support the respondent's contention, and it is now well-settled that a mere error of law is not necessarily an illegality and is not an exercise by a Court of a jurisdiction not vested in it by law so as to entitle the person aggrieved to apply for revision. The preliminary objection prevails and I dismiss the petition. I make no order as to costs.

Z. K. *Revision rejected.*

(1) 21 B. 227; 1 Bom. L. R. 786; 12 Ind. Dec. (N. S.) 688.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2249 OF 1922.

June 23, 1925.

Present:—Mr. Justice Pearson and Mr. Justice Chakravarti.

Sreemati Chowdhury MAHESWARI DEI —PLAINTIFF—APPELLANT

versus

GAURHARI MAITY—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Landlord and tenant—Ex parte *decree for rent, whether operates as* res judicata *as to rate of rent.*

An *ex parte* decree is as much binding upon a defendant as any other decree is. The mere absence of a party does not affect the binding force of such a decree. [p. 383, col. 1.]

The decision in a previous rent suit whether *ex parte* or *inter parties*, operates as *res judicata* in a subsequent suit for rent even for a different period, if it decides any question which arises in the suit or if it omits to decide any question which should have been decided, if objection were taken by a party. [p. 383, col. 2.]

It is, however, always open to the defendant in a subsequent suit for rent to show that there has been subsequent variation in the rate of rent from that on the basis of which a previous suit was decreed. [p. 384, col. 2.]

(Case-law discussed.)

Appeal against a decree of the Additional District Judge, Second Court, Midnapur, dated the 12th June 1922, modifying that of the Munsif, Danton, District Midnapur, dated the 24th August 1921.

Babu *Bepin Chandra Basu*, for the Appellant.

Mr. *Bepin Chandra Mallik* and Babu *Kusha Prasun Chatterjee*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff and arises out of a suit brought for recovery of arrears of rent. The main question which arises for decision is what is the effect of certain *ex parte* rent-decrees obtained by the plaintiff against a tenant who held the land before the defendant purchased the tenancy in execution of a decree for rent obtained by the plaintiff, the landlord against the previous tenant. The facts as stated by the plaintiff appear to be these. One Annapurna held the lands in suit as a *raiyat* with right of occupancy under the plaintiff at a rent of Rs. 10-6 annas per year for 8 *bighas* and odd of land. That Annapurna sold the holding to one Bhagirath in the year 1906, but Annapurna continued to be the recorded tenant at the time when a suit for arrears of rent was brought and decreed *ex parte* against her in 1908. This decree, it appears, was for rent for a number of years and the rate of rent claimed was Rs. 10-6 annas a year. This decree was satisfied. On the 30th August 1911 the plaintiff obtained another decree for rent for a number of years against Annapurna at the same rate of rent and put the holding to sale advertising the same as bearing a rental of Rs. 10-6 annas a year. The holding was sold on the 15th December 1911 and the present defendant purchased the same and obtained the usual sale-certificate. In the sale-certificate the rent of the holding was stated to be Rs. 10 6 annas a year. The plaintiff then brought the present suit for rent for the years 1322 to 1325, claiming rent at the rate of Rs. 10-6 annas per annum for the same area.

The defence of the defendant was that the rent payable for the holding was Rs. 5-1 anna a year and not Rs. 10-6 annas as claimed by the plaintiff.

The plaintiff amongst other evidence relied upon the *ex parte* decree passed in the year 1908 and also the decree passed in the year 1911 in execution of which the defendant purchased the holding. The de-

fendant, on the other hand, relied upon an entry in the Record of Rights published in the year 1917, in which the rent was recorded at the rate of Rs. 5-1 anna. Defendant further contended that the *ex parte* decrees relied upon by the plaintiff were not admissible in evidence, at any rate they were not binding against him as *res judicata*.

The Court of first instance decreed the suit of the plaintiff and held that the rent payable was Rs. 10-6 annas a year. There was an appeal against that decree by the defendant and the Court below remanded the case for a fresh trial specially on the ground that the statement in the sale-certificate did not operate as an estoppel against the defendant. The learned Munsif after this remand came to the same conclusion as he had arrived at before and gave a decree to the plaintiff at the rate claimed. Against this decree the defendant again appealed and the lower Appellate Court has reversed the decree made by the Munsif and given a decree at the rate of Rs. 5-1 anna as alleged by the defendant. The lower Appellate Court pointed out that the entry in the sale-certificate, as has already been held, was not conclusive against the defendant. The learned Subordinate Judge further held that the *ex parte* decrees did not operate as *res judicata*, nor did they furnish any evidence as to the rate of rent payable by the defendant. Against this decree the plaintiff preferred this second appeal and the main question which I have already stated is as to the effect of the *ex parte* rent-decrees in the present case. It appears that there is a good deal of divergence of opinion in this Court as to the effect of *ex parte* rent-decrees in a subsequent trial for the recovery of rent against the defendant or his successor-in-interest. It would serve no useful purpose to discuss the numerous cases in which the question arose and divergent views were entertained by the Court. The first case that I wish to refer to is the Full Bench case of *Maharajah Beer Chunder Manick Bahadoor* v. *Ram Kishen Shaw* (1), in which Sir Richard Couch in delivering the judgment of the Full Bench in a short judgment which he delivered, stated the law as follows: "We are of opinion that the decree is admissible in evidence. The question of its value, when admitted, is to be determined by the lower Courts. The defendant has alleged that it was obtained fraudulently. It does not appear that he gave any evidence of this, and it will be for the Court to say whether there is any evidence in support of that allegation". It should be pointed out that in that case the plaintiff claimed rent for the year 1279 and relied upon an *ex parte* decree obtained for the rent of 1278 and the question arose as to whether that decree was admissible in evidence in proof of the rate of rent payable by the defendant. This *ex parte* decree, it further appears, was not executed. This judgment of the Full Bench clearly laid down that an *ex parte* decree was admissible in proof of the rate of rent payable by the defendant and that the value of the decree would depend upon the circumstances of the particular case. The binding effect of the decree would depend upon as to what it really decided. This Full Bench decision was relied upon by Sir Richard Garth in the case of *Bir Chunder Manickya* v. *Hurish Chunder Dass* (2), the same case which was remanded by this Court by their judgment in the Full Bench case to which I have already referred. The case came on before Mr. Justice Ainslie who was also a party to the Full Bench case and he held that the *ex parte* decree was of no value, because the question as to the rate of rent was decided without entering into any discussion thereof. There was an appeal under cl. 15 of the Letters Patent, and Sir Richard Garth in delivering the judgment of the Appellate Court quoted the words of Sir Richard Couch to which I have already referred, and Sir Richard Garth stated the effect of the judgment of the Full Bench to be this: "That an *ex parte* decree is *prima facie* for purposes of evidence as good as any other decree, and as binding between the parties upon the matter decided by it. But, that if the defendant could show, as he said he was prepared to do, that the former decree was obtained by fraud, or that it was irregular, or contrary to natural justice, or the like". The learned Chief Justice later on in the judgment stated the law in these words: "The Judge pronounced the decree to be of no value as evidence, merely because it had not been contested by the defendant. In this we consider he was quite wrong: a decree obtained *ex parte* is in the absence of fraud or irregularity, as binding, for all purposes, as a decree of a contested suit. If it were

(1) 23 W. R. 128; 14 B. L. R. 370.

(2) 3 C. 383; 1 C. L. R. 385; 2 Ind. Jur. 913; 1 Ind. Dec. (N. S.) 830.

not so, a defendant in a rent suit might, always by not appearing, and allowing the judgment to pass against him without resistance, prevent the plaintiff from ever obtaining a definite judgment as to what is the proper amount of rent due from him to his landlord.

"If a defendant does not think it worthwhile to contest the suit but allows the plaintiff's evidence, and the judgment passed upon it, to go unquestioned, he has no right afterwards to dispute the correctness or the value of the judgment, merely because he chose to absent himself from the trial.

"Of course if any fresh circumstances had arisen since the former decree was made, which would justify on the one hand an abatement, or on the other hand an enhancement, of the rent decreed in a former suit, the Court would be bound to take such circumstances into consideration."

Sir Richard Garth finally decided this case on the ground of *res juaicata* and on the principle of the case of *Nobo Doorga Dossee* v. *Foyzbux Choudhry* (3) and that case lays down that "Even assuming that the judgment in the former suit were not binding between the parties as an actual estoppel, it would afford such cogent evidence between them upon the point, that the Judge in this suit (in the absence of some entirely fresh materials) would be perfectly right in acting upon it".

The Full Bench case as explaind by Sir Richard Garth laid down that the decree was admissible in evidence and would be binding only as to the question which it really decided in passing the decree. The determination of the question as to what was decided must depend upon the circumstances of each case and the value of the decree as evidence would depend upon that question. It would appear that the matter had been settled by the decision of the Full Bench and the subsequent judgment of Sir Richard Garth's explaining what the Full Bench had really decided. But unfortunately it was not so. The controversy again broke out and the question was referred to the Full Court in the case of *Modhusudun Shaha Mundul* v. *Brae* (4) in which the Referring Court divided the questions which were referred under four different heads. Firstly, whether an *ex parte* decree for arrears of rent operates so as to render the question of the rate of rent *res judicata* between the parties; secondly, whether it so operates, if the rate of rent alleged by the plaintiff is recited in the decree without any express declaration that the rate of rent so alleged has been proved; thirdly, whether it so operates, if the rate of rent alleged is expressly declared by the decree to have been proved; and, fourthly, whether an *ex parte* decree operates so as to render any question decided by the decree *res judicata* in the absence of proof that such decree was executed. Before I discuss the effect of the judgment of the Full Court, I should like to point out at the outset that the previous decrees relied on by the plaintiff as *res judicata* in that case were *ex parte* decrees made by the Deputy Collectors and not by the Civil Courts. Those decrees were for very small sums not amounting even to one year's rent. The conflict of decisions to which reference was made was of decisions and decrees of Civil Courts. The Full Court after pointing out that Sir Richard Garth in his final judgment of the case referred to the Full Bench, had held that the decree was *res judicata* between the parties. It should be remembered that Sir Richard Garth was well aware that the Full Bench had only decided that the decree was admissible in evidence and its value would depend upon the circumstances of each case and his observations must be read as deciding the question as to the value to be attached to the *ex parte* decree relied upon in that case and not as a general proposition. The learned Chief Justice pointed out in that case that the defendant had failed to show that the decree was obtained by fraud, and further pointed out that the defendant brought forward only materials consisting of the evidence which the defendant might and could have brought forward if he had so pleased in the former suit and for which he offered no excuse for not producing on that occasion. As I have already stated four questions were referred to the Full Court, and in the order of reference it was pointed out that the third question did not, strictly speaking, arise in that case. Therefore, with all deference due to the learned Judges I should not be guilty of any disrespect, if I point out that any decision on that point would not be strictly a decision which would be binding as overruling the decision of the Full Bench, although as an expression of opinion by the Full Court, it is entitled to the respect which is due to

(3) 1 C. 202; 24 W. R. 403; 1 Ind. Dec. (N. S.) 129.
(4) 16 C. 300; 8 Ind. Dec. (N. S.) 197.

such pronouncement. The first question, it will appear, was limited to the question as to whether the decree, with regard to rate of rent, was *res judicata* between the parties. The second question was, what was the effect of a recital in the decree as to the rate of rent in the absence of any decision on that point. In answering these questions the Full Court based their decision upon the ground that it is possible for the defendant in certain cases to show that the decree for the rent might have been supported on the ground that the decree for the rent claimed could have been made without determining the rate of rent payable, and this appears clearly from the following passage: "We think this argument well-founded. We think that, if at the hearing of such a suit, the plaintiff were to prove that the amount claimed by him as rent was actually due, although he did not establish the rate named by him in his plaint, he might nevertheless be entitled to a decree. That such a case might possibly arise is obvious. If it might, it follows that the statement of the rate of rent in the plaint is not necessarily an allegation so material that the determination of it in the affirmative is involved in the act of the Court in making a decree." So far as the decrees which the Full Court had to consider, they were decrees, as I have stated, passed by a Deputy Collector, who had no jurisdiction to make any declaration as to the future rent payable and the decrees were not even for a year's rent. All that their Lordships pointed out was that neither a recital in the decree of the rate alleged by the plaintiff unless that question was decided, nor a declaration as to the rate of rent if no such declarations were prayed for in the plaint would operate so as to make the matter *res judicata* in the absence of a decision on the point. It appears, therefore, clear that all that the Full Court decided was that the decrees in these cases did not operate as *res judicata* as to any question which was not shewn to have been decided. The Full Bench laid down the same law. The broad proposition laid down by Sir Richard Garth was that an *ex parte* decree is as much binding upon the party as any other decree is; the mere absence of a party does not affect the binding force of such a decree. This is a proposition of law which was not dissented from by the Full Court and has been followed in subsequent cases after the decision of the Full Court. Sir Lawrence Jenkins in the case of *Mahommad Gowhar Ali* v. *Samir-ud-din Sheikh* (5) by quoting the decision of the Judicial Committee in the case reported as *Jugodumba Dossee* v. *Tarakant Bannerjee* (6) held that it is impossible to allow the appellant to take advantage of defendant's absence on that occasion to re-open any question which either was expressly decided or must be determined in a decree. The learned Chief Justice pointed out that these observations apply equally to a suit as to an appeal. In the very recent case of *Shib Chandra* v. *Lakhi Priya Guha* (7), after considering numerous cases on the point Mr. Justice Suhrawardy and Mr. Justice Duval laid down as follows:—"It, therefore, follows that the decision in a previous suit for rent, whether *ex parte* or *inter partes* operates as *res judicata* in a subsequent suit for rent, even for a different period, if it decides any question which arises in the suit or if it omits to decide any question which ought to have been decided, if objections were taken by a party". Although the question for determination in this suit arose in a different form, the principle applies equally to a suit for rent as is indicated in a passage I have quoted above. The result of these decisions seems to me that the decree even though it is *ex parte* is as good and as binding between the parties as a contested decree. It has been held repeatedly that an *ex parte* decree for rent is conclusive upon the question as to the existence of the relationship of landlord tenants between the parties at the time of the decree. See the case of *Hiranmoy Kumar Saha* v. *Ramjan Ali Dewan* (8). This view is based on the same principle as was laid down in the Full Bench case above referred to.

There is no reason why the same principles should not apply to the decision in an *ex parte* decree as to what was the rate of rent at which the decree was made. In a contested decree, express issues are raised on the pleadings of the parties or otherwise, but in an *ex parte* decree the Court must necessarily be taken to have decided questions which were necessary for supporting the decree made in the case and to that extent the decree must be taken to have decided such questions.

(5) 22 Ind. Cas. 383; 18 C. W. N. 33.
(6) 6 C. L. R. 121; Bald. 212 (P. C.).
(7) 85 Ind. Cas. 123; 29 C. W. N. 253; 40 C. L. J. 597; (1925) A. I. R. (C.) 427.
(8) 29 Ind. Cas. 694; 20 C. W. N. 48; 43 C. 170.

When a previous *ex parte* decree for rent of a previous year, or years, is put in evidence, authorities show that it is admissible in evidence. The questions, therefore, in each case must arise as to what effect should be given to such a decree, and that question must be determined by the circumstances of each case. The Full Court pointed out that there may be a case in which a decree for rent may be explained to have been passed without determining what the rent payable for each year was. The *ex parte* decrees filed in the present case are, therefore, admissible in evidence.

Let us now examine the circumstances of this case and determine what really was decided in making these decrees. The plaintiff claimed rents for several years and the aggregate was arrived at by adding rent at the rate of Rs. 10-6 annas a year. The decree, therefore, in that case could not have been made unless the Court found that the rent payable for these years was at the rate of Rs. 10-6 annas a year and the calculation was made on that basis. The defendant in the present suit says that the rent was payable at the rate of Rs. 5-1 anna even in those years, as that was the rent payable by him in the year 1888, as appears from the Road Cess Return relied upon by the defendant. If the defendant did appear in those rent suits, he might have avoided the decree passed *ex parte* against him only by proving that the rent was not Rs. 10-6 annas each year as was claimed, but Rs. 5-1-anna per year as alleged by the defendant. This issue was not expressly raised, because the defendant did not appear. If he did appear, it would have been his duty, if he wanted to avoid the decree, to raise that issue and prove it; and he now seeks to prove it by evidence which would have been available to him then. According to the rules, which I have quoted, as laid down in the Full Bench case of *Bir Chandra Manikya* v. *Haris Chandra Das* (2) and subsequently laid down in the judgment of Sir Lawrence Jenkins, the defendant cannot improve his position by merely absenting himself at the time of the trial of the previous suit. In the present case the defendant did not establish that the decrees were obtained by fraud, nor did the defendant establish that the decrees were or could have been obtained, as was pointed out by the Full Court, without the determination of the question as to what the rent payable each year was. As I have already pointed out, the effect or the value of each *ex parte* decree must be determined with reference to the circumstances of each case. The present case, I have already indicated, is within the rule laid down by the Full Bench and also recently laid down by Mr. Justice Suhrawardy and Mr. Justice Duval. The limitations pointed out in the judgment of the Full Court do not apply to the present case. The defendant in the present case is trying to do now what he might and ought to have done when the previous *ex parte* decrees were passed. These decrees could not have been passed for the amounts decreed, if the defendant had appeared and proved, as he now intends to do, that the rent payable each year was at the reduced rate. I might point out that the lower Appellate Court has held that the *ex parte* decree of 1908 does mention the rate of rent. I may also point out that the decree for rent for a particularly specified period cannot and does not contain a declaration by implication what the future rent would be. It is always open to the defendant, as was pointed out by Sir Richard Garth, in the Full Bench decision, to show that there has been subsequent variation of the rent. In the absence of evidence of such variation, the Court of facts is entitled to find that the amount of rent payable per year was the same at which the *ex parte* decree was passed. In the present case, all that the defendant stated was that the rent was all along payable at the rate of Rs. 5-1 anna and not at the rate of Rs. 10-6 annas. No variation of rent subsequent to the *ex parte* decree was set up, nor, as I have already stated, any attempt was made to show that the decrees were obtained by fraud; the entry in the Record of Rights is thus shewn to be wrong. The result would be that in the absence of such evidence, the defendant will be bound to pay rent at the rate of Rs. 10-6 annas. It would be unnecessary, therefore, to send the case back for a determination of the question as to the rate of rent payable by the defendant. We follow the course adopted in the case of *Bir Chandra Manikya* v. *Haris Chandra Das* (2).

The decree of the lower Appellate Court is set aside and that of the first Court is restored with costs in all Courts.

M. B.
Z. K. *Appeal decreed.*

MADRAS HIGH COURT.

CRIMINAL APPEAL No 326 OF 1924.

November 27, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

THE PUBLIC PROSECUTOR, MADRAS —APPELLANT

versus

KIMIDI ANNAM NAIDU AND OTHERS —ACCUSED—RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 21, 353—P. W. D. lascar, whether public servant—Assault on public servant.

The definition of a public servant in s. 21 of the Penal Code includes every officer in the service or pay of Government. [p. 385, col. 2.]

A P. W. D. lascar who is carried on the regular establishment of the Department and whose general duty is to carry out the orders of his superior officer, the local overseer, and who in the course of his duties is carrying out a function of Government, namely, the distribution of water from public channels, is a public servant within s. 21 of the Penal Code. [*ibid.*]

Reg. v. *Ramajirav Jivbajirav*, 12 B. H. C. R. 1, *Queen* v. *Nachimuttu*, 7 M. 18; 1 Weir 27; 2 Ind. Dec. (N. S.) 598 and *Nazamuddin* v *Queen-Empress*, 28 C. 344; 4 C. W. N. 798, considered.

Appeal under s. 417 of the Cr. P. C., 1898, against the acquittal of the aforesaid accused by the Stationary Sub-Magistrate, Palakonda, in C. C. No. 348 of 1923 on his file.

Mr. *J. C. Adam*, Public Prosecutor, for the Crown.

Mr. *B. Jagannadha Doss*, for the Accused.

JUDGMENT.—This is an appeal by Government against the acquittal of five accused persons who were charged with offences under ss. 186 and 353 of the Indian Penal Code. The appeal as regards the former charge is not pressed, and we are concerned only with the offence under s. 353, Indian Penal Code.

The prosecution case was that P. W. No. 6, a P. W. D. lascar went to enforce an agreement regarding the distribution of water for irrigation between the two villages Gattamangalapuram and Chinnamangalapuram, which both take water from the Venkamma channel; that, on a complaint from Gattamangalapuram people that Chinnamangalapuram people had deprived them of their agreed turn, he went to open the sluices for Gattamangalapuram, but when he went and got into the channel to open the doors, apparently the sluices were plank sluices, the accused set upon him and pushed him down into the channel and threatened to beat him and take away his life. The accused were tried by the Stationary Sub-Magistrate of Palakonda and acquitted. The grounds of acquittal are *first* that a P. W. D. lascar is not a public servant within the meaning of s. 353, Indian Penal Code; *secondly* that, even if he is, this lascar was not discharging the duties of his office at the time of the assault; and *thirdly*, that the Gattamangalapuram people were not entitled to water that morning. The Public Prosecutor challenges each of these three points.

As to the first point we think the lower Court is clearly wrong. The definition of a public servant in s. 21 of the Indian Penal Code, in which sense, of course, the words are used in s. 353, includes every officer in the service or pay of Government. A P. W. D. lascar, it is clear from G. O. No. 840-W, dated the 28th March 1893, is a person carried on the regular establishment of the P. W. D. His duties are various, he taking his orders generally from the local overseer. The accused contend that, even so, he is not an officer, and referred us to a case in *Reg.* v. *Ramajirav Jivbajirav* (1) which restricts the meaning of the word "officer" to a person employed to exercise to some extent a delegated function of Government. But even that ruling extends the definition to one whose duties are immediately auxiliary to those of some one armed with authority from Government. The case reported in *Queen* v. *Nachimuttu* (2) does not help the accused, as that was a case of a carter temporarily employed by the P. W. D. In *Nazamuddin* v. *Queen-Empress* (3), a Bench held that the *dictum* in *Reg.* v. *Ramajirav Jivbajirav* (1), is too narrow and that a salt peon, whose duties were not defined but whose general duty was to carry out the orders of his superior officer, was a public servant If then the lascar in the course of his duties was carrying out a function of Government, namely, the distribution of water from public irrigation channels—and we think he clearly was—undoubtedly he is Government for the purposes of that particular function and is, therefore, a "public servant".

The next question is whether he was acting within the scope of his duties. It is argued for the accused and apparently accepted by the lower Court, that because

(1) 12 B. H. C. R. 1.
(2) 7 M. 18; 1 Weir 27; 2 Ind. Dec. (N. S.) 598.
(3) 28 C. 344; 4 C. W. N. 798.

there was an agreement between the villagers as to the periods within which each should take water, therefore, it was no business of the lascar to see that this agreement was carried out; that is, the accused pleaded that in effect, Government had handed over their duties in this matter to the villagers themselves. The lower Court seems to base this view on Exs. A and F. Exhibit A is simply a note by the Sub Divisional Officer laying down the terms of the agreement and bearing the signatures of representative villagers. There is nothing in it or in the evidence to indicate that the charge of the distributing mechanism, the plank sluices, was taken away from the P. W. D. authorities and handed over to any villager. Exhibit F is merely a note to the Village Munsifs that the new arrangement is to come into force from a particular Sunday. It is notable that, in Ex. F, there is no direction to the Village Munsifs themselves to carry out the arrangement. The accused did not, and cannot, before us, suggest who was put in charge of this distribution, if the P. W. D. Subordinates were superseded. It is perfectly clear then that the duty of distribution was not given to any one else by the P. W. D. and this is also borne out by the evidence. Prosecution Witness No. 1, the overseer, says that P. W. No. 6's duty was to regulate the distribution of the Venkamma Channel water, which at the time of the offence was to be distributed between the two villages according to the agreement in Ex. A. Not a single question was put to him in cross-examination to suggest that the distribution business had been taken away by him from his subordinate and handed over to any non-official. We are satisfied that the lower Court is quite wrong in concluding that P. W. No. 6, in regulating the distribution of water at the time of the offence, was not acting within the scope of his duties.

The third point, it appears to us, has been found by the lower Court in favour of the accused on an entire misapprehension of facts. Under the arrangement in Ex. A the week was divided as follows: $2\frac{1}{2}$ days for Chinnamangalapuram, $1\frac{1}{2}$ days for a hamlet of Chinnamangalapuram, and three days to Gattamangalapuram, and the turn was to commence on Sunday the 13th May. The lower Court assumes that Chinnamangalapurm was to begin the week and on this assumption calculates that it, was the turn of Chinnamagalapuram on the day of the offence, 17th June 1923, and, therefore, the lascar had no right to give water to Gattamangalapuram on that day. But the Sub Magistrate has entirely overlooked the evidence that Chinnamangalapuram had previously deprived Gattamangalpuram of two of its three days' water in the week and that that was the very reason why the lascar had to go and alter the distribution. It is preposterous for Chinnamangalapuram to contend that, although they had stolen two of Gattamangalapuram's days, they were yet entitled to keep their own days as well, on the principle of "heads I win and tails you lose." The lascar's obvious duty was to see that Gattamangalapuram got their three days' water in the week, whatever week-days those three days might be when the wrongful action of the other party had disarranged the weekly order. The soundness of the Sub-Magistrate's finding that, because Gattamangalapuram got water given them by the Overseer on his visit on 12th June 1923, therefore, their turn expired on 15th June, 1923, depends entirely on whether Gattamangalapuram got water on the 13th and 14th after the Overseer left, a point with which he nowhere deals and on which the evidence is all to the contrary.

The prosecution witnesses, villagers, are probably going too far, when they claim that the days for Gattamangalapuram were Sunday, Monday and Tuesday; but the real question is whether they were not entitled to water on that particular Sunday; and all are agreed that, for three or four days prior to that day, Chinnamangalapuram had deprived them of water, and that they had none. The defence answer to the charge, namely, that there was no agreement at all, really makes their case so much the worse, because then there can be no doubt that the P. W. D. were in charge. Their plea that Gattamangalapuram is not entitled to any water unless there is enough to carry water over the dam No. (1) is no answer at all in the face of the agreement, Ex. A, and it merely indicates that Chinnamangalapuram people were suffering from a guilty conscience in the matter.

We are, therefore, satisfied that it was the lascar's duty to distribute water to Gattamangalapuram on that Sunday and that he was doing so when the accused interfered.

The prosecution witnesses are agreed

that accused Nos. 1 and 2 pushed the lascar down and that accused Nos. 3, 4 and 5 threatened him with sticks. There is no reason to disbelieve these witnesses, especially the independent evidence of the lascar, who has no motive for complaining falsely against the accused. Accused Nos. 1 and 2 have attempted to prove *an alibi* but the evidence is much too vague for proof. We are satisfied that all these accused did use criminal force to the lascar, who is a public servant while he was acting in the discharge of his duties. They have, therefore, committed an offence under s. 353 of the Indian Penal Code. We, therefore, reverse the acquittal of these accused and convict them of an offence under s. 353 of the Indian Penal Code.

As regards the sentence, in view of the long delay in presenting the prosecution case, and the time which has now elapsed since the offence, a heavy sentence is not called for, particularly as this case had been brought up chiefly as a test case in order to obtain a ruling as to the legal position of P. W. D. lascars. We think it is sufficient to impose a fine of Rs. 20 on each of the accused; and do so accordingly, and we direct further that, in default of payment they will undergo simple imprisonment for two weeks.

Two weeks' time after receipt by the lower Court of this judgment will be granted to respondents within which to pay the fine in the lower Court.

V. N. V.
Z. K. *Accused convicted and fined.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 128 OF 1925.
September 16, 1925.
Present:—Mr. Dalal, J. C.
FATEH BAHADUR AND ANOTHER—APPELLANTS
versus
ABDUL RAHEEM AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 476, 476B—Penal Code (Act XLV of 1860), ss. 467, 471—Complaint by Munsif exercising powers of Small Cause Court—Appeal, forum of.

Where a Munsif invested with Small Cause powers makes a complaint under s. 476 of the Cr. P. C. for the prosecution of persons in respect of offences under ss. 467 and 471 of the Penal Code, an appeal from such an order lies under s. 476B of the Cr. P. C. to the Court of the District Judge and not to the Court of the Subordinate Judge.

Application for revision against an order of the First Subordinate Judge, Bahraich, dated the 4th May 1925.

Mr. *Naim Ullah*, for the Appellants.

Mr. *Asghar Hasan*, for the Opposite Party.

JUDGMENT.—This is an application in revision by the scribe Fateh Bahadur and the witness Abu Mohammad to a document which is alleged to be forged. The Judge of Small Causes at Bahraich has made a complaint to the District Magistrate of Bahraich for the prosecution of the applicants under ss. 471 and 467 of the Indian Penal Code. An appeal is allowed from such a complaint under s. 476-B of the Cr. P. C. The Appellate Court is described in cl. (3) of s. 195, Cr. P. C.

The applicants here put in an appeal in the Court of the Sessions and Subordinate Judge of Bahraich. He refused jurisdiction as he had obviously none under the provisions of the law already referred to. That provision says that in the case of a Civil Court from whose decree no appeal ordinarily lies that Court shall be considered to be subordinate to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate The Court of Small Causes is such a Court, so it is subordinate only to the Court of the District Judge of Gonda.

The learned Counsel argued that this was not a Court of Small Causes but one where a Munsif is invested with such powers. There is no such distinction in the Provincial Small Cause Courts Act. The Local Government may in writing establish a Court of Small Causes at any place under s. 5 and appoint a Judge of that Court under s. 6. That is the only method of creating a Court and appointing a Judge to it. That Judge may perform any other function but when he presides in the Court of Small Causes he is a Judge of the Court of Small Causes and nothing else. Nowhere is any provision made in this Act for a Munsif especially empowered to exercise such powers

I desire, however, that the applicants shall have their appeals heard by a Court

having jurisdiction because it is obvious that they have made a *bona fide* mistake. The Judge of Small Causes describes himself in his complaint as a Munsif. As Munsif his decrees are ordinarily appealable to the Sessions and Subordinate Judge of Bahraich. It is a pity that Counsel are more prone to litigate on rulings than on a common sense view of any subject. The course the applicants' Counsel ought to have adopted in the lower Court would have been to admit an obvious mistake caused by the ordinary procedure prevailing in Bahraich and request the District Judge of Gonda to transfer the appeal to his own file or to move this Court to do so.

I set aside the order of the lower Court and transfer the appeals of Fateh Bahadur, Abu Mohammad and also of Abdul Hasan who has not applied to this Court to the Court of the District Judge of Gonda. He is requested to hear the appeals as if they had been property filed in his Court originally within the period of limitation.

As the respondent Abdul Rahim, who desires prosecution has been damnified in costs through a mistake, however, excusable of the applicants I direct that Abdul Rahim shall receive his costs upto to-day of both the Courts from the applicants Fateh Bahadur and Abu Mohammad. These costs may be recovered as if they were decreed.

Z. K. *Order set aside;*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 271 OF 1924.
(CRIMINAL REVISION PETITION No. 227 OF 1924.)
December 12, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

In re APPASWAMY IYER—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Penal Code (Act XLV of 1860), s. 193—Sanction for prosecution for perjury—Trial, commencement of—Amendment of Code, effect of—Trial, legality of.

Sanction for the prosecution of an accused person for the offence of perjury was granted to a private individual under s. 195 of the Cr. P. C., and the trial of the accused commenced under the provisions of that Code. Before the trial was concluded the Code was amended and the procedure with regard to sanction for prosecution was abolished:

Held, that the trial was not affected by the amendment of the Code inasmuch as the Court having taken cognizance of the case lawfully its jurisdiction to try the case to its conclusion was not ousted by the subsequent amendment of the Code. [p. 389, cols. 1 & 2.]

Per *Wallace, J.*—Once a Court is properly seized of a case no amendment of the law except an amendment which takes away its jurisdiction to try the case, can affect the Court's authority to proceed with the trial. [p. 389, col. 2.]

The consequence of an amendment of procedure is not that all matters properly begun under the old procedure collapse and have to be begun again under the new procedure, but that they shall be continued under the new procedure from the time when the new procedure came into force. [*ibid.*]

The necessity of a sanction order for the initiation of criminal proceedings is a mere barrier which has to be crossed before a Court reaches the stage of trial and once that barrier has been crossed the jurisdiction of the Court to try the case is not taken away by the fact that the procedure with regard to the crossing of that barrier has subsequently been abolished or altered. [*ibid.*]

Per *Madhavan Nair, J.*—A trial which has been properly begun on a sanction order granted to a private individual under the provisions of the Cr. P. C. before its amendment cannot be regarded as having been vitiated by an alteration in the procedure with regard to the initiation of proceedings laid down in the amended Code. [p. 390, col. 1.]

Petition, under s. 439 of the Cr. P. C., 1898, praying the High Court to revise an order framing charge, dated the 5th March 1923, in C. C. No. 37 of 1923, on the file of the Court of the First Class, Sub-Divisional Magistrate, Usilampatti, and for quashing all proceedings in the said C. C. No. 37 of 1923.

Mr. *P. S. Narayanaswami Iyer*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.

Wallace, J.—The question raised in this revision petition is whether, when a criminal Court has taken cognizance of an offence for perjury before the amendment of the Cr. P. C. on a sanction order to a private individual granted before the Code was amended, but has not completed the trial before the amended Code, which abolished all such sanctions, came into force, the trial can go on without a fresh complaint under the amended provisions of s. 476, Cr. P. C. The point is one of first impression and is not very easy to decide. The petitioner is

the accused in the perjury case. The first Court had refused the sanction. The lower Appellate Court granted it. The petitioner, moved the High Court to revoke that sanction after the amended Code came into force. The High Court held that, under the amended Code, such an application would not lie and dismissed it. The petitioner complains that the amendment of the Code should not have been used to deprive him of his opportunity of moving that the sanction ought to be set aside and that, if the amended procedure is to govern his case, it must be held to govern it from the beginning. Had a complaint been put into the lower Court under the new Code, the petitioner would have had a right to appeal to this Court. As the lower Court's order is merely one granting his sanction the petitioner, by the amendment of the Code, is now left without a remedy in the nature of appeal or revision against that order. That, however, is not the point really before us now; it has been settled already by the High Court's order. The point before us now is whether the trial which has been properly begun on a sanction order must now be dropped owing to the amendment of the Code. Our attention has been drawn by both sides to two recent rulings of this Court --neither of them, however, is exactly on all fours—which are reported as *Nataraja Pillai* v. *Rangaswamy Pillai*, (1) and *Sesha Aiyar* v. *Public Prosecutor* (2). In the latter case, a Bench held that the production of sanction was a mere matter of procedure. There the application was to revoke a sanction granted under the old Code. The learned Judges referred to *Nataraja Pillai* v. *Rangasawmy Pillai* (1) and agreed with the view there expressed, that no party had a vested right of appeal or revision in the matter of getting a sanction revoked. *Nataraja Pillai* v. *Rangaswamy Pillai* (1) was the converse case in which the party moved the High Court to grant a sanction which the lower Court refused. I was a party to that decision. *Nataraja Pillai* v. *Rangaswamy Pillia* (1) looks at it from the standpoint of a complaint while *Sesha Aiyar* v. *Public Prosecutor* (2) looks at it from the standpoint of an accused, but there is no essential difference in the conclusion, that the matter is one entirely of procedure, and it is plain that the old s. 195 did not draw any appreciable distinction between the position as accused or complainant, of the parties in the matter of moving the High Court either to grant a sanction refused or to revoke a sanction granted.

In order to decide as to whether a trial founded on a sanction and properly begun on a procedure which has been altered by the amended Cr. P. C. can now go on, it is essential not to confuse 'cognizance' with 'jurisdiction.' Once a Court is properly seized of a case, I do not see that any amendment of law except an amendment which takes away its jurisdiction to try the offence, can affect the Court's authority to proceed with the trial. To hold that an amendment of the procedure of trial under the Code automatically brings to an end all trials founded on the original procedure—which is really the contention of the petitioner—is not a conclusion which appears to me justified either in law or in common sense. The consequence of an amendment of procedure is not that all matters properly begun under the old procedure collapse and have to be begun again under the new procedure, but that they shall be continued under the new procedure from the time when the new procedure came into force. If that were not the intention of the Legislature, I think it was bound to have said so. Cognizance founded on a sanction order was merely a barrier which had to be crossed before a Court reached the stage of trial and once that barrier had been crossed I do not see what authority short of interference by a Court of Appeal or Revision empowered to cancel the sanction order, or legislation *ad hoc* can reverse the process. This is the view taken by a learned Judge of this Court in Cr. M. P. No. 606 of 1924 and this also the view stated, although without reasons in *Muthiah Goundan* v. *Chinna Nallappd Goundan* (3) to which also I was a party.

The petitioner appeals to some observations of mine in *Nataraja Pillai* v. *Rangaswamy Pillai* (1) that "Obviously the Court has power to discharge or acquit an accused person of a charge which requires previous sanction, if, in the course of the trial and before judgment is pronounced, it is brought to its notice that no sanction has been obtained, and I can see no difference between such a case and a case where the sanc-

(1) 77 Ind. Cas. 297; 47 M. 381; 46 M. L. J. 274; 19 L. W. 358; 25 Cr. L. J. 361; (1924) A. I. R (M.) 657.

(2) 81 Ind. Cas. 190; 19 L. W. 463; 34 M. L. T. 353; (1924) A. I. R. (M.) 485; 25 Cr. L. J. 702.

(3) 83 Ind. Cas. 702; 19 L. W. 392; (1924) M. W. N. 358; (1924) A. I. R. (M.) 615; 25 Cr. L. J. 142.

tion on which the trial is proceeding has been set aside during the trial," but these really do not help him, because, in such a case, the prosecution was either not properly begun at all under the old procedure, or, if it had properly begun under the old procedure, it has also properly come to an end under the old procedure by the revocation of the sanction. What the petitioner sought to do in that case was to revise the old procedure after the new procedure had come into force. I can, therefore, see no reason to interfere in revision in this case and dismiss the petition.

Madhavan Nair, J.—The facts of this case are not disputed. Sanction under s. 195 of the old Cr. P. C. to prosecute the petitioner for perjury was refused by the first Court. The Appellate Court granted the sanction. An application filed by the petitioner to revoke that sanction after the amended Code came into force, was dismissed by the High Court on the ground that under the amended Code such an application would not lie. Proceedings against the petitioner began on the sanction granted under the old Code, but were not completed before the amended Code came into force, and, now a charge has been framed against him for an offence under s. 193 of the Indian Penal Code. The present petition is to revise the order framing the charge and for quashing all proceedings against the petitioner in connection with the charge on the ground that such proceedings are bad in law inasmuch as those were started without a written complaint by the Court, as is now required under the new Cr. P. C.

The point arising for our own consideration is whether the trial which has been properly begun on a sanction order granted to a private individual under the old Code and the charge framed against him should now be considered bad in law, because of an alteration in the procedure laid down by the amended Code. The learned Vakil for the petitioner has relied upon two decisions of this Court, namely, *Nataraja Pillai* v. *Rangaswami Pillai* (1) and *Sesha Aiyar* v. *Public Prosecutor* (2) in support of his argument. In *Nataraja Pillai* v. *Rangaswami Pillai* (1) an application was made to the High Court to set aside an order revoking a sanction granted under s. 195 of the old Cr. P. C. It was held that such an application does not lie after the amendment of the Code and that no party has a vested right of appeal or revision in getting a sanction order revoked. In *Sesha Aiyar* v. *Public Prosecutor* (2) it was held that an application made to the High Court after the amended Code has come into force to revoke a sanction granted under s. 195 of the old Code is not maintainable. The learned Judges expressed the view that "the production of a sanction for the cognizance of certain specified offences was purely a matter of procedure" and also held, following *Nataraja Pillai* v. *Rangaswarmi Pillai* (1), that no private party has a "vested right of appeal in a sanction matter which would be preserved in spite of the amendment of the law." Relying on these decisions it has been argued that, since the grant or the revocation of sanction is purely a matter of procedure which is affected by an alteration of the law, the proceedings commenced in pursuance of a sanction granted under the old Code are also bad in law in view of the alteration in the procedure laid down in the amended Code. It appears to me that neither of the two decisions above referred to deals with the question now raised before us.

On the other hand, the decisions in *Muthia Goundan* v. *Chinna Nallappa Goundan* (3) and Cr. M. P. No. 606 of 1924 brought to our notice by the learned Public Prosecutor have a direct bearing on the question and the latter one suggests the correct principle to be applied in the present case. In *Muthia Goundan* v *Chinna Nallappa Goundan* (3), the learned Judges, Ramesam and Wallace, express their view that 'the new Cr. P. C. amending Act' does not affect the complaint filed under the Act before the amendment. In Cr. M. P. No. 606 of 1924 it was held by Krishnan, J., that "the amendment of the Cr. P. C. did not affect complaints already filed on sanction properly obtained. S. 195 requires the sanction only to enable the Court to 'take cognizance' of certain offences and, once the case is launched and cognizance has been taken by the Magistrate, the fact that he commits the case to the Sessions for trial does not affect the question." It seems to me that this decision lays down the correct principle. The production of sanction, which is purely a matter of procedure, is a pre-requisite of certain prosecutions, [see *Sesha Aiyar* v. *Public Prosecutor* (2)]. Sanction is required only to enable the Court to take cognizance of certain offences and, when once the case is launched and cognizance has been taken by the Magistrate of any offence, nothing

short of an amendment which specifically takes away the jurisdiction of the Court to try the offence, can affect the right of the Court to go on with the trial according to law.

In my view, an alteration in the law of procedure relating to the grant of sanction cannot invalidate proceedings validly begun under the old procedure. If the intention of the Legislature, was to annul such proceedings also, then it would have expressed such intention in appropriate language. Applying the principle indicated in Cr. M. P. No. 606 of 1924, I would hold that the proceedings of the Magistrate in this case are not *ultra vires* and illegal.

I would, therefore, dismiss this petition.

V. N. V. *Petition dismissed.*

Z. K.

LAHORE HIGH COURT.

CRIMINAL PETITION No. 1673 OF 1923.

February 22, 1924.

Present:—Mr. Justice Scott Smith.

GHAZA ALI—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused—Accused examined after examination of some witnesses for prosecution—Examination, absence of, after close of prosecution case—Trial, legality of.

The word "shall" in s. 342 of the Cr. P. C. makes the duty imposed on the Court of questioning the accused generally on the case, after the witnesses for the prosecution have been examined and before he is called on for his defence, mandatory and not merely discretionary. [p. 391, col. 2.]

Where an accused person is examined after only a part of the prosecution evidence has been recorded and is not examined again after all the witnesses for the prosecution have been examined, there is no compliance with the provisions of s. 342 of the Cr. P. C. and the whole trial is vitiated. [p. 391, col. 2; p. 392, col. 1.]

Petition for revision of an order of the Sessions Judge, Lahore, dated the 31st July 1923.

Lala *Nawal Kishore*, for the Petitioner.

The Government Advocate, for the Respondent.

JUDGMENT.—The petitioner having been convicted by a Magistrate of an offence under s. 308 of the Indian Penal Code and sentenced to two years' rigorous imprisonment and to a fine of Rs. 100 and his appeal having been dismissed by the Sessions Judge he has come up to this Court on the revision side. It is urged on his behalf that his trial was illegal as he was not questioned generally on the case after the witnesses for the prosecution had been examined and before he was called on for his defence, in accordance with the provision of s. 342 (1) of the Cr. P. C. The record shows that his statement was recorded after two of the witnesses for the prosecution had been examined. The charge was then framed against him and on a subsequent date three more prosecution witnesses were examined, and after that the evidence for the defence was heard. The Court, however, did not question the petitioner again after the prosecution evidence had been recorded as laid down in s. 342 of the Code. The word 'shall' in this section makes the duty imposed on the Court of questioning the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence mandatory and not discretionary.

In *Mitarjit Singh* v. *Emperor* (1) where the accused had been questioned by the Magistrate after the examination-in-chief of the prosecution witnesses and before there had been any cross examination at all, and after the subsequent cross-examination they were not questioned again, it was held that the trial was bad. That case was distinguished in *Byrne* v. *Emperor* (2). That was a case where the accused was examined after all the witnesses for the prosecution had been examined and cross-examined at considerable length and before the charge was framed though he was not examined after a further lengthy cross-examination, and it was held that the trial was not bad and that s. 342 of the Cr. P. C. could not be interpreted as conveying a peremptory direction if the Court had already questioned the accused before the charge, when the case for the prosecution had been closed and the witnesses for the prosecution had been cross examined. The present case is distinguishable from that reported as *Byrne* v. *Emperor* (2) because in the present case the accused was examined after only a part of the prosecution evidence had been recorded and was not

(1) 63 Ind. Cas. 825; 6 P. L. J. 644; 2 P. L. J. 520; (1922) Pat. 7; 22 Cr. L. J. 697; (1922) A. I. R. (Pat.) 158.

(2) 81 Ind. Cas. 337; 4 L. 61; 1 P. W. R. 1923 Cr.; (1924) A. I. R. (L.) 84; 25 Cr. L. J. 801.

examined again after all the witnesses for the prosecution had been examined.

Under the circumstances I must hold that the petitioner has been prejudiced by the procedure adopted by the Magistrate and I allow the revision and set aside his conviction and sentence, and direct that he be re-tried from the point when the evidence for the prosecution was closed. There is no necessity to record the evidence for the prosecution over again, but the accused should be examined upon the whole case and should be allowed to produce any further witnesses he may desire. The Magistrate will then write a fresh judgment deciding the case.

Z. K. *Revision allowed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 592 OF 1924.
(CRIMINAL REVISION PETITION No. 494 OF 1924.)

April 16, 1925.

Present :—Mr. Justice Devadoss.

ABDUL ALI SAHIB AND ANOTHER—ACCUSED NOS. 1 & 2—PETITIONERS

versus

AMIRUDDIN *alias* SABU SAHIB—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 352, 447—Purchase of land from ostensible owner—Possession under bona fide *claim of right—Obstruction—Assault—Offence.*

Where a person who had an ostensible title to a piece of land sold it to another and the latter under a *bona fide* claim of right took possession of the land and ploughed it and in maintaining possession against a rival claimant assaulted the obstructor :

Held, that there being no certainty that the obstructor was the owner of the land, and the accused having acted under a *bona fide* claim of right, no offence either of trespass or assault was committed by him.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Cuddalore, in C. S. No. 6 of 1924, preferred against that of the Court of the Second Class Magistrate, Gunjee, in C. S. No. 324 of 1923.

Messrs. *Ethiraj* and *T. E. Ramabhadrachari*, for the Petitioners.

Mr. *K. Ramaswami Goundan*, for the Respondent.

ORDER.—This is an application to revise the order of the Sub-Divisiona Magistrate of Cuddalore. The petitioners have been convicted of trespass and assault under ss. 447 and 352, Indian Penal Code, and sentenced to pay fine. The contention of Mr. Ethiraj for the petitioners is that the petitioners acted in the *bona fide* exercise of their civil right in ploughing the field in question and that their act does not amount to an offence. There is a good deal of evidence on both sides but there is the outstanding fact that the property belonged to Kathifabi under the sale-deed executed by Hatiz on 29th September 1886 which is marked Ex. I. The petitioners claim under Kathifabi ; she executed a sale-deed on 11th December 1922, Ex. 7, to one Mali Hasan Saheb. The complainant's case is that he got an oral sale from his mother-in-law Kathifabi of the whole property and has been enjoying the property for forty years. It may be that his case is true, but when a person who has an ostensible title sells a land to another and that man goes and ploughs it, it cannot be said that he commits criminal trespass. There is a *bona fide* claim of civil right on the part of the petitioners and their act in ploughing the field in question is not an offence under s. 447.

If the land was the land of Kathifabi then the act of the accused would not amount to an offence. In the state of evidence it cannot be said for certain that the complainant is the owner of the land and, therefore, the conviction of criminal trespass is bad.

As regards assault, that also depends upon the question whether the complainant was entitled to the land or the petitioners. If the petitioners were entitled to the land they have a right to plough it and if a person objects to it, an assault of the kind now in question would be justified in maintaining possession of the land.

I set aside the conviction and sentence and direct the fines, if paid, to be refunded.

V. N. V. *Conviction set aside.*

Z. K.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 152 OF 1925.

August 20, 1925.

Present:—Mr. Kennedy, J. C., and Mr. Rupchand Bilaram, A. J. C.

VISHNOO NAINARAM—ACCUSED—APPLICANT

versus

DIPCHAND SITALDAS—COMPLAINANT—OPPONENT.

Criminal Procedure Code (Act V of 1898), Ch. XL, ss. 503, 506—Civil Procedure Code (Act V of 1908), O. XXVI, r. 1—Commission for examination of witness, when to be issued—Discretion of Court.

The issue of a commission to examine a witness is not a very satisfactory mode of proceeding either in civil or criminal cases. On the one hand the Court has no opportunity of noting the demeanour of the witness and on the other of controlling irrelevant and unnecessary or harassing cross-examination of the witness. [p. 393, col. 2.]

Chapter XL of the Cr. P. C. confers a wide discretion on the Court to issue Commissions for the examination of witnesses but such discretion should be sparingly exercised and only in cases of real hardship and inconvenience having due regard to the prejudice which is likely to be thereby caused to the opponent. [*ibid.*]

Regarding the grounds on which a Criminal Court may issue a Commission to examine a witness living within its local limits, in ordinary cases the provisions of O. XXVI, r. 1 of the C. P. C. may be accepted as a safe guide. [*ibid.*]

Application to revise an order of the District Magistrate, Nawabshah, dated the 19th March 1925.

Mr. *Partabrai D. Punwani*, for the Applicant.

Mr. *Motiram Idanmal*, for the Opponent.

ORDER.—In this case the learned District Magistrate of Nawabshah has accepted the recommendation of the Trying Magistrate and has ordered a commission to issue under s. 506, Cr. P. C. for the examination of the Mahant of Halani who resides within a few miles of the Trying Magistrate's Court house. The Mahant is an important prosecution witness. The complaint has been filed by one of his followers under s. 500, Indian Penal Code against the accused who is the Editor of a vernacular paper published at Hyderabad Sind and is based on certain comments made by the accused in respect of a letter alleged to have emanated from the Mahant.

The grounds on which exemption from the personal appearance of the Mahant in Court was sought and which apparently weighed with the learned District Magistrate was that the Mahant commands a large following of respectable Hindus both inside and outside Sind and that his giving evidence in Court would be derogatory and humiliating both to him and to his following.

The accused has now come to us in revision. It is true that he has filed this application nearly four months after the order and that the explanation offered by him for the delay is not satisfactory. We, however, think that the point at issue is one of considerable importance and one in which we should condone the delay.

The issue of a commission to examine a witness is not a very satisfactory mode of proceeding either in civil or criminal cases. On the one hand the Court has no opportunity of noting the demeanour of the witness and on the other of controlling irrelevant and unnecessary or harassing cross-examination of the witness. Chapter XL of the Cr. P. C., no doubt, confers a wide discretion on the Court to issue commissions but such discretion should, in our opinion, be sparingly exercised and only in case of real hardship and inconvenience having due regard to the prejudice which is likely to be thereby caused to the opponent.

The powers conferred on a Civil Court by O. XXVI, r. 1, C. P. C., which provide for issue of a commission to examine witnesses residing within the local limits of the Court are more specific and limited than those of ss. 503 and 506, Cr. P. C., which refer to commissions to examine witnesses generally whether residing within the jurisdiction of the Court or not. Without in any way crystallising the grounds on which a Criminal Court may issue a commission to examine a witness living within its local limits we think that in ordinary case the provisions of O. XXVI, r 1, C. P. C. may be accepted as a safe guide by a Criminal Court. This rule provides for issue of a commission where the witness is either exempted under the Code or where he cannot attend the Court on account of sickness or infirmity.

Under this rule *pardanishin* ladies and women who lead a life of seclusion have been exempted from personal appearance except in cases where the Presiding Judge considers it extremely desirable to observe the demeanour of such witnesses and orders that they be examined by him personally. Provision is also made under the rules dispensing with the presence of

Government officials required to give formal evidence. We are not aware of a Mahant, however high his position be, being examined on commisson by a Civil Court under this rule except where he has been exempted by a special notification issued by Government. An attempt was made on behalf of this witness to secure for him that privilege but it was refused. We think that under the circumstances it was not a wise exercise of the discretionary powers vested in the learned District Magistrate to grant to him the privilege which he was not able to secure from Government. We accordingly set aside his order.

The learned Pleader for the accused has stated that the accused has no objection if the learned Trying Magistrate examined the witness at his private residence. We have no doubt that if the learned Magistrate who is a Hindu can conveniently do so he will grant this concession to the witness.

Z. K. *Application allowed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 908 OF 1924.
CRIMINAL REVISION PETITION No. 759 OF 1924.)
March 20, 1925.
Present:—Mr. Justice Davadoss.
In re DYTA SEETHARAMAYYA—
ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 16, 367—Bench of Magistrates—Chairman differing from majority—Judgment of Court, how to be written—Procedure.

Where the Chairman of a Bench of Magistrates is opposed to the majority of the Bench, and is not prepared to write a judgment for the majority, one of the majority ought to write the judgment and that should form part of the record, so that, the High Court in revision may know the reasons for the opinion of the majority.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order dated the 4th September 1924 of the Court of the Session, Guntur, in Criminal Revision Petition No. 14 of 1924, praying that the order of the First Class Bench Court, Bapatala, dated the 25th June 1924, in C. C. No. 88 of 1924, may be referred to the High Court for orders.

Mr. *K. Ramaswami Gounder* for Mr. *N. Balasundaram*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—This is an application to revise the order of the First Class Bench Magistrate of Bapatala. Two of the Magistrates found the accused guilty under s. 352, Indian Penal Code, but the Chairman of the Bench wrote a dissenting judgment holding that the accused was not guilty. No reasons were given for finding the accused guilty and therefore, there is no judgment as required by law. I think, the conviction ought to be set aside and seeing it is a petty case, it is not worth while sending the case back for a re-trial The fine, if paid, will be refunded. I must here indicate my view, that in cases wherever the Chairman of the Bench Magistrates is opposed to the majority and where he is not prepared to write a judgment for the majority, one of the Magistrates ought to be asked to write the judgment. Otherwise the Chairman, if he happens to differ from the majority would write only his view of the case, whether it be for conviction or acquittal; and the rest of the Magistrates would not be in a position to place on paper their reasons for their opinion. In such cases the rule ought to be that, where the Chairman is opposed to the majority of the Bench, one of the majority ought to be asked to write the judgment and that should form part of the record, so that, the Court in revision may know the reasons for the opinion of the majority.

V. N. V. *Conviction set aside.*
Z. K.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 168 OF 1925.
August 17, 1925.
Present:—Mr. Kennedy, J. C., and
Mr. Rupchand Bilaram, A. J. C.
EMPEROR—PROSECUTOR
versus
RADHO AND OTHERS—ACCUSED.

Bombay Prevention of Gambling Act (IV of 1887), s. 5—Penal Code (Act XLV of 1860), ss. 40, 65, 67—General Clauses Act (X of 1897), s. 25—Gambling—Sentence of fine—Imprisonment in lieu of fine, duration of.

The provisions of ss. 65 and 67 of the Penal Code apply equally to punishments inflicted under a special law, like the Gambling Act and, therefore, the maximum term of imprisonment which can be awarded in lieu of fine in respect of an offence under s. 5 of the Gambling Act is one week only.

Queen-Empress v. *Yakoob Sahib*, 22 M. 238; 1 Weir 32; 8 Ind. Dec. (N. S.) 170 and *Queen-Empress* v. *Venkata*, 2 Bom. L. R. 1081, relied upon.

Reference made by the Additional Sessions Judge, Hyderabad (Sind).

Mr. *C. M. Lobo*, Acting Public Prosecutor, for the Crown.

JUDGMENT.—Four gamblers, Radho, Hosho Shah, Jesso and Rijhu, were convicted and sentenced by the City Magistrate, Hyderabad, under ss. 4 and 5 of the Gambling Act. Rijhu alone appealed against his conviction and sentence to the Additional Sessions Judge, Hyderabad. The learned Judge was of the opinion that the sentence awarded to him and to the other accused persons in lieu of fines imposed on them was not in compliance with the provisions of s. 65 of the Indian Penal Code. He has himself dealt with the case of Rijhu and has referred the case of the remaining three accused persons to us.

Radho has been sentenced to pay a fine of Rs. 100 or in default to suffer one month's rigorous imprisonment. Hosho Shah has been sentenced to pay a fine of Rs. 120 or in default to undergo $1\frac{1}{2}$ months' rigorous imprisonment and Jesso has been sentenced to pay a fine of Rs. 160 or in default to undergo two months' rigorous imprisonment.

We think the learned City Magistrate was clearly in error in awarding sentences in excess of one week or $\frac{1}{4}$th of one month which is provided by s. 5 as a substantive punishment which could be inflicted under that section. It is clear from s. 40 of the Indian Penal Code and s. 25 of the General Clauses Act that the provisions of ss. 65 and 67 of the Indian Penal Code equally apply to punishments inflicted under a Special Law like the Gambling Act: *Queen-Empress* v. *Yakoob Sahib* (1), and *Queen-Empress* v. *Venkata* (2). Section 65 deals with cases where the offence is punishable either with imprisonment or fine or both. While s. 67 refers to offences punishable with fine only. The offence under s. 5 of the Act is punishable with imprisonment of one month or with fine, and the maximum sentence which could, therefore, be inflicted in lieu of fine is one week only.

We accordingly order that the sentences awarded by the learned City Magistrate in lieu of fine should be limited to one week's rigorous imprisonment only in case of each of the three accused persons and we set aside so much of the order as directs them to undergo rigorous imprisonment in excess of that period.

Z. K. *Order accordingly.*

(1) 22 M. 238; 1 Weir 32; 8 Ind. Dec. (N. S.) 170.
(2) 2 Bom. L. R. 1081.

MADRAS HIGH COURT.
FULL BENCH.

CRIMINAL REVISION CASE NO. 392 OF 1924.
(CRIMINAL REVISION PETITION NO. 329 OF 1924).

December 7, 1924.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Justice Sir Charles Spencer, KT., Justice Sir Kumaraswami Sastri, KT., Mr Justice Beasley and Mr. Justice Srinivasa Iyengar.

RAMAKRISHNA IYER—PETITIONER

versus

SITHAI AMMAL—COUNTER-PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—General Clauses Act (X of 1897), s. 6—Sanction to prosecute—Amendment of Code—Right to move superior Court for revocation of sanction, whether taken away.

A Magistrate granted sanction for the prosecution of the accused for an offence under s. 211 of the Penal Code and a complaint was filed before a competent Magistrate pursuant thereto before the amendment of s. 195 of the Cr. P. C. by Act XVIII of 1923. Thereafter the accused moved the District Magistrate to revoke the sanction under sub-s. (6) of s. 195 of the old Cr. P. C.:

Held, that notwithstanding the amendment of the Code and the re-construction of the whole procedure with regard to sanctions, the District Magistrate had jurisdiction to entertain the application of the accused and to revoke the sanction granted by the lower Court if it appeared to him that on the merits the sanction should not have been granted. [p 398, col 1.]

Alterations by a new Act in the form of procedure are always retrospective, unless there is some good reason why they should not be. [p. 397, col. 1.]

But if the new Act touches a right in existence at the passing of the Act, it cannot be held to act retrospectively unless a clear intention to that effect is manifested. [p. 397, col. 2; p. 398, col. 1.]

A right of appeal is only by Statute. It is not in itself a necessary part of the procedure in an action but is the right of entering a Supreme Court and invoking its aid and interposition to redress the error of the Court below. [p. 398, col. 1.]

The power to apply to a higher Court to revoke a sanction by an inferior Court is not a mere matter of procedure but is a substantive right and by virtue of s. 6 of the General Clauses Act such right is unaffected by a change in the law relating to sanctions. [*ibid.*]

Gardner v. *Lucas*, (1878) 3 A. C. 582, *Attorney-General* v. *Sillem*, (1864) 33 L. J. Ex. 209; 10 H. L. C.

704; 10 Jur. (N. S.) 446; 10 L. T. 134; 4 N. R. 29; 11 E. R. 1200; 12 W. R. 641; 138 R. R. 382 and *Colonial Sugar Refining Co.* v. *Irving*, (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513, relied on.

Bapu v. *Bapu*, 14 Ind. Cas. 305; 39 M. 750, 11 M. L. T. 367; (1912) M. W. N. 499; 22 M. L. J. 419; 13 Cr. L. J. 209, referred to.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the District Magistrate, Tanjore, dated the 4th May 1924, in C. M. P. No. 2 of 1924, preferred against that of the Court of the Stationary Second Class Magistrate, Kumbakunam, in M. C. No. 9 of 1923.

Mr. *Srinivasa Gopalachari*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.

Coutts Trotter, C. J.—In this case the Sub-Magistrate of Kumbakonam gave leave to the petitioner before us, one Ramakrishna Iyer, to prosecute the respondent, a woman called Sithai Ammal, under s. 211 of the Indian Penal Code for bringing against him a false charge of dacoity. The respondent thereupon went before Mr. Shield, who was then the District Magistrate of Tanjore and he passed an order on the 11th September 1923, the new Cr. P. C. having come into force on the first of the month. The learned District Magistrate came to the conclusion that there was nothing for him to do. He was asked to revoke the sanction and he said "I am not going to revoke the sanction, there is nothing in it". It is admitted that the complaint had been filed before the 1st of September 1923. In that view we have found from the records he was wrong—but that being his view and he presumably not being properly instructed on the facts, he supposed that no complaint had been filed before the new Statute came into operation. He first outlines the procedure relating to such a complaint and says it would be regulated by the new Code. In point of fact, as we have already said, he was misinformed about that and the complaint had in fact been filed before the operation of the new Code. Mr. Shield having done nothing, the matter was brought before his successor as District Magistrate of Tanjore, Mr. Hood, and Mr Hood after pointing out the incorrect assumption on which his predecessor had acted, disallowed the prosecution and revoked the sanction that was granted, rightly holding that he was not revising the order of his predecessor Mr. Shield because the petition was not considered by Mr. Shield and there was no order of Mr. Shield to revise. It is now sought to be said before us that that action of Mr. Hood was illegal and without jurisdiction and that the sanction granted by the Second Class Magistrate of Kumbakonam must stand. It is best to begin with a citation of the material sections of the old and new Codes. Under the old Cr. P. C., s. 195, the machinery for dealing with certain offences of which the one in question in this case was one was that, before the prosecution could be launched, it was an essential condition precedent either that the previous sanction of the Court should have been obtained, obviously by one of the parties or that the Court should *suo motu* make a complaint, and by sub-s. (6) it is provided that "any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and no sanction shall remain in force for more than six months from the date on which it was given: provided that the High Court may, for good cause shown, extend the time". The new Code envisages an entirely different state of things and for all practical purposes it abolishes sanction entirely. It provides a substitute, for the condition precedent is not the sanction but a complaint in writing by the Court before which such proceeding as the matter arose out of it is tried or by the Court to which that Court is subordinate. The argument put before us is this, that as the complaint in this case was filed before the coming into operation of the new Code and as the sanction required by the old Code was dispensed with and abolished by the new Code, therefore, it abolished the power to revoke the sanction which was conferred by the old Code: and it is said that that must be so, because this power to invoke the Court to interfere with the sanction of the Court below is not a right vested in anybody but a mere matter of procedure. That undoubtedly was definitely held by a Bench of this Court in *Nataraja Pillai* v. *Rangaswami Pillai* (1). It is said that there is another authority in favour of the present appellant, which is *Sesha Aiyar* v. *Public Prosecutor* (2). We do not think that that deci-

(1) 77 Ind. Cas. 297; 47 M. 384; 46 M. L. J. 274; 19 L. W. 358; 25 Cr. L. J. 361; (1924) A. I. R. (M.) 657.

(2) 81 Ind. Cas. 190; 19 L. W. 463; 34 M. L. T. 353; (1924) A. I. R. (M.) 585; 25 Cr. L. J. 702.

sion under the circumstances in which it was given really applies to this case at all, because it is quite apparent from the concluding sentences of Mr. Justice Krishnan's judgment, which was the only one that was pronounced in the case, that the Court was under the misapprehension that the prosecution in that case had been launched after the new Code came into force. That is a supposition which we now know to be wrong and we are not prepared to say that we should differ from the decision in the case ; but as it was based on an incorrect supposition, the decision is not really before us and does not give us any assistance one way or the other.

What are the principles guiding such matters as this? The line of distinction is very clearly laid down in a series of English cases of great authority which we respectfully follow and the distinction drawn is between a matter of substantive right and a matter of mere procedure. The main cases that have been referred to are *Gardner* v. *Lucas* (3) and *Attorney-General* v. *Sillem* (4).

Their Lordships in *Gardner* v. *Lucas* (3) lay down the general principle that rules of procedure are always retrospective in their operation unless there is good reason why they should not be.

Lord Blackburn says: "The general rule, not merely of England and Scotland, but, I believe, of every civilised nation is expressed in the maxim '*nova constitutio futuris formam imponere, debet non præteritis.*'—*prima facie* any new law that is made affects future transactions, not past ones. Nevertheless, it is quite clear that the subject-matter of an Act might be such that, though there were not any express words to show it, it might be retrospective. For instance, I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clrearly there by-gone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. Then again I think that where alterations are made in matters of evidence, certainly upon the reason of the thing, and I think upon the authorities also, those are retrospective whether civil or criminal.

"But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid, to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding—I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to show that is not the case. The Lord President has put instances which show the reason and object for this ruling. We must apply the ordinary rule in considering Statutes, and say it is not retrospective for such a purpose as this, there being no evidence of an intention upon the face of the language to make it retrospective."

The other rule is best illustrated by the decision of the Privy Council in *Colonial Sugar Refining Co.* v. *Irving* (5). That was a case in which the opinion of their Lordships was delivered by Lord Macnaghten and he lays down the principle in language so clear that I cannot possibly do better than adopt it:

"As regards the general principles applicable to the case, there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well-founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence, at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And, therefore, the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal

(3) (1878) 3 A. C. 582.

(4) (1864) 33 L. J. Ex. 209; 10 H. L. C. 704; 10 Jur. (N. S.) 446; 10 L. T. 434; 4 N. R. 29; 11 E. R. 1200; 12 W. R. 641; 138 R. R. 382.

(5) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that Statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

There is one other passage which I should like to quote and it is from a judgment of Lord Westbury in the well-known case of *Attorney-General* v. *Sillem* (4) and it is quoted in Stroud's Judicial Dictionary, 2nd Edition, Volume I at page 98: "The right of appeal is only by Statute. It is not in itself a necessary part of the procedure in an action but is the right of entering a Supreme Court and invoking its aid and interpositions to redress the error of the Court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal."

Now turning again to the Indian authorities what do we find? The learned Judges in *Nataraja Pillai* v. *Rangaswami Pillai* (1) seem to me to base their observations on the following passage in the judgment of Sir Arnold White, C. J., in *Bapu* v. *Bapu* (6): "We think, however, the power conferred on this Court by s. 195 (6) of the Cr. P. C. is not a part of the appellate and revisional jurisdiction of this Court conferred by Chapters XXXI and XXXII of the Cr. P. C."

It follows therefore it was concerned with the question of what was the proper procedure. However, the matter is not directly before us, though Sir Arnold White, C. J., was quite right in thinking, that the power conferred was not a part of the appellate revisional jurisdiction, under Chs. XXXI and XXXII of the Code. But that is not the question we have to determine. The question we have to decide is whether this was a right of entering the superior Court and invoking its aid and interposition to redress the error of the Magistrate's Court below and, therefore, it seems to us, that, on principle and those very weighty authorities, we ought to hold that this is not a case of procedure but it is a case of a real right to invoke the aid of a higher tribunal. We are also of opinion that those principles are really involved and carried out by s. 6 of the General Clauses Act X of 1897, because what that section says is this :

"Where this Act, or any Act of the Governor-General in Council or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(*a*) revive anything not in force or existing at the time at which the repeal takes effect ; or

(*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ; or

(*d*) * * * * *

(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed." That is the shortest method of dealing with this matter, namely, to base our decision on the words of that section but, as in our opinion, a very important legal principle is involved, we have thought it better to state that principle with reference to the pronouncements of the very eminent Judges whose judgments we have quoted. Mr. Srinivasagopalachariar conceded that, apart from the question of jurisdiction, he could not argue that Mr. Hood's order was not right in other respects.

The result will be that this petition is dismissed.

Spencer, J., Kumaraswami Sastri, J., Beasley, J. and Srinivasa Iyengar, J.—We agree.

V. N. V.
Z. K.

Petition dismissed.

(6) 14 Ind. Cas. 305; 39 M. 750; 11 M. L. T. 367; (1912) M. W. N. 499; 22 M. L. J. 419; 13 Cr. L. J. 209.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 681 OF 1924.
(CRIMINAL REVISION PETITION No. 573 OF 1924.)
April 22, 1925.

Present :—Mr. Justice Krishnan.

DENEPUDI NARASAYYA AND ANOTHER—PETITIONERS

versus

CHIGULURI VENKIAH AND OTHERS—COUNTER-PETITIONERS Nos. 1 TO 16, 18 TO 22, 24, 26, 27 AND 29 TO 46—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Likelihood of breach of peace, absence of—Procedure—Proceedings dropped—Notice to parties, whether necessary—Order concerning disposal of property—Jurisdiction of Magistrate.

Where after proceedings are started under s. 145 of the Cr. P. C. the Magistrate is satisfied that a likelihood of a breach of the peace either did not exist or that it has ceased to exist, it is his duty to drop the proceedings and to withdraw from interfering with the rights of the parties in the property. An order dropping the proceedings in such a case is not liable to be attacked on the ground that notice was not given to the parties to show the existence of a likelihood of a breach of the peace. [p. 399, col. 2.]

Manindra Chandra Nandi v. *Barada Kanta Chowdhury*, 30 C. 112; 6 C. W. N. 417 and *Gothipathi Suryanarayana* v. *Aukeneed Prad*, 81 Ind. Cas. 626; 20 L. W. 58; 46 M. L. J. 565; 47 M. 713; 25 Cr. L. J. 978; (1924) A. I. R. (M.) 795, relied on.

After dropping the proceedings, the Magistrate is *functus officio* and has no jurisdiction to pass any further orders in regard to the disposal of the sale-proceeds of the crops on the property which had been attached pending the proceedings. The proper procedure in such a case is to keep the amount in deposit to enable the party entitled to it to get a decree of a Civil Court establishing his title thereto. [p. 400, col. 1.]

Chenga Reddi v. *Ramaswamy Goundan*, 27 Ind. Cas. 152; 1 L. W. 1032; 16 Cr. L. J. 104 and *Natesa Naicker* v. *Raghavachariar*, 85 Ind. Cas. 256; 20 L. W. 924; (1925) A. I. R. (M.) 327; 26 Cr. L. J. 512, followed.

Mahalakshmi v. *Subbarayadu*, 74 Ind. Cas. 447; 17 L. W. 429; (1923) A. I. R. (M.) 472; 24 Cr. L. J. 783, distinguished.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order, dated the 7th June 1924, of the Court of the Sub-Divisional Magistrate, Masulipatam, in Miscellaneous Case No. 16 of 1923.

Messrs. *V. L. Ethiraj* and *K. Venkatarama Raju*, for the Petitioners.

Mr. *V. Ramadoss*, for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.—This is an application to revise certain proceedings passed by the Sub-Divisional Magistrate, Masulipatam, in connection with an application filed by the petitioner asking the Magistrate to take action under s. 145 of the Cr. P. C. The Magistrate stating that he was satisfied that there was a dispute likely to cause a breach of the peace, passed a preliminary order under s. 145 and directed the parties to attend his Court and to file written statements of their respective claims as regards the possession of the subject-matter in dispute. At a subsequent stage, the Magistrate became satisfied that there was no likelihood of a breach of the peace and he, therefore, dropped the proceedings, and passed no orders under s. 145 regarding possession of the property.

The first point taken before me in revision is that the Magistrate was not entitled to drop proceedings without giving an opportunity to the petitioner to show by evidence that there was a likelihood of the breach of the peace and the Magistrate's conclusion that there was no likelihood of the breach of the peace from information received was incorrect. It is contended that, without an opportunity being given to the parties to show the existence of the likelihood of the breach of the peace, a Magistrate who has started proceedings under s. 145, Cr. P. C., cannot cancel or drop them. This does not seem to me to be the law at all; for, as pointed out in *Manindra Chandra Nandi* v. *Barada Kanta Chowdhury* (1), where this very question was raised and considered, "a party to a proceeding under s. 145 is not in the position of a plaintiff in a civil suit who has set the Court in motion and has a right to require a decision upon the questions raised by him. If a Magistrate either refuses to make an order under sub s. (1) of s. 145, or, having made such an order, subsequently cancels it on the ground that a dispute does not exist likely to cause a breach of the peace, no private person has any *status*, in our opinion to contest the propriety of his refusal to make an enquiry into the question of possession." It must be borne in mind that proceedings under s. 145 are not taken in the interests of private parties but for the preservation of the public peace and if the Magistrate is satisfied that the likelihood of the breach of the peace either did not exist or that it has ceased to exist, it is the proper duty of the Magistrate to drop proceedings, under s. 145 and withdraw from interfering with the rights of the parties in the property. The case of *Manindra Chandra Nandi* v. *Barada Kanta Chowdhury* (1) in which this

(1) 30 C. 112; 6 C. W. N. 417.

very question was raised and decided by a Bench of that Court—Calcutta High Court—is against the contention raised by the petitioner. That ruling has been followed in this Court by Spencer, J., in *Gothipathi Suryanarayana* v. *Ankeneed Prad* (2) and I am prepared to take the same view. I do not think it is open to a party to come up here and say that the Magistrate had no business to drop proceedings on the ground that there was no likelihood of a breach of the peace without giving him an opportunity to show that there was such a likelihood. It is the Magistrate's duty to be satisfied that there is no breach of the peace in his district. If he is so satisfied, it is not for a private party to object. Clause (5) of s. 145 provides for a special case whereas the Magistrate is proceeding with the trial of the question of possession the parties to the proceedings or even other persons who are interested are given the right to show that no dispute likely to cause a breach of the peace exists or has existed. The existence of this clause does not take away the power of the Magistrate himself to drop proceedings if he is satisfied that there is no further likelihood of the breach of the peace. This first objection, therefore, fails.

The main point in the case, however, is as regards the order passed by the Magistrate about the deposit in Court. While the proceedings were going on in his Court, the property seems to have been put under attachment and the crops seem to have been sold and certain moneys realised were deposited in Court. The Magistrate has passed an order directing the deposit to be given over in the main to the counter petitioner excepting a small sum of Rs. 5—8 to be paid to the petitioner before me on proving his title. On this point, it has been contended before me that, having dropped the proceedings under s. 145, the Magistrate is *functus officio* and has not jurisdiction to pass any further orders in the case. That contention is supported by two decided cases in this Court, *Chenga Reddi* v. *Ramaswamy Goundan* (3) and *Natesa Naicker* v. *Raghavachariar* (4). On the contrary, there is a case in *Gothipathi Saryanarayana* v. *Ankeneed Prad* (2) which says that a Magistrate may pass orders directing that the income or profits obtained by sale of the crops on the land should be given over to the person who raised the crops or from whose possession the property was taken. As pointed out in *Chenga Reddi* v. *Ramaswamy* (3) and *Natesa Naicker* v. *Raghavachariar* (4) it is this very point that is in dispute in a proceeding under s. 145, as to who was in possession of the land, and, if the Magistrate is not going to make an enquiry to find out who was in such possession on the ground that there is no further likelihood of the breach of the peace, and drops proceedings, it seems to me to be hardly correct for him to say that the sale-proceeds of the crops should be handed over to the person who raised the crops. That means that the Magistrate has to come to a conclusion as regards the very question that he is not going to consider. I am inclined to follow the rulings in *Chenga Reddi* v. *Ramaswamy* (3) and *Natesa Naicker* v. *Raghavachariar* (4) in preference to that in *Mahalakshmi* v. *Subbarayadu* (5). I notice that in *Mahalakshmi* v. *Subbarayadu* (5) the counter-petitioners were not represented and the order was in favour of the petitioner who apparently made out the crops had been taken from him. The Magistrate had directed that the money should be kept in deposit to enable the party entitled to it to get a decree of a Civil Court to show his title. It seems to me that that was the proper order in the case. I think it is not right for the Magistrate after dropping the proceedings to make any further orders. He must leave the parties to settle their rights in the manner they think best to do, in the meanwhile holding his hands. In this case, therefore, I set aside the order of the Magistrate directing payment of the money deposited to the counter-petitioner. The money will be kept in deposit in Court till one or other of the parties produces a decree of a Civil Court to show his right to that money, and, on the production of such a decree the money will be paid to the party entitled to it.

With this variation the petition must be dismissed.

V. N. V.

Z. K. *Petition dismissed.*

(2) 81 Ind. Cas. 626; 20 L. W. 58; 46 M. L. J. 565; 47 M. 713; 25 Cr. L. J. 978; (1924) A. I. R (M.) 795.

(3) 27 Ind. Cas. 152; 1 L. W. 1032; 16 Cr. L. J. 104.

(4) 85 Ind. Cas. 256; 20 L. W. 924; (1925) A. I. R. (M.) 327; 26 Cr. L. J. 512.

(5) 74 Ind. Cas. 447; 17 L. W. 429; (1923) A. I. R. (M.) 472; 24 Cr. L. J. 783.

MADRAS HIGH COURT.

APPEAL SUIT No. 173 OF 1923.

April 1, 1925.

Present :—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr. Justice Krishnan.

NELAKANTI SUNDARASIVA ROW AND OTHERS—PLAINTIFFS NOS. 3, 4 AND 2 —APPELLANTS

versus

IVATUARY VIYYAMMA AND OTHERS—DEFENDANTS NOS. 1 TO 20—RESPONDENTS.

Hindu Law—Life-estate holder, alienation by - Subsequent surrender to reversioner—Reversioner, whether can question alienation—Evidence Act (I of 1872), s. 92 - Partition lists, non-production of—Oral evidence, admissibility of.

Where a reversioner obtains the estate through surrender by a Hindu widow or other life-estate-holder, he is not entitled during her lifetime to question alienations made by her prior to the surrender. Especially where the surrender is effected for the purpose of defeating alienees for consideration, the rule that till the surrenderer dies, her acts cannot be questioned by the surrenderee, is a just and equitable one. [p. 402, cols. 1 & 2.]

Subbamma v. *Subrahmanyam*, 32 Ind. Cas. 813; 39 M. 1035; 30 M. L. J. 260 and *Singaram Chettiar* v. *Kalyanasundaram Pillai*, 26 Ind. Cas. 1; (1914) M. W. N. 735; 1 L. W. 687, followed.

Vaidyanatha Sastri v. *Savithri Ammal*, 42 Ind. Cas. 245; 41 M. 75; 33 M. L. J. 387; (1917) M. W. N. 653; 22 M. L. T. 275; 6 L. W. 542, distinguished.

Where in a partition between two Hindu daughters, two lists were drawn up for the properties as divided and mention was made in them of the right of survivorship having been extinguished and on a question arising whether the right of survivorship was extinguished or not, the lists were not produced:

Held, that the lists constituted only a piece of evidence and though non-production of them might go to shake the weight of the evidence, it did not prevent other and oral evidence being given. It was not a case to which s. 92 of the Evidence Act applied. [p. 401, col. 2.]

Appeal against a decree of the Court of the Additional Subordinate Judge, Cocanada, in O. S. No. 28 of 1921.

Mr. *B. Satyanarayana*, for the Appellants.

Messrs. *D. Appa Row*, *G. Lakshmanna* and *C. Rama Row*, for the Respondents.

JUDGMENT.—Two points are raised for decision in this appeal. The first question we have to decide is whether when the two sisters Viyamma (the first defendant) and the deceased Peramma divided their women's estate, they did so merely with a view to convenient enjoyment retaining the right of the survivor to take the whole on the death of one of them or whether such right of survivorship was expressly excluded by agreement between the parties. It is not denied that it was open to the sisters to do either, in a manner binding between themselves. The question is one of fact and the learned Subordinate Judge has held that the right of survivorship was expressly excluded.

The properties originally belonged to one Perayya. He died without male issue and he had no co-parceners. His estate, therefore, passed to his widow Rajamma. She died 25 years ago and the estate then passed to Perayya's two daughters, Viyamma and Peramma, they taking a joint daughter's estate for life. It was these ladies that divided the estate. There is no partition deed but the division is admitted by all parties, the only dispute being whether the right of survivorship between themselves was retained or expressly given up. The Subordinate Judge has accepted the evidence for the defence on the point, in preference to the contrary evidence for the plaintiff. The documents he has referred to though not very conclusive, support the defence version so far as they go, as pointed out by him. No reason has been shown for us to take a different view of the evidence in appeal. It was, however, elicited from one of the witnesses that two lists were drawn up for the properties as divided and mention was made in them of the right of survivorship having been extinguished. Now it is contended that these lists not being produced, oral evidence cannot be allowed in proof of the transaction. The partition and the arrangement to extinguish the right of survivorship were both made orally and the list, if any, will only be one of the pieces of evidence in favour of it. Non-production of it may go to the weight of the evidence but does not prevent other evidence being given. It is not a case to which s. 92 of the Evidence Act applies. We accept the finding of the Subordinate Judge that the right of survivorship was expressly extinguished when the partition was made.

The second question raised is one of law. The plaintiff claims the suit properties through the 2nd defendant who is the nearest reversioner to Perayya, to whom the surviving daughter Viyamma has executed a deed of surrender Ex. XVI. He contends that by virtue of the surrender the 2nd defendant has become entitled to the whole of the Perayya's estate and that he is not bound by any arrangement made between the two sisters. This is a question on which

we are concluded by authority in this Court and unless we differ from it and refer the question to the Full Bench, we are bound to follow it. The ruling in *Subamma* v. *Subrahmanyam* (1) is exactly in point and lays down that when a reversioner obtains the estate through the surrender by the life-estate-holder of her estate, he is not entitled to question her alienations during her lifetime but must wait till her death to do so. It was urged for the appellant that this case is no longer good law after the ruling of the Full Bench in *Vaidyanatha Sastri* v. *Savithri Ammal* (2) which held that in the case of an adoption by a widow the right of the adopted son to question the widow's alienations accrued at once, overruling the decision in *Sreeramulu* v. *Kristamma* (3) which was relied on as an authority in *Subbamma* v. *Subrahmanyam* (1). The ruling in *Vaidanatha Sastri* v. *Savithri Ammal* (2) cannot, however, be taken as shaking the authority of the *Subbamma* v. *Subrahmanyam* (1) when we find two of the learned Judges on the Full Bench, the late Chief Justice Wallis and Kumaraswami Sastri, J., expressly referring to and distinguishing it. The Chief Justice had affirmed the same proposition in *Singaram Chettiar* v. *Kalyanasundaram Pillai* (4). A ruling to the contrary in C. M. A. No. 322 of 1919 was cited to us in an unreported decision of Oldfield and Seshagiri Iyer, JJ., where it was held that a reversioner claiming by surrender from a widow was in the same position as a person adopted by a widow and could at once challenge the widow's alienations, but this case besides being unreported, was not followed by Wallis, C. J., and Oldfield, J., himself, when it was cited to them in the case reported as *Raja Gopala Surya Rao* v. *Suryanarayana Jagapathi* (5) Oldfield, J., practically went back on his former judgment. In this state of authority I am not prepared to differ from the ruling in *Subbamma* v. *Subrahmanyam* (1) above referred to, on a supposed analogy between the case of a son adopted by a widow and reversioner claiming by virtue of a surrender by the widow on the ground that both of them claim from the last male holder and not from the widows.

As Kumaraswami Sastri, J., points out in *Vidyanatha Sastri* v. *Savithri Ammal* (2), the Courts are justified in recognising the right of surrender by the widow, to impose conditions on her power based on considerations of justice, equity and good conscience. Whereas in this case the surrender was effected for the purpose of defeating alienees for consideration, the rule that till the surrenderer dies, her acts cannot be questioned by the surrenderee seems to be a just and equitable rule. I would, therefore, follow the ruling in *Subbamma* v. *Subrahmanyam* (1) and hold that the plaintiff is not entitled by virtue of the surrender deed, Ex. XVI, to question the alienations of Peramma in favour of the defendants till Viyamma dies and the joint life-estate comes to an end.

In this view, it is not necessary to consider whether the surrender is an invalid transaction in the circumstances of this case. Both the points taken by the appellant failing the appeal must be dismissed with costs of respondents Nos. 5 to 20.

V. N. V.
N. H. *Appeal dismissed.*

(1) 32 Ind. Cas. 813; 39 M. 1035; 30 M. L. J. 260.
(2) 42 Ind. Cas. 245; 41 M. 75; 33 M. L. J. 387; (1917) M. W. N. 653; 22 M. L. T. 275; 6 L. W. 542.
(3) 26 M. 143; 12 M. L. J. 197.
(4) 26 Ind. Cas. 1; (1914) M. W. N. 735; 1 L. W. 687.
(5) 64 Ind. Cas. 488; 41 M. L. J. 208 at p. 211; 14 L. W. 29; (1921) M. W. N. 431.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 317 OF 1924.
July 29, 1925.
Present:—Mr. Findlay, Officiating J. C.
RAGHOBA—PLAINTIFF—APPLICANT
versus
GOPI AND ANOTHER—DEFENDANTS—NON-APPLICANTS.

Limitation Act (IX of 1908), s. 19—Partial payment of debt—Endorsement signed by debtor on bond—Limitation, whether extended—Acknowledgment by agent.

Partial payment of a debt due under a bond accompanied by an endorsement signed by the debtor amounts to an acknowledgment of the liability under the bond and gives a fresh starting point for limitation under s. 19 of the Limitation Act.

Pamulapati Venkatakrishniah v. *Kondamudi Subbarayudu*, 36 Ind. Cas. 240; 40 M. 698; 3 L. W. 576; (1916) 2 M. W. N. 256 and *Mohan Lal* v. *Ganesh Ram*, 48 Ind. Cas. 724, relied on.

An acknowledgment by an agent cannot extend the period of limitation unless he is authorized by his principal to make it on his behalf.

Application for revision of a decree of the Small Cause Court, Balaghat, dated the 3rd September 1924, in Civil Suit No. 697 of 1924.

Mr. *M. D. Khandekar*, for the Applicant.

Messrs. *Atmaram Bhagwant* and *S. A. Gadgay*, for the Non-Applicants.

ORDER.—In this order I dispose of Civil Revision Cases Nos. 317 and 320 by the same applicant Raghoba against the same non-applicants Gopi and *Musammat* Kamabai. The grounds of revision are practically identical in either case. On behalf of the plaintiff-applicant it is urged that the theory that the payments of Rs. 55 and Rs. 80 respectively were made on the two bonds and endorsed on the backs thereof, towards interest as such, was given up. What has been urged instead is that these endorsements amounted to fresh acknowledgments of liability, and therefore, gave a fresh standing point for limitation within the meaning of s. 19 of the Indian Limitation Act. In each case the endorsement was made in the handwriting of the plaintiff's *Mukhtyar* and defendant No. 1's thumb-impression was taken underneath. The absurdity of the previous allegation that the payments were made towards interest as such is patent from the fact that when the payment of Rs. 80 was made, only a lesser amount was then due for interest in the case of the bond in Suit No. 697 of 1924.

As regards the contention that the endorsement in question combined with the fact of the two payments gave a fresh starting point under s. 19 of the Limitation Act, reliance has been placed on the decision in *Pamulapati Venkatakrishniah* v. *Kondamudi Subbarayudu* (1). The facts of that case are very similar, apart from the fact that two payments on one day had therein been made by the debtor. In Second Appeal No. 118 of 1918 [*Mohan Lal* v. *Ganesh Ram* (2)], decided on 30th September 1918, Drake-Brockman, J. C., dealt with an analogous question and followed the Madras case quoted. The real point for decision in the present case is whether the acknowledgments of these payments authenticated by the thumb-impression of defendant No. 1 amount, either in express terms or by reasonable construction, to an admission that the debt or part thereof is due from him in either case. The payments made have not fully satisfied either bond, and, had this been the intention of the parties, a specific reference thereto would undoubtedly have appeared in the endorsement.

The only reasonable implication to be put on the endorsement is that the defendant Gopi by affixing his thumb-impression thereto admitted by implication that the balance due under each bond was still owing by him. As against Gopi (defendant No. 1), therefore, the suit was, in my opinion, wrongly dismissed.

In the case of defendant No. 2, even although Gopi is her husband, there is no proof that he had authority to make the acknowledgment on her behalf and I am of opinion that as against *Musammat* Kamabai no fresh starting point of limitation can arise in the circumstances of the present case.

It is clear, however, that the rate of Rs. 3 imposed by the bonds in case of default was a penal one and it seems to me that the original rate of Rs. 2 per mensem gives the plaintiff all the reasonable compensation he is entitled to in the circumstances of the case. The lower Court's judgment is, therefor, reversed in so far as the dismissal of the suit against Gopi is concerned, and in the case of Civil Revision No. 317 of 1924 a decree for Rs. 122-11-9 will issue. The non-applicant Gopi will bear the plaintiff's costs in the lower Court in proportion to the sum now decreed. A corresponding decree for Rs. 147-10-8 will also issue in Civil Revision No. 320 with a corresponding order as to costs. The non-applicant No. 1 will bear the applicant's costs in these revision applications in proportion to the amount of the decrees now passed.

G. R. D. *Order accordingly.*

N. H.

(1) 36 Ind. Cas. 240; 40 M. 698, 3 L. W. 576; (1916) 2 M. W. N. 256.

(2) 48 Ind. Cas. 724.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 46 OF 1924.

February 6, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice and Mr. Justice Krishnan.

B. R. SAWMY RAO—APPELLANT

versus

F. H. WILSON, THE OFFICIAL ASSIGNEE OF MADRAS—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Mortgage—Separate provisions for payment of interest

and principal - Suit to recover interest—No demand for principal—Insolvency of mortgagor—Application by Official Assignee to declare mortgage inoperative, whether maintainable.

Where there is a provision in a mortgage-deed for the payment of interest different from that providing for the payment of the principal, making two independent covenants, and a personal action is brought on the covenant for the payment of interest and a decree is obtained, that would not prevent a subsequent suit being brought for the recovery of the principal. To such a case O. II, r. 2 of the C. P. C. has no application. It can apply only if at the date of suit both the principal and interest have become payable. [p. 406, cols. 1 & 2.]

Kishen Narain v. *Pal Mal*, 72 Ind. Cas. 187; 50 I. A. 115: 4 L. 32; (1922) A. I. R. (P. C.) 412; 44 M. L. J. 123; 25 Bom. L. R. 220; 32 M. L. T. 41; 27 C. W. N. 802; 18 L. W. 341; 50 C. 126; 6 P. W. R. 1923; 9 O. A. & L. R. 488 (P. C.) and *Muhammad Hafiz* v. *Muhammad Zakariya*, 65 Ind. Cas. 79; 44 A. 121; 49 I. A. 9; 20 A. L. J. 17; 26 C. W. N. 297; (1922) M. W. N. 89; 35 C. L. J. 126; 42 M. L. J. 248; 15 L. W. 377; 24 Bom. L. R. 341; 30 M. L. T. 224; 3 P. L. T. 279; 1 P. W. R. 1922; (1922) A. I. R. (P. C.) 23 (P. C.), followed.

Under a mortgage-deed, interest was payable every month. The deed also provided for payment of principal and interest whenever demanded, and in default the mortgagee was entitled to proceed against the mortgaged property. A suit was brought in the Small Cause Court for interest due and a decree was obtained. At that time no demand had been made for payment of principal. The mortgagor subsequently became an insolvent, and an application was made by the Official Assignee for a declaration that the mortgage had by virtue of O. II, r. 2 of the C. P. C. become inoperative:

Held, (1) that the principal not having become payable on the date of the suit, O. II, r. 2 had no application to the case; [p. 406, col. 1.]

(2) that the bar arising out of O. II, r. 2 applied only to a second suit by the mortgagee and did not entitle the Official Assignee to make an application in the insolvency proceedings for a declaration that the mortgage had become inoperative. [*ibid.*]

Appeal against an order of Mr. Justice Waller, dated the 15th April 1924, passed in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court, in I. P. No. 195 of 1923.

Messrs. *Grant* and *Greatorex*, for the Appellant.

Mr. *V. Varadarajah Mudaliar*, for the Respendent.

JUDGMENT.

Coutts-Trotter, C. J.—This raises a matter of some little interest. The learned Judge came to the conclusion to which he felt himself constrained to come with obvious and natural reluctance. I confess that I do not see any particular difficulty about this case when the documents are looked at carefully.

The case gives rise to a question as to the construction of O. II, r. 2, an enactment peculiar to Indian Law and an enactment the supposed benefit of which I have never been able even to guess at or to make the slightest suggestion of what benefit it would be to any body at all. The effect of it is said to be that the mortgagee in this suit having sued for an instalment of unpaid interest on his mortgage was to be held hereafter debarred from recovering the principal. That would not carry the respondent all the way because what he has done here is not to raise this matter by way of defence to a suit on the mortgage or any thing of the kind but to go boldly to the Court of Insolvency and ask for a declaration that the mortgage is dead, cancelled. In any event whatever be the true effect of O. II, r. 2, he cannot go to that length and if it were necessary to decide on that ground alone, I should be prepared to allow this appeal on the ground that the learned Judge had no jurisdiction, on an application of the Official Assignee, to make any such declaration. However, I think it can be decided on a better ground than that.

The line of demarcation between the two clauses of cases that arise is clearly drawn by the judgment of the Privy Council in the case of *Kishen Narain* v. *Palmal* (1) and what the Board says is this; "If the plaint originally brought came to be properly interpreted as claiming only a personal relief in respect of the unpaid interest, the appellant's case would be on surer ground"; and further "it does not appear to their Lordships that if the mortgage had provided, as mortgages always do in this country, for an independent obligation to pay the principal and the interest, that in a suit brought to obtain a personal judgment in respect of the interest alone, the rule would have prevented a subsequent claim for payment of the principal." That is the guiding principle that the Board has laid down for us. Now what of this instrument? It seems to me perfectly clear that there is an independent covenant for the payment of the interest and that the principal actually becomes payable not on failure to pay a current instalment of interest, but on failure to comply with the demand to pay the interest and principal due together. There is no proviso here which I quite agree might make all

(1) 72 Ind. Cas. 187; 50 I. A. 115; 4 L. 32; (1922) A. I. R. (P. C.) 412; 44 M. L. J. 123; 25 Bom. L. R. 220; 32 M. L. T. 41; 27 C. W. N. 802; 18 L. W. 341; 50 C. 126; 6 P. W. R. 1923, 9 O. & A. L. R. 498 (P. C.).

the difference, that the failure to pay an instalment of interest shall make the whole principal amount due. I take it though it is not necessary to decide the point, that in such a case very likely O. II, r. 2, might apply. But, as I say, here there is an independent covenant to pay interest and it is on that I have scrutinised the pleading in the Small Cause Court suit very carefully and it is quite obvious that the suit was brought on a personal covenant and a personal covenant alone to pay interest and the plaint carefully abstains from asking for any sort of charge upon or other remedy against the mortgaged property; and the defence was an unsuccessful attempt to force the plaintiff into the position of saying that he was claiming in a matter which involved an adjudication as to immoveable property—an attempt which properly failed.

Then the next thing—and it is apparently the ground on which the learned Judge went in making this order—is that the letter of the 28th of December 1921, which demanded the interest was of itself also a demand for the principal. That argument is one that I fail to appreciate. It is no use setting out the letter; there is an unquestioned demand for the interest and what follows is a warning that, if that demand is not complied with, the Vakil will be instructed to recover not only the interest but the principal. How a threat to make a demand can be construed as being in itself a demand, I do not understand and I am free to say on that part of Mr. Aingar's argument that I have been totally unable to follow it.

On these grounds I think that the learned Judge's order is wrong and must be reversed with costs here and below on the Original Side scale.

Krishnan, J.—This is an appeal against an order passed by Waller, J., sitting on the Insolvency Court, on an application made by the Official Assignee to have a mortgage in favour of the appellant bofore us, declared invalid.

The learned Judge has passed an order in those terms. The reason given for the order is this: The mortgagee, it seems brought a suit in the Small Cause Court, Madras, for the interest due, under the mortgage bond, for some months. It is claimed that because of that circumstance, the mortgagee's right to sue for the principal is barred by O. II, r. 2 of the C. P. C. and, therefore, the Official Assignee is entitled to be given a declaration that the mortgage is defunct. To start with, there is the difficulty in the way of this application that O. II, r. 2, does not apply unless the mortgagee brings a suit to enforce his mortgage as the rule merely bars a second suit The question will arise only in a second suit brought by the mortgagee and not in an application brought by the Official Assignee in the Insolvency Court as representing the insolvent mortgagor. In the second place, if we look at the mortgage bond, it clearly contains separate covenants as regards payment of interest and of principal. It provides that the mortgagors "shall pay the interest of the said debt, every month, within the 5th of that month, commencing from the 5th of the current month, May 1921." It then goes on to provide that the mortgagors and their heirs shall pay the principal amount, Rs. 5,000 and the interest due therefore, to the mortgagee or his heirs whenever demanded. It is quite clear that here we have two independent covenants; and it leaves it open to the mortgagee to call in his mortgage-money whenever he likes or to leave it under mortgage with the mortgagors; but the right to get the interest every month is specifically provided for and requires no demand whatsoever, for interest is payable independently of demand on the 5th of every month. The sentence that follows these two clauses in this mortgage-deed is this; "In default of our paying so, you and your heirs shall legally proceed upon us and on our heirs and on the mortgaged properties mentioned in the Sch. A below and on our other properties and shall realise the amount." It is contended that the words "In default of our paying so" should be taken to mean "in default of our paying either the interest in the first clause or the principal amount and interest as in the second clause on demand. I am unable to agree with this contention. I think the words "in default of our paying so" clearly has reference only to the second clause, namely, on the failure to pay the amount of the principal and interest after demand. No demand was necessary to bring a suit for the interest. A suit for interest was brought by the mortgagee in the Small Cause Court not against the property itself but to get a personal decree against the mortgagors. The fact that he

brought that suit before demanding the principal cannot prevent a subsequent suit being brought for the principal amount after demand. If, as held by Waller, J., a demand had already been made for the principal money before the suit in the Small Cause Court had been brought and the principal amount and interest had both become payable by the time, O. II, r. 2 would apply to the second suit by the mortgagee; but that contention fails in this case because I agree with the learned Chief Justice that Ex. B does not amount to a demand for the payment of the principal amount at all. It is as explained by his Lordship only a threat that proceedings would be taken through a Vakil for the purpose of recovering the principal as well if the interest is not paid; the Vakil if he is instructed will have to take the necessary steps under the bond to realise the money and the first step which he would have to take would be to make the necessary demand under the deed; so that with all respect to Waller, J., Ex. B cannot be construed, in my opinion, as tantamount to a demand for the principal. In this view at the date when the Small Cause Suit was brought the principal amount of the mortgage money had not become payable, the mortgagee not having exercised his option of calling it in. Order II, r. 2, then would not apply even in the case of a second suit on the mortgage.

The point whether O. XXXIV, r. 14, has not got a bearing on this question has not been argued and, therefore, I do not wish to express any opinion on that point.

The law as to the applicability of O. II, r. 2, has been laid down by the Privy Council in the cases referred to before us, namely, *Kishen Narain* v. *Pal Mal* (1) and *Muhammad Hafiz* v. *Muhammad Zakariya* (2). In the latter case, as Lord Buckmaster explained where there is a provision in the mortgage-deed for the payment of interest different from that as to the payment of the principal, making two independent covenants, if a personal action is brought on the covenant for the payment of interest and a decree is obtained, that would not prevent a subsequent suit being brought for the mortgage-money and O. II, r. 2 would have no application. That is exactly the case here. Order II, r. 2, will apply only if at the date of suit both the principal and interest had become payable.

In these circumstances, I agree with the learned Chief Justice that this appeal must be allowed with costs as against the Official Assignee.

V. N. V. *Appeal allowed.*

Z. K.

(2) 65 Ind. Cas. 79; 44 A. 121; 49 I. A. 9; 20 A L. J. 17; 26 C. W. N. 297; (1922) M. W. N. 89; 35 C. L. J. 126; 42 M. L. J. 248; 15 L. W. 377; 24 Bom. L. R. 341; 30 M. L. T. 224; 3 P. L. T. 279; 1 P. W. R. 1922; (1922) A. I. R. (P. C.) 23 (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 22 OF 1924.

June 30, 1925.

Present:—Mr. Kennedy, J. C., and Dr. DeSouza, A. J. C.

GANGARAM GHANSHAMDAS—APPELLANT

versus

GIRDHARIMAL CHETANMAL—RESPONDENT.

Limitation Act (IX of 1908), s. 12—Time requisite for obtaining copies—Due diligence—Sum not legally payable, delay in payment of, effect of.

In calculating the time requisite for obtaining a copy of the judgment or decree appealed against under s. 12 of the Limitation Act the Court has to consider whether the appellant has acted with due diligence, but by due diligence it should not be understood that a party should in order to obtain the necessaay copies be ready and willing to pay any sums which are not legally leviable from him. [p. 407, col. 2.]

Appeal from the judgment and decree of the Joint Judge, Sukkur, dated the 9th June 1924.

Mr. *Kundanmal Dayaram*, for the Appellant.

Mr. *Tolasing K. Advani*, for the Respondent.

JUDGMENT.—In this case a curious point of limitation arises as to whether the appeal was filed in time in the District Court. The District Court held that the appeal was time-barred and dismissed the appeal. It appears that the Trial Court delivered its judgment on the 10th May 1923, and that the appellant who was the original plaintiff applied for a copy of the judgment and the decree on the 6th June 1923. A copy of the judgment was delivered on the 9th June 1923, but a copy of the decree was not prepared in the office till the 15th June 1923. The reason for the delay was that the defendant had failed to

pay the costs of making true copies of certain exhibits which had been produced by him so that the record could not be completed in time and eventually the plaintiff on being pressed by the clerk was made to pay the costs of copying the exhibits, as otherwise the clerk refused to prepare the decree. The amount of costs was paid by the plaintiff on the 12th June. The decree was prepared on the 15th June and on the same day a copy of it was made ready for delivery to the plaintiff. It appears that a deficit of six-annas was still owing from the plaintiff and the copy of the decree though it was ready on the 15th June was not delivered to him till the 19th June, when the plaintiff deposited the deficit of six annas.

The learned Joint Judge considered that the plaintiff could claim exemption only up to the date when the copy of the decree was made ready, *viz.*, upto the 15th June and not upto the date of its actual delivery to him, *i.e.*, 19th June. He held that he (plaintiff) was entitled to claim exemption for the period between 7th June and 15th June 1923 as being the period requisite for obtaining copies of the judgment and the decree. On this basis of calculation he was of the opinion that the period for filing the appeal expired on the 18th June 1923, and as the Courts remained open, before vacation, till the 20th June 1923, he held that there was a delay of three days in filing the appeal, and that there was no reason to condone this delay.

The circumstances under which the plaintiff was compelled to pay the costs of preparing the copies of Exhibits filed by the defendents are not satisfactorily explained. It is difficult to say that the plaintiff was under a legal liability to pay these costs. The plaintiff had to pay them because unless they (the costs) were paid by somebody the clerk refused to prepare the decree. The plaintiff's necesssity was the clerk's opportunity. The plaintiff apparently paid a certain sum on account towards these costs on the 12th and failed to pay the balance of six-annas till the 19th June. The learned Joint Judge has held that the plaintiff had failed to exercise due diligence because he did not pay all the costs on the 15th June, and this argument is re-inforced by Mr. Tolasing on behalf of the respondent who argued that the plaintiff, if he thought he was not liable, should have paid under protest, or at any rate brought the matter to the notice of the Judge in Chambers. But we are unable to say that so long as the legal liability of the plaintiff to pay costs of preparing copies of the defendant's exhibits, is not established there were any laches on his part because he failed to pay these costs. No doubt the learned Judge points out that the plaintiff must show that he has acted with due diligence, but by due diligence it should not be understood that a party should be ready and willing to pay any sums which are not legally leviable from him.

It is not clear from the record on what account the deficit of six-annas was due. But as the learned Judge has proceeded on the assumption that the deficit was in respect of costs of preparing copies of exhibits we think that the view that there was want of diligence on the part of the plaintiff cannot be sustained.

We, therefore, hold that the delay in filing the appeal in the District Court should be condoned and we excuse the delay. We reverse the decree of the First Appellate Court on the preliminary point of limitation and remand the appeal for disposal on the merits. The costs will abide the result.

P. B. A. *Appeal allowed.*
Z. K

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 258 OF 1923.

June 23, 1925.

Present :—Justice Sir Ewart Greaves, KT, and Mr. Justice B. B. Ghose.

NRIPATI NATH BHATTACHARJEE—JUDGMENT-DEBTOR—APPELLANT

versus

JATINDRA KUMAR DAS—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 66, 90—Execution of decree—Sale-proclamation, non-publication of—Irregularity—Waiver.

Non-publication of the sale-proclamation is not an illegality but is an irregularity which can be waived by the judgment-debtor. [p. 408, col. 2.]

In order to be bound by waiver, a person must be aware of what exactly he is waiving and what right he is giving up. [*ibid.*]

Appeal against an order of the Subordinate Judge, Fifth Court, Dacca, dated the 4th April 1923.

Mr. *Sarat Chandra Roy Chowdhury* and Babu *Girija Mohan Sanyal*, for the Appellant.

Babu *Rajendra Chandra Guha*, for the Respondent.

JUDGMENT.

Greaves, J.—This is an appeal by the judgment-debtor No. 4 from an order of the Fifth Subordinate Judge of Dacca, dated the 4th April 1923. The application before the learned Subordinate Judge was to set aside the sale of the properties of the judgment-debtor on the ground that there had been irregularity in the sale and that no sale proclamation was issued in the case. This is how the matter was opened to us, as the argument proceeded it was urged that the failure to publish the sale-proclamation was not merely an irregularity but an illegality and that the sale was, therefore, vitiated. The debt due to the decree-holder is Rs. 7,000 and odd and it is said that the properties of the judgment-debtor which were sold for just over Rs. 1,000 were in fact worth upwards of Rs. 27,000.

Now, the facts are set out quite clearly and succinctly in the judgment of the learned Subordinate Judge. He states that in January, 1922, the decree-holder applied for execution of the decree and that after the service of the notice the appellant filed an objection in the month of April 1922 to the sale. Then it appears that in May 1922, he gave up a portion of his objection and two days later, namely, on the 8th May, the objection case was dismissed for non-prosecution. It further appears that on that day, namely, the 8th May, the appellant before us and other judgment-debtor who has not appealed, asked for a long time to make a payment and waived fresh sale-proclamation and also all irregularities in the previous sale-proclamation. Thereupon the learned Judge gave them three months' time in which to discharge their indebtedness to the decree-holder and he fixed the 8th August 1922 as the date of sale. It appears that he also indicated at that time that if some substantial payment was made on account of the debt he would be prepared to favourably consider any further application for extension of time. No payment, however, was made and the sale took place on the 12th August the properties being purchased by the decree-holder on that date for Rs. 1,065. It appears that when the application to which this appeal relates was made to the learned Subordinate Judge the decree-holder expressed his willingness even then to give up the properties if he got his money and that he was prepared, moreover, to give time to the judgment-debtor to make the necessary payment in discharge of the decree. Even this concession, which was offered by the decree holder, apparently, was not acceptable to the appellant and he relied on what he considered his strict right, namely, to have the sale set aside on the ground that there was no sale-proclamation.

Now, it seems to us that the learned Subordinate Judge has quite rightly held that on the failure to publish the sale-proclamation there was an irregularity that could be waived by the judgment-debtor and that it has been waived in the present case. We have, therefore, to consider in this appeal whether the order of the learned Subordinate Judge of Dacca in refusing to set aside the sale is a wrong order.

Now, there was a return by the peon of publication of the sale-proclamation but it appears from the evidence given on behalf of the appellant that there was, in fact, no service of the sale-proclamation. This is spoken to by no less than 5 witnesses who gave evidence on behalf of the judgment-debtor, namely, witness No. 2, witness No. 3, witness No. 4, witness No. 5, and witness No. 6 who state that no sale-proclamation was served on the properties sold. No evidence was given on behalf of the decree-holder to contradict this and I think, therefore, we must accept that there was, in fact, no publication of the sale-proclamation. Now, is this an illegality as is suggested on behalf of the appellant or is it merely an irregularity? I feel myself no doubt that it is not an illegality but it is an irregularity which can be waived by the judgment-debtor. The question, therefore, is, has there been a waiver by the judgment-debtor in the present case of this irregularity? It is suggested that this is not so and that the judgment-debtor did not know at the time he waived the irregularity that there had been, in fact, no service and no publication of the sale-proclamation. Now, there is no doubt that to waive anything, you must be aware of what you are waiving and you cannot be held bound by any waiver unless you are aware of what exactly you are waiving and what rights you are giving up. I think, there is no doubt in the present case that at the time the appellant waived any irregularity in the service of the sale-proclamation, he was fully aware of the facts of the case. This being so, it seems to me that the learned Subordinate Judge was perfectly

correct in holding that he could not interfere having regard to the fact that there had been waiver by the judgment-debtor of any irregularity that might have taken place in connection with the sale-proclamation. Then it is suggested that there has been fraud and that there could be no waiver of fraud. There is no doubt, I think, that if facts were concealed by the decree-holder at the time of the waiver the judgment-debtor would not be bound by any waiver if he was ignorant of the fact owing to fraud practised by the decree-holder. But I confess that I have listened and listened in vain to discover what was the fraud upon which the appellant relies. The nearest approach that was suggested was the so-called false statement in the return by the peon with regard to the service and publication of the sale proclamation. But there is no proof that this was instigated by the decree-holder so it cannot be deemed evidence of fraud on behalf by the decree-holder. Then it is suggested that the entries with regard to the value of the properties must have been false to the knowledge of the decree-holder and that this is a fraud practised by him on the Court and on the judgment-debtor. It does not seem to me that this is so even if the properties were under-valued. I do not think this is a fraudulent action on behalf of the decree-holder so as to entitle the applicant in the circumstances to the order which he seeks, namely, to set aside the sale.

It may be very unfortunate for the judgment-debtor that the properties which he alleges to be worth upwards of Rs. 27,000 have been sold at just over Rs. 1,000. But after all, it seems to me, that he has had abundant opportunity to produce the money and to pay to decree-holder had he desired to do so. The three months given him from April 1922 until the sale of the 12th August of that year do not seem to have been utilised by the judgment-debtor in any attempt to pay off the debt or to pay any sum whatsoever on account thereof. Consequently it seems to me that he must be liable for consequence of his own act and if as I think there is no fraud and if as I think there is no illegality we should not be justified in the circumstances of the case in interfering with the order of the learned Subordinate Judge and setting aside the sale.

The result is that the appeal fails and is dismissed with costs. Hearing-fee 3 gold *mohurs*.

The record may be sent down at once.

Ghose, J.—I agree.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 19 OF 1924.

June 30, 1925.

Present :—Mr. Kennedy, J. C., and Dr. De Souza, A. J. C.

HYDERABAD MUNICIPALITY—APPELLANT

versus

HAKUMAL AND OTHERS—RESPONDENTS.

Municipal tax, non-collection of—Abrogation of tax.

Where there is a valid rule duly framed by a Municipality and duly sanctioned for the levy of a certain tax, there can be no tacit or inferential abrogation of the tax, *e.g.*, by non-collection of the tax for a length of time, and so long as the rule is there it may be enforced at any time without further ceremony or without obtaining new sanction. [p. 410, col. 2.]

Appeal from the judgment and decree of the District Judge, Hyderabad (Sind), dated the 18th March 1924.

Captain *C. C. Lewis*, for the Appellants.

Mr. *Motiram Ramchand*, for the Respondents.

JUDGMENT.—We find it somewhat difficult to appreciate the reasons why the Court of the first instance and the Appellate Court decided this suit in the manner in which they have done. The question stripped of unnecessary detail is a very simple one. The Hyderabad Municipality levies octroi from persons residing within Municipal limits and has issued rules to enable it to do so. These rules for the purposes of the present litigation must be supposed to be valid and to have received sufficient sanction. One of these rules is r. 12 which requires all addressees of parcels liable to octroi duty coming by post *inter alia* to pay the octroi duty on such articles. The present plaintiffs were called upon to pay octroi duty upon certain articles which they had received by post and they brought a suit to have it declared that the demand of the Municipality is *ultra vires* and for an injunction directing the Municipality not to levy the octroi on postal articles. Both Courts, namely, the First Class Sub-Judge of Hyderabad

and the District Judge granted a declaration to the plaintiffs and gave them the injunction prayed for. And the Municipality now comes here in appeal.

As we have said there is apparently a valid rule duly framed by the Municipality and duly sanctioned requiring certain persons to pay octroi on postal articles. If that rule be still in force and has not been abrogated, it is impossible for persons who receive postal articles legally to refuse to pay such octroi on them as may be due under the octori rules. But the allegation of the plaintiffs is that there has been an abrogation of that rule. In vain we invited the plaintiffs to point out any resolution of the Municipality formally abrogating the liability of the inhabitants to pay octroi on postal articles. But they say that there has been a tacit or inferential abrogation. We are not at all clear what is meant by a tacit and inferential abrogation of a tax, or how it is possible for those who are responsible for the financial management of the Municipality to abrogate a tax tacitly and inferentially seeing that they cannot impose one tacitly and inferentially. But we suppose the plea is that owing to the conduct of the Municipality in failing to collect this tax for some time, it would not be equitable to allow them now to collect it.

A short history, therefore, of the trouble may be given. It appears that for a long time there was a custom by which postal articles entering Hyderabad were examined and assessed whilst still in the custody of the Post Office and that the addressees were expected to pay the octroi before taking delivery. Now this was apparently used either accidentally or intentionally as a means of giving trouble to the Post Office, and Government, therefore, said if the Municipalities persist in examining articles at the Post Office (as they were in strict law entitled to do, because it was the agents of the Post Master General who actually brought the articles within the Municipal limits), then in that case the Government would prohibit levying of octroi on postal articles under the special powers given to Government by the Municipal Act to rescind obnoxious taxes. Alarmed at this threat, the Municipality ceased to require that the goods should be examined at the Post Office and neglected to put into force the provisions of para. 12 and the rules thereunder. The result was that for some months no octroi was levied on postal articles. As may reasonably be supposed the result of this was that all persons living inside Municipal limits who wished to import small and valuable articles otherwise subject to octroi imported them through the Post Office thus escaping octroi. Thereupon the Municipality be thought themselves of r. 12 and proceeded to enforce it. From this short narration, it would seem that the Municipality never tacitly or inferentially abrogated this tax. All that they did was to abandon a particular means of levying this tax. That is to say they gave up their right or claim to examine the articles at the Post Office. But the rate-payer was still bound under the r. 12 himself to go and make a declaration of the value of any postal article which arrived and was subject to octroi. It may probably be the case that the rate-payers did not do their duty and it may be that the Municipality was negligent in not compelling them so to do their duty. But there has been no abrogation of the rule calling upon the rate-payers to pay octroi and as the rule is there it may be enforced without further ceremony or without obtaining new sanction.

The fact that the officers of the Municipality sometimes in correspondence loosely called this disuse of a means of collection an abrogation of the tax in no way changes the legal position.

As regards the arguments for convenience we have nothing to say. It may be that the Municipality has been negligent in not enforcing the rule and it may be that they induced hopes to spring up in the minds of the rate-payers that they would be able wholly to avoid the payment of the octroi. And it is quite likely that the rule is unenforceable in practice and it may well penalize the honest while benefiting the dishonest, and it is likely that short notice given may cause some persons to suffer. But all these things are matters of policy. They are not matters which should concern ourselves and there is much to be said as far as the question of policy goes upon both sides. For instance while the extremely rapid introduction of the notification of the intentions of Municipality to enforce r. 12 may cause in some respect a hardship to some individuals yet it clearly appears necessary in the interests of the general public. Because if a long date had been given every body would have hastened to import articles subject to octroi

before the said date arrived. But as we have already said the question of convenience or policy of the Municipality is not a question for us. It is a matter between the Municipality on one side and the Government on the other or the Municipality on the one side and the electors on the other. All that we have to do is to ascertain whether the plaintiffs have succeeded in proving that they are no longer bound by the provisions of r. 12 and the ancillary rules of the Municipal bye laws. And we have no hesitation in saying that they are so bound and that, therefore, the Municipality cannot be prevented by us from collecting octroi on postal articles.

The result, therefore, is that we set aside the order of the lower Court and dismiss the suit with costs throughout.

Before the decree is issued the Municipality must pay deficit amount of Court-fee of Rs. 35.

P. B. A.
Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 201 OF 1923.
July 3, 1925.

Present:—Mr. Justice Cuming
and Mr. Justice Chakravarti.

Srijut MANOHAR DAS MAHANTA —PLAINTIFF—APPELLANT
versus
BROJENDRA LAL DAS AND OTHERS —DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), s. 54—Sale of estate—Allowance charged upon estate—Encumbrance, what is—Notice, question of, whether arises—Suit to recover allowance—Recurring liability—Limitation.

The fact that an allowance had been received out of certain lands for a long period from several successive owners is proof of the grant of a perpetual allowance charged on such lands. [p. 412, col. 2.]

Mana Vikrama v. *Karnavan Gopalan Nair*, 30 M. 203, followed.

An encumbrance is a right to or interest in land which may subsist in any third person to the diminution of the value of the land and not inconsistent with the passing of the fee in it by a deed of conveyance. [*ibid.*]

The period of limitation for a suit for the recovery of money where the liability to pay the money is recurring, arising every year, runs in respect of the amount of each yearly payment from the time when each yearly amount falls due. The mere failure to sue for the money for any particular year for more than twelve years would not bar a suit for the recovery of an amount which falls due subsequently. [p. 413, col. 1.]

In a sale under s. 54 of the Bengal Land Revenue Sales Act, no question of the notice of an encumbrance arises. [*ibid.*]

Appeal against a decree of the Subordinate Judge, dated the 26th August 1922, reversing that of the Munsif, First Court, Burdwan, dated the 16th December 1921.

Mr. *Sarat Chandra Bose*, Dr. *Dwarka Nath Mitra* and Babu *Narendra Krishna Bose*, for the Appellant.

Messrs. *Hara Prosad Chatterji* and *Samarendra Kumar Dutt*, Babus *Mrityunjoy Chatterji*, *Biraj Mohan Majumdar*, *Kali Kinkar Chakravarti*, *Shishir Kumar Banerji* and *Tarakeswar Nath Mitra*, for the Respondents.

JUDGMENT.

Cuming, J.—This appeal arises out of a suit for recovery of Rs. 615-2-5 *gandas* by the sale of *Mouza* Jonardanpur which belongs now to defendants Nos. 12 and 13. The case of the plaintiff who is the Mohanta of the *gadi* of Rajgunj Asthal is that this property is charged with a yearly payment to him of Rs. 129-1-1-1 *kant*. One Baidya Nath Tewari who was the predecessor of defendants Nos. 3 to 11 promised to pay Rs. 120 (*sicca*) per year to the then Mohanta Udhadhas for the expenses of the idols of the Asthal and as security for the payment of the said annual amount he first of all promised to make over 101 *bighas* of land. This land, however, not being demarcated it was not made over to the Mohanta. But subsequently a partition having taken place between Baidyanath Tewari and the heirs of his brother Gopinath Tewari under the partition deed it was provided that the predecessor of defendants Nos. 1 and 2 should pay to the Mohanta at the rate of Rs. 120 (*sicca*) per annum from the income of Jonardanpur. This amount was paid for many years to the Mohanta by the predecessors of defendants Nos. 1 and 2; and at one time the predecessor of the plaintiff obtained a decree for arrears of this money against the predecessor of defendants Nos. 1 and 2. At the time of the partition *Touzi* No. 21 within which was comprised the *Mouza* Jonardanpur was divided up amongst the co-sharers and separate accounts were opened. That portion of the *touzi* which contained Jonardanpur was sold in January 1907 for arrears of revenue and was purchased by defendants Nos. 12 and 13. The plaintiff contended that as only a share of the estate was sold it was sold with all the encumbrances and that this payment of the annual amount of Rs. 120 (*sicca*) was an

encumbrance and the purchasers were still liable to pay this amount. The case of defendants Nos. 12 and 13 with whom we are now concerned would seem to be that there was no charge on the property, that if so, this charge was not an encumbrance and lastly that they were purchasers without notice and, therefore, they were not liable to pay the money.

The first Court decreed the suit. He held that a valid charge was created on the property and that this charge was not extinguished by the revenue sale. In appeal the learned Subordinate Judge held that a valid charge was created on the property by Baidya Nath Tewari the predecessor of defendants Nos. 1 and 2. He, however, held that as the defendants were purchasers without notice that charge was not enforcible against Jonardanpur in their hand and he further found that the charge created on Jonardanpur by Ex. 4 was not an encumbrance within the meaning of s. 54 of the Revenue Sale Law. He further found that the plaintiff's case was barred by limitation, because he had not brought his case within 12 years from the date of the purchase at the revenue sale.

The plaintiff has appealed to this Court and he contends that the charge created by Baidya Nath Tewari is an encumbrance and that, therefore, as defendants Nos. 12 and 13 purchased at the revenue sale only a share in the estate under s. 54 of Act XI of 1859 they purchased it burdened with the charge, and secondly he argues that the suit is not barred by limitation. It is a suit to enforce payment of money charged on an immoveable property and the liability was a recurring one and limitation runs from each period for which the money was due. The respondents who are traversing both these points, however, contend that no charge whatever was created on the property. I shall deal with this point first of all, because obviously if no charge was created on the property by Baidya Nath Tewari then there is nothing more to be said and the plaintiff's suit must fail. Both the lower Courts have found that a valid charge was created on the property. No doubt there is no document which specifically charges Jonardanpur with the payment of this Rs. 120. The only document that we have is the Ex. 4 in which it is stated that in the place of the land which he (Baidya Nath Tewari) promised to the Mohanta Rs. 120 a year would be paid from the income of Jonardanpur. There i further evidence that this amount had been paid for more than 100 years. The lower Courts have, I think, rightly followed the principle laid down in the case of *Mana Vikrama* v. *Karnavan Gopalan Nair* (1). There it was laid down that the fact that an allowance had been received out of certain lands for a long period from several successive owners is proof of a grant of a perpetual allowance charged on such lands. This principle, I think, may be applied to the present case. This money was being paid for more than 100 years which the land must have obviously passed through a number of hands. I think the lower Courts were entitled to draw an inference from this that there was a charge, on Jonardanpur to pay to the Mohanta every year the sum of Rs. 120 (*sicca*).

I shall now deal with the two points raised by the appellant. The appellant contends that this charge is an encumbrance and that, therefore, the purchasers at the revenue sale purchased the property burdened with this encumbrance. As far as I can see a charge of this character is an encumbrance on the land. Bouvier in his Law Dictionary which is referred to in the case of *Prodyote Kumar Tagore* v. *Rakhal Chandra Sarkar* (2) defines an encumbrance as "any right to, or interest in, land which may subsist in a third person to the diminution of the value of the land and not inconsistent with the passing of the fee in it by a deed of conveyance". It seems to me that this definition exactly covers the present case. This liability to pay Rs. 120 every year to the Mohanta is an interest in the land which subsists in the Mohanta to the diminution of the value of the land. Obviously the land in suit is of less value on account of the burden. I have, therefore, no hesitation in coming to the finding that this charge on the land is an encumbrance and that Jonardanpur having been sold as part of the estate, under s. 54 the purchaser took the land burdened with the liability to pay Rs. 120 (*sicca*) to the present plaintiff.

With regard to the question of limitation that has been decided by the learned Subordinate Judge against the plaintiff he seems to hold that as the money has not been paid for more than 12 years the claim

(1) 30 M. 203.
(2) 5 Ind. Cas. 243; 14 C. W. N. 487; 11 C. L. J. 209; 37 C. 322.

is entirely barred. Incidentally I may point out that this question of limitation was not argued, nor pressed in the Court of first instance. The learned Subordinate Judge is clearly wrong in the finding he has come to on this point. The suit is a suit for recovery of money due and the liability to pay this money is a recurring liability arising every year and the period of limitation runs from the time when each yearly amount fell due. The mere failure to sue for the money for any particular year for more than 12 years would not bar a suit for the amount which subsequently became due.

A further point raised by the respondents is that they are purchasers without notice of the encumbrance. In a sale under s. 54 of Act XI of 1859 no question of notice arises.

The result, therefore, is that this appeal succeeds. The decree of the lower Appellate Court is set aside and that of the Court of first instance restored.

The appellant is entitled to his costs both here and in the lower Appellate Court from defendants Nos. 12 and 13. The other respondents will bear their own costs of this appeal. The order of the lower Appellate Court as to the costs of the defendants other than defendants Nos. 12 and 13 will remain unaltered.

Chakravarti, J.—I agree with my learned brother in the order which he proposes to make in this case. I shall add only a few words. Defendants Nos. 12 and 13 purchased at a revenue sale a separate account which amongst other properties consisted of a *mouza* called Jonardanpur. They purchased, therefore, the *Mouza* Jonardanpur and under the provisions of s. 54 of the Revenue Sale Law they took it with all the encumbrances existing upon the property. The plaintiff by this suit wants to enforce payment of a certain sum of money by the sale of *Mouza* Jonardanpur. Now, the sole and real question in this case is "was there any encumbrance upon Jonardanpur when it was sold for arrears of revenue?" An encumbrance is a burden upon a property and ordinarily it diminishes the value of the property in question. Now, it appears that the predecessor of defendants Nos. 1 to 11 dedicated 101 *bighas* of land within *Mouza* Jonardanpur in favour of a certain Thakur of which the present plaintiff and his predecessors were *shebaits* as Mohantas. It appears that it was not found possible to demarcate 101 *bighas* so dedicated. It further appears from partition deed executed between the owners of the original property that *Mouza* Jonardanpur was assigned by the partition to the predecessor of defendants Nos. 1 and 2 with a burden of paying Rs. 120 (*sicca*) out of the income of *Mouza* Jonardanpur in lieu of the said 101 *bighas* of land. Apparently it was with the assent of the predecessor of the plaintiff. As it appears that subsequent to the date of that partition that is 1808 the sum of money had been all along paid by the predecessor of defendants Nos. 1 and 2 and in fact by defendants Nos. 1 and 2 themselves and received by the plaintiff and his predecessors. It also appears that in the year 1867 a decree was obtained by the predecessor of the present plaintiff against the then holder of the *Mouza* Jonardanpur for the amount of Rs. 120 (*sicca*) then as Rs. 129 and odd in Company's coin. The charge mentioned in the partition deed was enforced by a decree of the Court. In the circumstances both the Courts have held that *Mouza* Jonardanpur was held by defendants Nos. 1 and 2 subject to the burden of payment of Rs. 129 and odd to the plaintiff.

It has been argued by the learned Advocate who appears for the respondents that no charge was created in favour of the Thakur of which the plaintiff is the *shebait*. I agree with my learned brother that it is clear that there was a liability created upon this property of *Mouza* Jonardanpur for the payment of Rs. 129 and odd in favour of the Thakur. In the days when this transaction took place no formal deed was necessary for the creation of a charge in favour of a Thakur in the way of *debutter*. From the circumstances which I have stated it is quite clear that the income of Jonardanpur to the extent of Rs. 120 (*sicca*) was assigned for the *sheba* and *puja* of the Thakur. Whoever was the holder of this *Mouza* Jonardanpur was liable to pay this sum out of the income of the *mouza*. In my opinion, therefore, there was a valid charge upon this property created in the manner stated above. This certainly was a burden upon the property when it was sold for arrears of revenue under s. 54 of Act XI of 1859; the defendants Nos. 12 and 13 when they purchased the property purchased it subject to that burden and, therefore, as minus the income which was dedicated in favour of the Thakur. With

these few words I agree with my learned brother in the judgment which he has just delivered.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 233 OF 1923.

January 7, 1925.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

LINGAM VEERA RAGHAVA RAO—PETITIONER—DEFENDANT—APPELLANT

versus

MALLAPRAGADA GURUNATHA RAO—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 58, 60—Execution of decree—Attachment—Claim proceedings—Scope of enquiry—Property liable under decree, effect of—Omission to implead party—Notice, want of, effect of—Appeal—Prejudice.

The enquiry under O. XXI, r. 58 of the C. P. C. is designed to cover cases where a third party comes forward with a claim to the property attached on the ground that it is not attachable as the property of the judgment-debtor or liable for the decree. [p. 415, col. 2.]

In such an enquiry the Court can release the property from attachment only if the conditions laid down in r. 60 of O. XXI of the C. P. C. are found. Where, however, a party admits that the property attached is the property of the judgment-debtor in his hands and liable for the decree, he cannot maintain an application under r. 58 of O. XXI. An attachment cannot be raised at the instance of such a person merely on the ground that the decree-holder by a mistake omitted his name from the execution petition where it is found that in prior proceedings he had been made a party and had admitted the liability of the property in his hands. [*ibid.*]

In considering whether the legal representative of a judgment-debtor is entitled to maintain an appeal under s. 47 of the C. P. C. against an order of the Executing Court merely on the ground of want of notice, the Court must consider whether that want of notice has in any way prejudiced the appellant. [*ibid.*]

Appeal against an order of the District Court, Ganjam, at Barhampore, in E. A. No. 166 of 1922, in E. P. No. 16 of 1920, in O. S. No. 6 of 1903.

Mr. *C. Sambasiva Rao*, for the Appellant.

Mr. *Y. Suryanarayana*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Court, Ganjam in a claim petition under O. XXI, r. 58. The circumstances briefly are as follows: The plaintiff sued in 1903 for the recovery of certain lands, the chief defendant being one Subba Rao, the second defendant in the case. He got a decree which was confirmed by the High Court on appeal in 1909. He got delivery in 1911 and in 1913 he filed E. P. No. 67 of 1913 for mesne profits due under the decree. Subba Rao died while the appeal was pending and his mother was brought on record as his legal representative. She died before the execution petition was filed. In the execution petition, the brothers of Subba Rao were added as legal representatives and the father of Subba Rao, the third defendant in the suit was also made a counter-petitioner. The assets of Subba Rao in their hands were attached. On 3rd November 1914, this execution petition was struck off the file with directions to the decree-holder to renew it after the appeal against the first Court's order was disposed of finally by the High Court. On 16th November 1915 the decree-holder put in another E. P. No 59 of 1915 against the same parties. In that execution petition the brothers claimed the property as the joint family property of themselves and Subba Rao. This claim was dismissed by the District Judge and by the High Court also on 23rd January 1920 and those decisions declared unequivocally that the property was Subba Rao's separate property. This execution petition was dismissed on 18th November 1921 as the decree-holder elected to proceed with a fresh execution petition which he had filed. This was E. P. No. 16 of 1920 put in on 28th April 1920 for the same relief against the same property, and the property was attached as the property of the judgment-debtor, Subba Rao, in the hands of the counter-petitioners on 25th July 1922. To this execution application, for some reason or other, the third defendant, the father of Subba Rao, was not made a party. Taking advantage of this, he put in a claim petition against the attachment on the ground that he had had no notice. The hearing of this claim petition went on *pari passu* with a petition by the decree-holder to add the third defendant as a party in the execution petition. The District Judge dismissed the claim petition and added the third defendant as a party to the execution petition on 23rd April 1923. Against the order dismissing the claim petition the present appeal is filed. He has not appealed or moved in revision against the order adding him as a party to the execution petition, although in the course of the hearing before us, he contended that that order was contrary to law because

the Court could not bring him on in the execution petition more than 12 years after the date of the decree. We are here, however, strictly confined to dealing with the appeal against the order on the claim petition.

Now, the High Court's judgment on 23rd January 1920 made it clear to both parties that the true legal representative of Subba Rao was his father the third defendant. The third defendant does not deny that the property attached is the estate of Subba Rao in his hands and that it is liable to be proceeded against in execution for the decree amount. His claim, therefore, is not that he holds this property in any right of his own, but only as the legal representative of the judgment-debtor, and the ground on which he put in his claim petition E. A. No. 166 of 1922, was not that the property was not that of the judgment-debtor and not liable for the decree, but the purely technical one that, the holder of the assets of the judgment-debtor, had not been brought on record in the execution petition and given notice therein.

The District Judge went elaborately into the case and dismissed the claim petition on two grounds, first, that the third defendant had already in a counter put in by him in E. P. No. 67 of 1913 on 18th December 1924 as guardian of two of the brothers of Subba Rao, defendants Nos. 36 and 37, declared that he had no right to the property, and was, therefore, estopped from now putting forward the contrary; and second, that the estate of Subba Rao was sufficiently represented in the execution petition for purposes of execution by the brothers of Subba Rao even though they were not the true legal representatives.

As to the first point, it was disclosed during the course of the argument before us that the District Judge was in error in supposing that the counter of defendants Nos. 36 and 37 was put in by the third defendant. They were then actually majors and put in their counter as such. The statement therein that their father has no right whatever to the property, therefore, was not made by the father at all and cannot form an estoppel against him.

As to the second point, the question whether the placing on record of a wrong legal representative will bind the estate in such execution proceedings was gone into to some extent before us but we stopped the argument on that point as it seemed to us unnecessary to go into it further for the decision of the case.

We are of opinion that the third defendant's present petition was unsustainable under O. XXI, r. 58. The enquiry under that Order is designed to cover cases where a third party comes forward with a claim to the property on the ground that it is not attachable as the property of the judgment-debtor or liable for the decree. Now, the third defendant has all along admitted and admits now that this property is the property of the judgment-debtor in his hands and liable for the decree. In such an enquiry the Court can release the property from attachment only if the conditions of r. 60 are found; and that is not the present case at all. The Court could not then in law under this enquiry allow the third defendant's claim.

The petition of claim, however, was put in also under s. 47 of the C. P. C., and possibly the question of want of notice might fall to be considered if it is taken to be a case under that section; but, in considering whether an appeal from an order under that section should be allowed merely on the ground of want of notice in the execution petition, the Court must consider whether that want of notice has in any way prejudiced the appellant. In the present case we cannot conceive how it has prejudiced the appellant, nor is he able to suggest to us of what benefit it would have been to him if he had got the notice. He admits that the property is liable for the decree and has admitted it all along. He has been a party to two previous execution proceedings in which the property, which was in his possession all along, was attached as the assets of Subba Rao and he raised no objections to that, because he obviously could not, and has never denied that these assets were liable for the decree. So far back as 23rd April 1923, he was added as a party to this execution petition and he has not yet sought to have that order set aside. He is obviously now endeavouring merely to take advantage of a mistake made by the decree-holder in omitting his name from the execution petition--a mistake which, in view of his attitude throughout, cannot in any way profit him, or get rid of the cardinal fact that the property attached is liable for the decree, unless the decree-holder's claim is barred by time. His own claim, therefore, is obviously unsustainable, for, even if he was on record in E. P. No. 16 of

1920 no plea which he could raise would avail him. The only object of putting him on record and giving him notice is to give him an opportunity to put forward any claim which he has in his own right to the property or any question of limitation barring the execution petition. As to the former he was in no better position than he had been when he was on record in the two previous execution petitions; and as to the latter, there is no question of E. P. No. 16 of 1920 being time-barred.

No question of the continuance of attachment in E. P. No. 67 of 1913 for the benefit of E P. No. 16 of 1920 need be raised here. In E. P. No. 16 of 1920 there was a valid fresh attachment on 25th July 1922 and E. P. No. 16 of 1920 was not time-barred.

We can, therefore, see no reason to interfere with the order of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

V. N. V.
Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 23 OF 1923.

June 29, 1925.

Present :—Mr. Justice Cuming and Mr. Justice Chakravarti.

Kumar BIRENDRA NATH ROY BAHADUR—PLAINTIFF—APPELLANT

versus

ANADI PRASANNA DUTTA—DEFENDANT—RESPONDENT.

Landlord and tenant—Rent-decree, ex parte, *against executor, whether binding on legatee.*

An *ex parte* decree for rent obtained against the executor of an estate, which decides that the relationship of landlord and tenant subsists between the parties, is binding upon a legatee in the absence of proof of fraud, or of the fact that the estate was not properly represented by the executor in the previous suit on the ground that his capacity as an executor had come to an end before that suit was brought, or that there has been a change of circumstances subsequent to the decree which has made the decree ineffectual. [p. 417, col 1.]

Appeal against a decree of the Subordinate Judge, Pabna, dated the 18th of July 1922, reversing that of the Additional Munsif, Serajgunj, dated the 30th of June 1921.

Mr. *Mahendra Nath Roy* and Babu *Phanindra Lal Maitra*, for the Appellant.

Babus *Brojo Lal Chakravarti* and *Santimoy Majumdar*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the plaintiff and arises out of a suit for rent. The plaintiff's case shortly stated was this : that originally there was a *jote* in the name of one Ram Lochan Chatterjee bearing a rental of Rs. 40 that the *jote* was subsequently sub-divided into 3 *jotes*, one bearing a rental of Rs. 20 representing an 8-annas share of which Satish Chandra Dutta was the tenant, the other *jote* of a 4-annas share was held by Saroda Nath Dutta at a rental of Rs. 10 and the other *jote* of 4-annas share bearing a rental of Rs. 10 was held by the predecessor of the present defendant Anadi Prasanna Dutta. The defence of the defendant was that the plaintiff was not the only owner of the land for which this suit for rent had been brought but that the defendant was the owner of the land as *zemindar*. He further pleaded that there was no relationship of landlord and tenant between the parties.

Now, it appears that the Court of first instance gave a decree to the plaintiff and on appeal by the defendant the learned Subordinate Judge has reversed that decree and dismissed the plaintiff's suit. The present appeal is against the judgment and decree of the learned Subordinate Judge dismissing the suit.

Now it appears that the learned Munsif found that the estate of the defendant's predecessor was in the hand of a lady called Subhadra as executrix to the estate of her husband and the defendant is the owner of the estate now as a legatee under the Will of his father. The Court of first instance found upon the evidence that Subhadra had been paying rent for the *jote* before. That in the year 1916 three suits were brought by the plaintiff against the three defendants tenants whom I have described before and that the suit which was brought against Subhadra as the executrix to her husband's estate was decreed *ex parte* for rent in the year 1916. The learned Munsif further found that the property in suit belonged to the plaintiff and gave a decree for the rent. The learned Subordinate Judge went first into the question of title and he was not satisfied that the plaintiff has proved his title. After finding that the learned Subordinate Judge deals with the *ex parte* decree which the plaintiff obtained against Subhadra, and as to that

all that he says is "It is not, therefore, quite clear whether Subhadra represented the defendant's estate at the time when the *ex parte* decree in the rent suit was obtained by the plaintiff." In that view the learned Subordinate Judge gave no effect to the *ex parte* decree obtained against Subhadra. Now, it appears to us that when it is not disputed that Subhadra was the executrix of her husband's estate and was in possession of the estate of her husband and was paying rent to the plaintiff in the previous years and the *ex parte* decree was obtained against her as an executrix the *ex parte* decree would be *prima facie* binding upon the defendant. It does not matter whether the decree was *ex parte* or a contested one. It is nonetheless binding upon the defendant. But the defendant was entitled to show that the decree was not binding upon him on the ground that the estate was not properly represented by Subhadra on the ground that her capacity as an executor had come to an end before that suit was brought. The onus of proving that fact which was specially within the knowledge of the defendant was clearly upon him and upon the evidence which he has adduced the learned Subordinate Judge was not able to come to a definite finding to the effect that the estate was not represented by Subhadra. There is no other ground upon which the defendant seeks to get rid of the effect of the *ex parte* decree against him. That being so we think that the defendant is bound by the *ex parte* decree. It is clear that the decree did decide the question of the relationship of landlord and tenant between the parties. The defendant has made no attempt to show that the decree was obtained by fraud or that there was any change of circumstances subsequent to the decree which made the decree ineffectual. In the absence of any such finding we think the decree is binding against the defendant.

In this view we think the judgment of the learned Subordinate Judge is wrong and that the judgment of the Munsif ought to be restored with costs both of this Court and of the lower Appellate Court.

Cuming, J.—I agree.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 572 OF 1925.

June 25, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

L. R. COUNSELL—PETITIONER

versus

Srimati SUKUMARI DEVI—OPPOSITE PARTY.

Landlord and tenant—Lease—Plot included in lease, whether actually demised—Test - Intention.

The mere fact that a certain plot of land which is in actual existence is comprised in an agreement of tenancy is not conclusive that there was a genuine letting of that plot or that it was the intention of the parties that the plot should be included in the demise. The real test in order to determine whether there was a demise of the plot is whether there was a genuine intention on the part of the lessor that the lessee should be put in possession of the plot as part of the demise. [p. 418, col. 2; p. 419, col. 1.]

Rule against an order of the Court of the President of the Calcutta Improvement Tribunal, dated the 4th April 1925, in Revision Case No. 98 of 1924, preferred against that of the Court of the Controller of Rents, Calcutta, dated the 8th August 1924, in Standard Rent Case No. 278 of 1924.

Mr. *A. N. Chowdhury* (with him Babu *Hiralal Ganguly*), for the Petitioner.

Mr. *B. Chakarvarty* (with him Sir *P. C. Mitter* and Babu *Hiralal Chakravarty*), for Opposite Party.

JUDGMENT.

Greaves, J.—This Rule was obtained at the instance of the petitioner L. R. Counsell against an order of the President of the Tribunal, dated the 4th April 1925, refusing to fix a standard rent in respect of the premises referred to in the petition on the ground that they were outside the provisions of the Calcutta Rent Act.

The facts are these. On the 30th November 1922 a lease was entered into between Sukumari Devi of the one part and Lionel Rose Counsell, the petitioner of the other part. By the lease the upper flat of No. 6 Rawdon Street and the out-offices thereof together with a piece and parcel of land for "pleasure garden" situate at Mudi Shahnagore within the jurisdiction of the Tollygunge Municipality were demised to the petitioner for a term of five years from the 1st December 1922 to the 30th November 1927 at a clear monthly rent of Rs. 450. The other provisions of the lease are not material for the purposes of this application. The schedule to the lease sets out in detail the demised premises. The first item in the schedule is the flat at 6 Rawdon Street;

the second item is a plot and parcel of land situate at Mudi Shahnagore within the limits of the Tollygunge Municipality lying in Division 6, Sub-division S, being Holding No. 57, *Dihi* 55 *grams*, Police Station Tollygunge, measuring about 10 *cottas*, more or less, bounded on the north and west by land of Jadunandan Lala on the east by land of Lakhi Bibi and on the south by a common passage.

The dispute between the parties really arises with regard to the second item of land contained in the schedule. The landlord contends that there was a genuine demise not merely of the upper flat of No. 6 Rawdon Street but also of the 10 *cottas* of land at Tollygunge and that consequently the Rent Controller has no jurisdiction to fix the standard rent of the premises. The petitioner, on the other hand, contends that there was no genuine letting of the 10 *cottas* of land at Tollygunge and that the real tenancy is of the upper flat of the premises No. 6 Rawdon Street and that consequently, the jurisdiction of the Rent Controller has not been ousted. The matter came before the Rent Controller in the month of August 1924 and no evidence was adduced before him on behalf of the landlord. Apparently, his legal adviser left the Court without cross-examining any of the witnesses called on behalf of the petitioner. Some evidence, however, was called before the President of the Tribunal on behalf of the landlord. The evidence consisted of two persons employed by the husband of the petitioner but their evidence has not been accepted by the President of the Tribunal and both the Rent Controller and the President of the Tribunal have accepted the evidence which was given on behalf of the petitioner before us. The Rent Controller found that the relationship of landlord and tenant did not exist as regards the Tollygunge plot and he states that this had not been challenged but he relies for this finding on a judgment of the Munsif in certain civil proceedings between the parties. I understand that judgment was put in evidence as an exhibit before the Rent Controller but we think that it is better that this judgment should not be relied on for the purposes of this case. The sister of the petitioner gave evidence before the Rent Controller and she stated that the plot of land in Tollygunge could not be traced. In the result, the Rent Controller relying, I think, on the passage in the Munsif's judgment, to which I have referred, found that the letting merely extended to the upper flat of No. 6 Rawdon Street and accordingly, he has fixed a standard rent for the premises of Rs. 259 per month inclusive of taxes. If he had jurisdiction then no question arises so far as we are concerned with regard to the standard rent that has been fixed. The matter was taken before the President of the Tribunal at the instance of the landlord and he raises as the second issue this: "Does the tenancy of the opposite party include anything besides the upper flat of No. 6 Rawdon Street? Is the flat a premises within the meaning of cl. (*e*) of s. 2 of the Rent Act? If not, can any standard rent be fixed for it? With regard to the second issue the President states that it is admitted that the lease under which petitioner holds the flat covers also some land in Tollygunge and he states that the case of the petitioner was that although the land was mentioned in the lease he had never been put in possession of it. The President goes on to state that the petitioner had sworn to that and that he accepts his testimony on this point. Then he goes on to state that the contention of the tenant, that is to say, the petitioner was that as the lessor has not put him in possession of the plot of land it could not be said to have been let to him and he seems to have arrived at a conclusion in favour of the landlord on the ground that he finds comprised in the lease this plot of land in Tollygunge. He states that no other ground was raised by the petitioner other than that he had never been put in possession of this land. He then states that the petitioner used the word "mythical" with reference to the land and that he also stated that he had obtained information about its location so that it could not be said that it was fictitious.

With all respect to the learned President of the Tribunal I do not think that these two reasons dispose of the case. The mere fact that we find comprised in an agreement of tenancy a certain plot of land is not conclusive that there was a genuine letting of that plot or that it was the intention of the parties that that should be included in the demise and I also think that the mere fact that the land itself existed is not sufficient to dispose of the case. Whether the land in fact existed or not is not a question which we can decide but I am prepared to assume for the purposes of this judgment

that there is a plot of land corresponding in general particularly with that set out in the lease but even so I do not think that this disposes of the matter. I think, the real test to be applied is this. Was there any genuine intention on the part of the lessor that the petitioner should be put in possession of this piece of land as part of the demise, that is to say, was it really his intention that the lease should extend as well to the land at Tollygunge as to the upper flat of No. 6 Rawdon Street. Turning to the evidence on behalf of the petitioner which has been accepted by both the Rent Controller and the President of Tribunal we find that again and again the petitioner was asking both before the tenancy to be shown the land and after the tenancy to be shown the land and to be put in possession thereof and when we find that there is no attempt either to indicate the land or to put the petitioner in possession of it I think the conclusion is inevitable that it was not really the intention of the lessor to include this in the demise but that he merely put it in to the lease as an attempt to evade the provisions of the Rent Act with regard to the upper flat of the premises No. 6 Rawdon Street.

For these reasons, therefore, I think, that the judgment of the President of the Tribunal is not correct and that we ought to restore the judgment of the Rent Controller who, I think, rightly held that he had jurisdiction in the circumstances to fix a standard rent in respect of the upper flat of No. 6 Rawdon Street.

The result is that we make the Rule absolute and the petitioner will be entitled to his costs—hearing-fee 5 gold *mohurs*.

It appears that the President of the Tribunal having decided the question of jurisdiction against the petitioner stated that the other issues need not be considered. The matter, therefore, will go back to the President of the Tribunal in order that he may deal with the issues other than the Issue No. 2 which deals with the question of jurisdiction.

Ghose, J.—I agree.

Z. K. *Rule made absolute.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT
No. 623 OF 1922.
July 28, 1925.

Present:—Mr. Justice Crump.

RAMCHANDRA RAMVALLABH AND OTHERS—PLAINTIFFS

versus

GOMTIBAI AND OTHERS—DEFENDANTS.

Insurance, marine—Time policy—Warranty of seaworthiness—Premium, non-payment of—Suit to recover losses, maintainability of.

On a time policy of marine insurance there is no warranty of seaworthiness. [p. 420, col. 1.]

The non-payment of the premium due under a policy of marine insurance affords no defence to the underwriter in answer to a suit by the assured to recover losses. [p. 420, col. 2.]

Mr. *Amin* (with him Messrs. *Coltman*, *M. C. Setalvad* and *Munshi*), for the Plaintiffs.

Mr. *Binning* (with him Mr. *Bahadurji*), for Defendant No. 1.

Mr. *Vyas*, for Defendant No. 4.

JUDGMENT.—The plaintiffs have filed this suit as the owners of a vessel called the *Fatehkhair* to recover from the defendants as underwriters the sum alleged to be due on a policy of marine insurance effected on the above vessel. Defendants Nos. 1 and 4, who appear and contest the suit, have raised a variety of defences which will be found embodied in the thirteen issues that have been raised in the suit. In most of those defences there is little or no substance and I do not find it necessary to discuss them at any length.

The plaintiffs' case is that the policy was a time policy for two hundred and eighty days and that the ship sailed from Jamnagar in September 1919 with a cargo of rice and proceeded to various ports, finally arriving at Busrah about the beginning of the month of January 1920. The details of the voyage as far as Busrah are not necessary for the purposes of the present suit. After the vessel left Busrah, it is said, she proceeded to Fao, and after leaving Fao she encountered bad weather and was driven ashore on the coast of the Persian Gulf near a place called Mastafa. There she became a total loss and the captain and the crew made their way to Linga, whence a telegram was sent to the owners in Bombay, and from Linga they proceeded *via* Karachi to Jamnagar, the home port of the vessel in question.

That is in brief the plaintiffs' case, and turning to those issues which are of minor importance and which embody defences,

which might well have been omitted having regard to the evidence in the case, I will make the following remarks. The first issue is: Whether the plaintiffs are owners of the vessel *Fatehkhair*. As to that, it is sufficient to say that there is the evidence of a partner in the plaintiffs' firm that they purchased the vessel. That evidence is supported by extracts from his accounts showing payments made towards the purchase price. There is the evidence of the captain who swears that the plaintiffs were the owners. There is the evidence of the broker who effected the policy and of the plaintiffs' *munim* and there is also the fact that the defendants, the underwriters, accepted the plaintiffs' firm as the owners of the vessel when they effected the insurance. There is also other evidence which it is unnecessary to discuss. Against all that there is nothing upon the record to suggest that any other person was the owner of this craft; and, therefore, there can be no doubt that the first issue must be answered in the affirmative.

The second issue is: Whether the plaintiffs had any insurable interest; and the finding on that follows the finding on the first issue.

Then, another point has been taken that the vessel was not seaworthy, and that too is one which possesses no substance whatever. It is settled law that on a time policy there is no warranty of seaworthiness, and in any case it would be for the defendants to show that the vessel was not seaworthy. The evidence of the captain at least implies that she was seaworthy and there is nothing whatever to the contrary.

Then, again, an issue is raised: Whether the vessel was lost by the perils insured against. Precisely what is understood by that issue I do not apprehend. No argument has been advanced before me upon the point, and seeing that the vessel, if the story told before me is true, was lost by the perils of the sea, there is nothing in that defence. It was further denied that the vessel was lost in the manner alleged in the plaint. As to that, there is no room for reasonable doubt in the light of the evidence recorded. The tindal Jusub Abu gave a very lively and apparently truthful account of the voyage and of the manner in which the vessel was lost. I see no reason whatever to decline to accept the story told by him. I believe it to be true; and the only criticism made was that whereas in the plaint the date of the loss was given as February 20, 1920 a calculation of the dates given by the tindal in his evidence would bring the date to somewhere about February 7. Well, that is a discrepancy which perhaps would have been avoided if a little care had been taken to arrive at the precise date; but it is one which is immaterial and does not detract in any way from the truth of the story told by the tindal. In other respects, no criticism has been made on this man's evidence and I accept it as true. It clearly shows that the ship met bad weather the third day after she left Fao, that bad weather got worse and at a certain point when a squall was approaching the crew endeavoured to take down the sail and while they were doing so the pulley on the mast jammed and the mast was carried overboard. They were obliged to cut it loose to avoid further damage and to bring the ship to anchor. After some time the anchor cable broke and the ship drifted towards a rock and during the night on a falling tide the ship was practically broken up. I do not feel any reason to doubt that the ship was so broken up as to lose her character as a ship and, therefore, there was an absolute total loss. Enough has been said to show that the questions raised in the fourth, fifth and sixth issues must also be answered in favour of the plaintiffs.

The real point in this case, in fact the only arguable point, is as to the question of the premium. First, it is argued that no premium has been paid and from this it is further argued that the plaintiffs, the assured in this case, are not entitled to recover anything on the policy. These two questions, that is whether in point of fact the premium was paid and whether if it was not paid the result is as contended for by the defendants, are closely interconnected. In my opinion it makes no difference whether the premium was in fact paid or not; and I will approach the question which arises from that point of view. It is, I understand, conceded that under the English Law relating to marine insurance the non-payment would afford no defence to the underwriter on a suit by the assured to recover losses. The matter is compendiously stated in Halsbury's Laws of England, Vol. XVII, Art. 692, and I will cite a short passage:—

"Unless otherwise agreed, where a marine policy is effected on behalf of the assured

by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses or in respect of returnable premium. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker."

It must necessarily follow from that that in a suit between the assured and the underwriter, no question can arise as to the payment of premium.

The matter will be found further discussed in Arnould on Marine Insurance, Vol. I, (10th Edition), page 155. The judgment of Bayley, J., in the case of *Power* v. *Butcher* (1) is there cited. The passage runs as follows:—

"According to the ordinary course of trade between the assured, the broker, and the underwriter, the assured does not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But as between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middle-man between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured, and to pay it to the underwriters."

That practice has now been embodied in the English Statute Law in s. 54 of the Marine Insurance Act.

That is, in brief, the law upon this point in England, and no doubt that law rests upon a long course of usage, and it cannot be assumed that the same course of usage is applicable to marine insurance in Bombay of the nature of that now before us. But before coming to the evidence in the case, there are various considerations which may be set out as indicating that in all probability the law is the same. In the first place it is extremely likely that the practice of marine insurance in Bombay is borrowed from the English usage. So far as I am aware, marine insurance is of a western birth and has been adopted from English sources; it is thus by no means improbable that the English usage will be found to prevail in Bombay. In the second place, this contention is not, as far as my knowledge goes, a new one. I am aware from at least one case that has been before me that it has been asserted before and though in that case the dispute was settled and no decision was arrived at, there it was practically admitted that the usage was as is now alleged. Further, there was a suit as regards the payment of the premium upon this very policy between the assured and the broker; and Mr. Justice Pratt, who decided that suit, judicially recognised the usage in Bombay to be the same as in England upon this point. (See judgment February 2, 1923, in Suit No. 4091 of 1922). Next, the wording of the policy itself suggests that that is so. The fifth clause of the policy is as follows:—"The insurance premium in respect of this vessel has been debited to the account of Thakar Tulsidas Ramdas," this Thakar Tulsidas Ramdas being the broker who brought about the policy. Why that clause should be inserted as one of the conditions of the policy is not clear unless the parties recognised it to have some effect and the only effect that it could have would be that the debiting the premium to the broker was held as between the underwriter and the assured to be equivalent to the payment of the premium.

Next, it is material with reference to this matter to invite attention to the conduct of the defendants themselves before the suit was filed. If the non-payment of premium were so obvious and so glaring a flaw in the plaintiffs' case as has been suggested in the argument before me, one would have anticipated that no sooner a claim was made the underwriters would have replied: "My dear Sir, you cannot seek to recover on this policy because no premium was paid." As a matter of fact nothing of the kind was said. The plaintiff firm on receipt of the news of the loss of the vessel communicated that news to the underwriters on March 2, 1920, and on April 7, 1920, they wrote to the underwriters calling upon them to pay their quota of the loss. On August 10, 1920, the plaintiffs wrote again saying that they had been verbally requested by the broker to furnish the underwriters with papers about the

(1) (1829) 10 B. & C. 329 at p. 339; 5 Man. & Ry. 327; 8 L. J. K. B. (o. s.) 217; 109 E. R. 472; 34 R. R. 432.

loss of the vessel and asking for details of the papers required. It is in evidence that no answer was received to any of these letters or to the reminder which was sent on September 19, 1920. The matters rested there until on July 23, 1921, the plaintiffs addressed the underwriters through their attorneys calling upon them to pay the amount of the policy. On July 28, 1921, for the first time we get a statement of the case for the defendants upon this point. First they say that the policy does not apply to the voyage referred to. Next, they deny the wreck. Thirdly, they say that the goods on board the vessel were not the goods covered by the policy. Then, they say they have not been furnished with the necessary papers and they go on to make a detailed demand for certain documents. In that letter from beginning to end there is not one word about the non-payment of the premium : and that tacit admission on the part of the defendants is a further corroboration of the usage which is now set up. But the matter does not rest here.

There is in the case a very fair body of apparently truthful testimony for the plaintiffs upon this point and not one line of evidence for the defendants to contradict it. Ghellabhai Hansraj, a partner in the plaintiffs' firm, says that the underwriter looks to the broker for the payment of premium. That is his experience as an insurer of several vessels. Then, we have very a reliable witness Mathuradas Kanji, who is both an owner of vessels and an underwriter of considerable experience. He says :

"The underwriter looks to the broker alone for the payment of the premium. If the assured fails the broker is bound to pay the premium."

He then goes on to say :—

"If a policy is effected and a ship is lost before the premium is paid the underwriter is responsible. If a policy for 280 days is effected in September 1919 and the ship is lost in February 1920 the non-payment of premium does not release the underwriter of his liability. The actual payment of premium does not affect the liability of the insurer.,'

Then again he says :—

"If the insurer does not pay the assured has no claim against the broker : that is as far as payment of loss is concerned. If the ship is not lost the insurer can sue the broker for the premium whether the assured has paid the broker or not. I know many cases in which the broker has been compelled to pay. I never go to Court and cannot remember instances."

Tulsidas Ramdas, who was broker in this case, supports this position. He says :—

"The assured pays the premium to the broker. That is the invariable practice... The underwriter looks to the broker for his premium."

Then, there is the evidence of Narandas Chathurbhuj, the *Munim* of a firm of underwriters, and he states :—

"We do not keep any account in the name of the assured. Our account is in the name of the broker. In case of loss the amount is debited to the broker. I have never heard of any case in which any objection was raised to paying loss on the ground that the premium was not paid."

He also says that "he cannot give instances in which the underwriter has paid loss when the broker has not paid the premium in the month of *Shravan*." That of course because no instance of the kind has occurred. Then, we have the evidence of Jivandas Ramdas, an insurance broker of twenty years' standing, and he too says that the underwriter looks to the broker for his premium, and he gives instances in his own practice where the assured having failed, he himself as broker had to pay the premium to the underwriters. He also says :—

"If there is an account between the underwriter and the broker the account may run on, but if the underwriter insists on being paid at *Shravan* the broker is bound to pay."

Now, if all that evidence is taken together, it seems to me to establish almost conclusively that the practice in this matter in Bombay is equivalent to or identical with the practice which the English Law has recognised in the passages which I have already set out. I really do not feel that there is any doubt though so far as I am aware the matter has not been judicially decided in these Courts as between the underwriter and the assured. That being so, is there any reason why the Court should refuse to give effect to this usage? I can see none.

It was argued that supposing the premium was not paid by the broker there would be no consideration for the contract, and that, therefore, the contract would be

bad as provided in the Indian Contract Act; but that argument, I think, rests upon two fallacies. First, s. 1 of the Indian Contract Act specifically exempts any usage or custom of trade; and secondly, I fail to see how it can be said that there is no consideration for a contract such as this. The consideration for the contract is the broker's undertaking to pay the premium, and that consideration, though it moves from a third person, is good consideration as the law stands in India. Therefore, it appears immaterial to me in this case to consider whether the broker Tulsidas Ramdas did or did not pay the premium to the defendants. If he did not, they have their remedy against him. If he did, *cadit quæstio*. But in no case is the right of the assured to recover the loss affected in any way.

It follows necessarily from what I have said that the plaintiffs are entitled to recover the amount claimed in their plaint. Therefore, there must be a decree against the first defendant as prayed in cl. 1 of the prayer of the plaint, and decree against each of the remaining defendants as prayed in cl. 2 of the prayer.

The defendants' attorneys to refund Rs. 500 paid by the plaintiffs to the defendants.

The costs of the suit to include the costs of the commission.

Z. K. *Suit decreed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2181 OF 1922.

June 24, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti

MONOHAR MUKHERJEE—PLAINTIFF—APPELLANT

versus

SURESH CHANDRA MUKHERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Will, construction of—Identification of property—Appeal, second—Question of fact.

Where the words of a devise are plain and the only question is as to the identification of the property referred to, the question is not one of the construction of a document, and cannot be argued in second appeal. [p. 424, col. 2.]

A Will recited that certain rooms on the northern and southern side of a particular building were set apart for the residence of the servants in connection with the library and the servants in connection with the *baithakkhana*;

Held, that the northern and southern rooms were assigned for the joint use of the servants of the library and the *baithakkhana*, and that it was not the intention of the testator to assign the northern rooms for the use of the servants of the library and the southern rooms for the use of the servants of the *baithakkhana*. [p. 425, col. 1.]

Appeal against a decree of the District Judge, Hoogly, dated the 31st May 1922, reversing that of the Subordinate Judge, Second Court of that District, dated the 31st July 1920.

Dr. *Dwarka Nath Mitra* and Babu *Hira Lal Chakravarti*, for the Appellant

Babu *Haradhan Chatterjee*, for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiff sued for recovery of possession on establishment of title of two rooms and a certain *varandah*. The case of the plaintiff was that these rooms together with a very large property belonged to Babu Joy Kissen Mukherji of Uttarpara. This gentleman had three sons Hara Mohan, Raja Peary Mohan and Raj Mohun. Hara Mohan had two sons Rash Behari and Shiv Narayan. During Babu Joy Kissen Mukherji's lifetime the three sons Hara Mohan, Peary Mohan and Raj Mohan acquired considerable properties of their own and these properties were managed by Babu Joy Kissen Mukherji in conjunction with his own property. About 9 years before his death Babu Joy Kissen Mukherji in 1879 executed a Will by which he dedicated certain of his properties to a library. In this Will he set out in detail which of the properties under his management belonged to his sons. It is admitted that any property dealt with by him as his own is his own property. The plaintiff's case is that these two disputed rooms belonged not to Babu Joy Kissen Mukherji but to Hara Mohan and from Hara Mohan came to his sons Rash Behari and Shiv Narayan. Rash Behari apparently got into financial difficulty and two Receivers were appointed to his properties. It is the plaintiff's case that he purchased this property from the Receivers of the estate of Rash Behari Mukherji. The purchase was made by the plaintiff in 1915. The case of the plaintiff is that he never got possession of this property after his purchase.

The defence was that the property belonged not to Hara Mohan but to Babu Joy Kissen and that it was by him dedicated to the use of the Uttarpara

Public Library and that the Uttarpara Public Library had all along been in possession of it.

The Trial Court held that the property belonged not to Babu Joy Kissen Mukherji but to his son Babu Hara Mohan and on that finding he decreed the plaintiff's suit. On appeal tbe learned District Judge held that the property in dispute was dedicated by Babu Joy Kissen Mukherji to the Uttarpara Public Library, that it belonged to Babu Joy Kissen Mukherji and not to his son Hara Mohan and that the property in dispute had all along been in the possession of the Uttarpara Public Library being occupied by the library servants.

Dr. Mitter on behalf of the appellant has urged first that on a proper construction of the Will it should be held that the property belonged to Hara Mohan and secondly assuming that the property belonged to Babu Joy Kissen it had not been dedicated to the library but it had been devised by the Will of Rash Behari.

With regard to the first point. Dr. Mitter argues that where the Will talks of brick built kitchen, stable and the rooms for *Durwans* on the northern and southern side of the building as being set apart for the residence of the servants in connection with the library and the servants in connection with *baithakkhana* on the upper floor of the library it means that the rooms on the north of the library were for the residence of the servants of the library and that the rooms on the south of the library, two of which are these disputed rooms were for the use of the servants of the *kaithakkhana*. It is sufficient to say that I do not think that the words bear this construction. The words in themselves are perfectly plain and they do not specify that the rooms on the north are for the servants of the library and the rooms on the south are for the servants of the *baithakkhana*. What the Will says is that the rooms on the north and the south are for the use of the servants of library and of the *baithakkhana*. It seems to me that even if the learned Advocate's arguments were correct it would not help his case materially. Both the parties admitted that Babu Joy Kissen only dealt with his own property and did not deal with the property of his sons. Therefore, if he dealt with these disputed rooms it must be because these rooms were his own property. I have no hesitation in holding that the interpretation of these words by the learned District Judge is the correct one, and that the rooms to the north and the south of the library were set apart for the use of the servants of the *baithakkhana* and the library. It has not been denied that these rooms in dispute are included in this expression rooms to the north and the south of the library. This clearly indicates that these rooms were the property of Babu Joy Kissen Mukherji, and were not the property of Hara Mohan Mukherji. Otherwise as I have pointed out Babu Joy Kissen Mukherji would not have dealt with it.

The second ground put forward by the appellant is that even assuming that they belonged to Babu Joy Kissen Mukherji they were not dedicated to the library but they were devised by the Will to Rash Behari. In other words, it was devised for the use of Rash Behari's servant, I have already held that these properties were not allotted exclusively to the use of the *baithakkhana* but were allotted to the use both of the library and also of the *baithakkhana*.

Lastly the appellant has urged that these properties actually formed part of the properties of Hara Mohan and to support this contention he relies on certain statement in Sch. *ka* in which the properties of Hara Mohan are detailed and he relies on the following words "within Boro Pergana south-western side of the said compound of the library of *kismat* Uttarpara east of the public road *mokarrari jamai* land together with built rooms and *pucca* shop house and godowns about 3 *cottas*." The learned District Judge has not been able to identify the property herein described as being identical with the property now in dispute. It cannot be said that this is a question of construction of the document. The words are perfectly plain and the only question is to what property they refer. That cannot be construed as a question of construction of a document and, therefore, cannot be argued in second appeal.

The result is that the appeal must fail and is dismissed with costs.

Chakravarti, J.—I agree that this appeal should be dismissed with costs.

It is necessary for the purpose of the disposal of this second appeal, to say this: one of the questions raised in the suit was as to whether the property now in dispute belonged to Babu Joy Kissen.

Mukherji or to his son Hara Mohan Mukherji. As to this the learned District Judge differing from the finding of the learned Subordinate Judge has found on the evidence that the property originally did belong to Babu Joy Kissen Mukherji and not to his son Hara Mohan. Assuming therefore, as found that the property did belong to Babu Joy Kissen Mukherji the plaintiff put his case in the alternative that by the Will of Babu Joy Kissen Mukherji the rooms in dispute were given to the sons of Babu Hara Mohan Mukherji. I agree with the construction which the learned District Judge has put upon the part of the Will which refers to this property. In order to construe the Will as suggested by the plaintiff the learned Subordinate Judge read the word "*Dakshin* to mean not what it ordinarily means, namely, the southern direction, but something else. That is a construction which Dr. Mitra who appears for the appellant did not submit before us as a proper construction of the word. The learned Doctor contended that in order to arrive at a true construction of the words we ought to read the word "respectively" in the sentence dealing with this property, that is, he contended, that the northern rooms were assigned for the use of the servants of the library and the southern rooms that is the rooms in dispute were assigned to the use of the servants of the owner of the *baithakkhana*, namely, Babu Rash Behari Mukherji. In my opinion we cannot introduce a word which is not there when the clause in the Will can be well construed as it stands without the addition of any other words. I do not think it is permissible to construe a Will by unnecessarily adding a word. I think the clause clearly means that both the northern and southern rooms were assigned for the joint use of the servants of the library and also of the servants attached to the services of the *baithakkhana*.

Apart from the question which I have discussed there is a finding by the District Judge that the rooms now in dispute had been all along in the possession of the Uttarpara Public Library. That being so, I think this finding alone was sufficient for the dismissal of the plaintiff's suit.

In this view I think the appeal is concluded and the plaintiff's suit has been rightly dismissed.

Appeal dismissed.

Z. K.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 36 OF 1925.

September 14, 1925.

Present:—Mr. Dalal, J. C.

BABU LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAMPHER SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Wrong application for copy of decree—Subsequent correct application—Time, exclusion of.

Judgment in a case was passed on 13th of May. Copy was applied for on 26th May without mentioning the date of the judgment. It was returned on 29th with the unused stamp for the correct entry. Another application for copy was put in on 3rd of July with the same unused stamp, and the copy granted on 10th July. Appeal was filed on 24th July. The limitation for the appeal was 30 days:

Held, that the time taken for the preparation of the copy was clearly from the 3rd of July to 10th of July and not from 26th May to 10th July and the appeal was beyond time.

Second appeal against an order of the District Judge, Fyzabad, dated the 16th October 1924, affirming that of the Additional Sub-Judge, Sultanpur, dated the 13th May 1924.

Mr. *J. K. Banerji*, for the Appellants.

Messrs. *H. Husein* and *Ganpat Sahai*, for the Respondents.

JUDGMENT.—The petition of appeal was dismissed by the lower Appellate Court on the ground that it was filed beyond time. The judgment of the Trial Court was passed on 13th of May, so the 30 days expired on the 12th of June. Eight days were taken in supplying a copy bringing the period up to 20th of June, which fell during the vacation, so the appeal ought to have been filed on the 3rd of July. It is argued here that the period for the preparation of the copy should be taken from the 26th of May 1924 to the 10th of July 1924. There is no ground for this indulgence. When the application for copy was filed on 26th May 1924 the date of the judgment was not given, so the stamp paper was returned by the *munsarim* to the applicant Babu Lal under date 29th May 1924. There is an endorsement on the stamp "Returned unused to Babu Lal, signed *munsarim* 29th May 1924". Subsequently another application with the same unused stamp was put in on 3rd of July 1924 and the copy was given to the applicant on 10th of July 1924. The time taken for the preparation of the copy was clearly from the 3rd of July to the 10th

of July and not from the 26th of May to the 10th of July.

The learned Counsel for the defendants-appellants here read a letter from his friend in Fyzabad to the effect that the learned District Judge was entirely wrong and that when the copy of the Munsif's judgment was brought to the Pleader at Fyzabad there was the entry of 26th May 1924 only on the copy as the date on which the application was made and no entry of 3rd July 1924. There is no affidavit to support this statement in the letter from the Pleader. The entry 3rd July appeared on the back of the copy and there is also the endorsement regarding the return of unused stamp which ought to have warned the Pleader in Fyzabad. This entry of return must have been made because when the stamp paper was not used, it had to be returned to the applicant according to rules. Without such return the applicant could not have known that it was not possible to grant him a copy or that is why another application was made on 3rd July 1924. It was his negligence that in the first application the date of the delivery of judgment of the Munsif's Court was not given. There is no question of a mistake of any officer of the Court misleading either the Pleader or the appellant. In fact when the appeal was taken to the Pleader it was beyond time. The Pleader's want of knowledge of Babu Lal's first blunder may be due to his negligence in not examining the copy properly. As regards the knowledge of Babu Lal there can be no question that he knew all the facts. An appeal which ought to have been filed on the 3rd of July was not filed till the 24th. There is no reason whatever to excuse this long delay of three weeks.

No circumstances exist entitling the appellant to the benefit of the provisions of s. 5 of the Limitation Act.

I dismiss this appeal with costs. Costs will include Rs. 25 to be paid to Babu Nageshar Prasad Vakil of Sultanpur who is guardian of the respondents Samala Prasad and Mangal Prasad. Notices were issued to these respondents and so the guardian had to appear here. This sum of Rs. 25 may be recovered by the Pleader by executing a decree to that amount.

N. H. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 565 OF 1923.

July 10, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

DODBASAPPA DHARMAPPA—PLAINTIFF—APPELLANT

versus

PRADHANAPPA VENKAPPA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 4, O. XIV, rr. 3, 5, O. XXI, r. 90—Execution of decree—Sale—Suit by auction-purchaser to recover possession from judgment-debtor—Fraud, plea of, whether can be raised in defence—Particulars of fraud—Pleadings—Issues, how to be framed—Procedure.

A judgment-debtor who has allowed an auction sale of his property in execution of the decree passed against him to be confirmed is not debarred from setting up a defence of fraud in the conduct of the sale in answer to a suit brought against him by the auction-purchaser to recover possession of the property. He must, however, give full particulars of the fraud alleged by him and on which he relies. [p. 427, col. 2.]

The materials on which a Court should frame issues in a suit are laid down in r. 3 of O. XIV of the C. P. C., and the Court has no power to take the case out of the hands of the parties and to make for any of them a case which he has no intention of making for himself. In framing issues the Court should not travel outside the pleadings and averments of the parties. [p. 428, cols. 1 & 2.]

Per *Fawcett, J.*—A Court has power under r. 5 of O. XIV of the C. P. C. to frame additional issues, but the additional issues authorized by this rule are such as may be necessary for the determination of the matters in controversy between the parties, and it is not the intention of the Legislature that the Judge should travel outside the actual averments and counter-averments of the parties. But the Court must consider the case made by a party and not the case as moulded by the astuteness of the Judge. The mere fact that the parties are given an opportunity of adducing additional evidence in regard to the issues framed by the Court itself which are not based upon the pleadings of the parties does not suffice to validate the procedure adopted by the Court. [p. 431, col. 1.]

A person who is charged with fraud should, when he is examined in Court as a witness, be cross-examined in regard to the allegations of fraud and his explanation taken into consideration in arriving at a decision upon the point. [p. 431, col. 2.]

Obiter dictum.—The charge against a bidder at an auction-sale that he and those who have acted in concert with him have acted in such a manner as to prevent the best price being obtained for the property does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale to him. [p. 430, col. 2.]

Second appeal from the decision of the Assistant Judge, Dharwar, in Appeal No. 33 of 1920, confirming that of the Subordinate Judge at Gadag, in Civil Suit No. 246 of 1918.

Mr. *G. N. Thakor* (with him Mr. *D. R. Manerikar*), for the Appellant.

Messrs. *R. A. Jahagirdar* and *A. G. Desai*, for the Respondents.

JUDGMENT.

Madgavkar, J.—The plaintiff-appellant Dodbasappa purchased the right, title and interest of defendant No. 3 Shiddappa and defendant No. 4, Pundappa, in the land in suit in execution of a money decree against them in favour of Rangrao in Suit No. 62 of 1905. The sale was confirmed and the appellant got the sale certificate in 1907. The present suit is for possession. Defendants-respondents Nos. 1 and 2 refuse to give him possession on the ground that they are in possession as mortgagees and that the mortgage has not expired. The suit is also resisted by defendants Nos. 3 and 4 on the ground that the appellant has been guilty of fraud in execution. Both the lower Courts have upheld the respondents' plea and dismissed the suit. The plaintiff appeals.

The precise issues found in both the lower Courts were that the execution had proceeded without notice to respondent No. 4 and that the appellant was guilty of this fraud as well as of misrepresentation to the Court at the time of sale that there was a mortgage of Rs. 2,500 on the property, whereas the actual mortgage amount was less. He thus induced the Court to confirm the sale though the price realized was Rs. 325.

Four main points are taken in the appeal for the appellant. (1) The respondents having failed to pursue their remedy to set aside the sale as laid down under O. XXI, r. 90, cannot now set up the present defence without first setting aside the sale by way of application or suit. (2) Respondent No. 4 failed in his pleadings to give the necessary particulars of the fraud; and the fraud held proved was based on a new case set up by the Trial Court and not raised by respondent No 4. (3) The findings of fraud were based not upon the legal evidence but were surmises arrived at by irregular procedure. (4) As in any case, defendant-respondent No. 3, who was admittedly an owner of the northern half, had not defended the suit, as against him at least, the appellant's claim should have been allowed.

It is contended for the respondents that in the judgment appealed against no serious objection to the procedure in the Trial Court appears to have been taken that the appellant consented to certain previous depositions being put in and that, therefore, the findings of the lower Courts should be accepted; and although as regards misrepresentation as to the amount of the mortgage. Issues Nos. 8 to 11 were raised by the Trial Court at a late stage, ample opportunity was given to both sides to adduce evidence, and the appellant was, therefore in no way prejudiced. In view of our conclusion on the other points, it is not necessary to express a definite opinion on the first contention of the appellant. But, speaking for myself, it appears to me to be too wide a proposition that a defence is barred because a suit might be barred, or that a judgment-debtor, who has allowed the sale to be confirmed, cannot subsequently set up a defence of fraud, as in the present case.

In this appeal it is necessary to enter into some detail as to the actual trial and of the pleadings. In his written statement, Ex. 15, respondent No. 3 set up (para .3), firstly' collusion between the appellant and respondents Nos. 1 and 2, secondly, (para. 6), absence of notice of the execution proceedings, and thirdly, agreement between the decree-holder Rangrao and the appellant to purchase the property for a small amount. Apart from this, no particular fraud was alleged. Order VI, r. 4, is clear that the appellant was entitled to particulars of the misrepresentation and fraud set up to resist the title ordinarily vesting in him under s. 65, C. P. C.—a principle emphasised by Lord Selborne, L. C., in *Wallingford* v. *Mutual Society* (1).

These particulars of fraud were only added in the respondents' evidence, Ex. 37. What the precise collusion consisted of had not been even set up and, therefore, he refers presumably to the collusion set up by respondent No 3, in the previous Suit No. 46 of 1912, that was decided against respondent No. 3 in the judgment Ex. 58.

Apart from its vagueness the case of collusion as between the appellant and respondent No. 3 may briefly be dismissed as having been *res judicata* in the litigation between the two parties concerned, when it was raised by respondent No. 3 as plaintiff; and even if proved, it would hardly suffice for the sale to be set aside by the parties concerned six years after the event. Similarly no particulars were given in the pleadings of the alleged collusion between the appellant and respondents Nos. 1 and 2. In the written statement the only substantial ground alleged is the absence of notice. It

(1) (1880) 5 App. Cas. 685 at p. 697; 50 L. J. Q. B 49; 43 L. T. 258; 29 W. R. 81.

would have been preferable perhaps if the second issue in the Trial Court had been defined and confined to this allegation of fraud instead of its being generally framed as was the case, namely, "Is this Court sale fraudulent and illegal as alleged by defendant No. 4?" However, that may be, the trial proceeded on Issues Nos. 1 to 7 as originally framed. Thereafter the learned Subordinate Judge in his anxiety to do justice between the parties felt that a perusal of the record of the execution proceedings was necessary and adjourned the case in order to enable him to send for the record and to deliver judgment. He sent for the record and went through it, evidently with very great care. It appeared to him that other suspicious circumstances, not brought to his notice, in the pleadings existed; and thereupon *suo motu* he framed Issues Nos. 8 to 11 and adjourned the suit to enable both sides to offer evidence if they chose. The oral evidence actually preferred consisted of Rangrao and his clerk Hanmant. They were merely called *pro forma* and their former evidence in Suit No. 46 of 1912, instituted by defendant No. 3, was put in by consent. The learned Subordinate Judge then came to the conclusion (1) that the alleged notice served upon respondent No. 4 was never served; (2) that the appellant in conspiracy with Rangreo and his clerk Hanmant fraudulently represented to the Court that it was duly served; and (3) that at the time of the sale the appellant had deliberately misrepresented to the Executing Court that the mortgage was for Rs. 2,500 instead of a smaller amount.

Conceding the wide powers under O. XIV with regard to the framing of issues, there can be no question, I think, on the record that this issue of misrepresentation of the mortgage amount was an issue completely outside the pleadings and was raised by the learned Subordinate Judge himself on a perusal of the record of the execution proceedings, which he himself had sent for and which neither party had put in. The materials, on which the Court may frame issues, are clearly laid down in O. XIV, r. 3 ; and these issues were outside the rule. In his very anxiety to do justice, the learned Subordinate Judge followed the course reprobated by this Court in *Naro Hari* v. *Anpurnabai* (2) and took the case altogether out of the hands of the litigants and made for the respondent a case which he had no intention of making out for himself. Moreover, the findings on these issues are based on inferences or rather on surmises founded on certain circumstances in the execution records before the learned Subordinate Judge, particularly the endorsement as to the mortgage amount of Rs. 2,500 on the sale proceedings, Ex. 54. This endorsement, however, was signed not by the appellant, but by one Hanmant Balaji, who was one of the bidders. In the vernacular record there is no admission of the appellant that he had made any such representation to the Court. In the English record this admission is immediately followed by a retractation. Under the C. P. C., the vernacular record is more authoritative. Moreover, it is no part of the duty of a bidder to inform the Court of the existence of the amount of incumbrance : and it appears to us, therefore, that this issue should never have been raised and that in any case the inference against the appellant as based on the irregular procedure cannot be supported.

It remains to consider the only substantial ground, namely, the absence of notice to respondent No. 4. Here again, on the evidence produced, both the Courts have arrived at an adverse conclusion against the appellant similar to that stated above. The bailiff Balkrishna, who has made the affidavit of proper service on the summons, Ex. 47, has not been called. Hanmant Venkaji, the *karkun* of Rangrao, who accompanied the bailiff to identify respondents Nos. 3 and 4, was called but not a single question has been put to him in regard to the service or the alleged conspiracy of which he alone would be the direct agent along with the bailiff. The record of his evidence put in is silent on the matter of service, and the further evidence is entirely directed to quite a different point than the point now in issue. The same observations apply with reference to Rangrao and the appellant. The learned Subordinate Judge has arrived at his conclusion mainly on the basis of the application, Ex. 52, by Rangrao for time to present Hanmant before the Court. This ground is clearly insufficient as a Pleader's *karkun* need not necessarily always be present in Court. In any case these are all questions which ought to have been put to Rangrao and Hanmant. Yet without a single question to either, both the Courts

(2) 11 B. 160*n* at p. 164; 11 Ind. Jur. 261*n*; Unrep. P. J. B. H. C. (1874-75) 235; 6 Ind. Dec. (N. S.) 105.

have in fact held proved a conspiracy on the part of Rangrao, his *karkun* and the bailiff and the appellant in addition, to make a false representation of service which was never effected. The Trial Court has again followed a course reprobated by their Lordships of the Privy Council in *Bal Gangadhar Tilak* v. *Shriniwas Pandit* (3). Hanmant, it should be observed, stated that respondent No. 4 was present at the sale. We are of opinion that respondent No. 4 has failed to prove absence of service, much less the fraud and conspiracy set up, and that the procedure and the inference of the lower Courts on this point cannot be supported.

It is not necessary to consider the question of collusion as between respondent No. 3 and respondent No. 4, with regard to their dealing with the property in the sale-deed, Ex. 38, of 1903, and the sale-deed and re-sale of half in 1907, except to observe that this course of dealings between the two respondents Nos. 3 and 4 *inter se* is not easily reconcileable, with the present contention of respondent No. 4 that he was on hostile terms with respondent No. 3 and had no information of the execution or the sale.

As regards the value or the small price paid by the appellant, there is one element which does not find place in the judgments appealed against. Till 1918, the auction-purchaser could not obtain possession of the property by reason of the right to possession for another twelve years of the mortgagees, respondents Nos. 1 and 2. This period and the interest on the purchase amount accumulating would, to a certain extent, reduce the amount paid, and might together with the comparatively smaller value twelve years ago of the land purchased, explain to some extent at all events, the price obtained in execution without the necessity of fraud or conspiracy of the kind alleged.

I would, therefore, allow the appeal.

Fawcett, J.—I agree with my learned brother's view, overruling the first contention of the appellant's Counsel, and holding that the defence as to the sale being a nullity is not necessarily barred because defendant No. 4 did not sue to set the sale aside within the time allowed by law or take the other remedies available to him in execution under the C. P. C. The decisions of this Court in *Shankar Daji* v. *Dattatraya Vinayak* (4) and *Mahadev Narayan* v. *Sadashiv Keshav* (5) show that such a defence can be set up, even though it rests on a claim, which could not be set up by the same person as a plaintiff. It is unnecessary to consider this point further, because I agree that the appeal should be allowed on other grounds.

Assuming that the defence that the sale by which the plaintiff obtained his title to the land is vitiated by fraud or illegality can be set up, it is necessary to see what exactly is the fraud or illegality that is pleaded by defendant No. 4. So far as illegality is concerned, although in para. 8 of the written statement defendant No. 4 says that there were many legal defects in the sale by which it was rendered null and void, the only actual illegality specified is that notice had not been duly served upon him in the prior execution proceedings. Under the ordinary rule that fraud or illegality must be specifically pleaded and particulars given, that is the only illegality that was really raised by his pleadings.

In regard to fraud the allegation in para. 7 is very vague and merely says that the plaintiff managed to get the property for a small amount, without the knowledge of defendant No. 4 and with fraudulent intent. That plea in itself would not really raise a case of fraud as it should be pleaded. But we can take into consideration the fact that the plea of fraud was developed during the trial and is taken by the Subordinate Judge in considering issue No. 2 to be the allegation that the plaintiff deceived defendant No. 3 by persuading him to believe that he (the plaintiff) would purchase the property for a small sum with a view to re-sell it to defendant No. 3, whenever he returned the amount with interest.

There is also an allegation of collusion between the plaintiff and defendant No. 3 for defrauding defendant No. 4 of his half share in the land. The latter part of this allegation has not been found proved, as I read the Subordinate Judge's judgment, but he did find that the plaintiff induced defendant No. 3 to consent to the final bid

(3) 29 Ind. Cas. 639; 39 B. 441 at p. 461; 17 Bom. L. R. 527; 13 A. L. J. 570; 19 C. W. N. 729; 22 C. L. J. 1; 29 M. L. J. 34; 18 M. L. T. 1; (1915) M. W. N. 484; 2 L. W. 611; 42 I. A. 135 (P. C.).

(4) 63 Ind Cas. 248; 45 B. 1186; 23 Bom. L. R. 514.

(5) 59 Ind. Cas. 118; 22 Bom. L. R. 1082; 45 B. 45.

that he made at the auction, representing to him that he would re-convey the land to defendant No. 3 as soon as the amount was paid, and that since the plaintiff never intended to keep his promise and other bidders were prevented from raising the price as a result of this misrepresentation, the Court sale was fraudulent and illegal. The Assistant Judge in appeal has held that the depositions of Rangrao and Hanmant in the previous Suit No. 46 of 1912 show that the bidding at the sale was low, because there was an understanding that the plaintiff should purchase the land at a low price and then re-convey it to defendant No. 3. But this is not made the basis of his final order and it appears to me to be incidentally referred to. His final conclusion is one confirming the finding of the lower Court that the confirmation of sale was due to fraud practised on the Court and that the plaintiff was a party to this fraud. However, even assuming that such collusion is a finding of fact on which the lower Courts' decrees are partially based, it is, in my opinion, quite clear that those findings are not supported by admissible evidence and have been arrived at in a manner that is clearly opposed to the provisions of the law as to *res judicata*, and as to the method of obtaining a reversal of a conclusion arrived at in a trial. This particular collusion or understanding was the subject-matter of the Suit No. 46 of 1912 between defendant No. 3 and the plaintiff, and the finding that that understanding was not proved is clearly *res judicata* as between th e plaintiff and defendant No. 3, who were the principal persons concerned in the alleged arrangement. The Subordinate Judge, therefore, so far as defendant No. 3's portion of the land is concerned, clearly had no jurisdiction to arrive at a contrary finding to that which had been come to in the previous suit. No doubt it was open to defendant No. 4, who was not a party to that litigation, and was a prior assignee as to his half of the land, to set up this alleged agreement or collusion and prove it. But such proof must obviously be based on something more than mere consideration of the testimony of some of the witnesses in the previous litigation. The Subordinate Judge, in his exercise of such jurisdiction, was virtually acting as if he was a Court of Appeal from the Subordinate Judge who tried the prior suit, and he was deciding that appeal not on all the materials of that suit but on two particular depositions which were given in that suit and which had been put in in this litigation, without any further cross-examination of the two witnesses in regard to the matter. He was not in such a good position as the Subordinate Judge, who tried the suit of 1912 and who had the witnesses before him, to decide the question ; and he had, in my opinion, no power to decide that the collusion and agreement set up were proved merely on the scanty materials that satisfied him and the Assistant Judge. There has, in my opinion, been an error in regard to the fundamental rules on which an issue can be decided in a suit, and the findings, so far as they affect defendant No. 3, offend against the law of *res judicata*.

It is also further open to question whether in any case the agreement or collusion set up would amount to fraud. For it has been held by their Lordships of the Privy Council in *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (6) that "the charge against a bidder that he and those who have acted in concert with him have acted in such a manner as to prevent the best price being obtained does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale to him." It seems to me that this ruling would apply to the present allegation, but it is unnecessary to go into this because, on the grounds I have already given, the findings of the two lower Courts can clearly not be accepted and should be interfered with in second appeal.

Then as regards the fraud that has been actually found by the Subordinate Judge on the additional issues, raised in Ex. 63 and confirmed by the Assistant Judge in appeal, I entirely agree with my learned brother that in raising those issues the Subordinate Judge was acting without jurisdiction and against the fundamental principles as to how a suit should be tried and determined, which have been laid down by the Privy Council in the leading case of *Goree Monee Dossee* v. *Juggut Indro Narain Chowdhry* (7). I give all credit to the Subordinate Judge for being actuated by a desire to do justice in the case, and

(6) 23 M. 227; 2 Bom. L. R. 640; 4 C. W. N. 228; 27 I. A. 17; 10 M. L. J. 1; 7 Sar. P. C. J. 661; 8 Ind. Dec. (N. S.) 561 (P. C.).

(7) 11 M. I. A. 1; 2 Sar. P. C. J. 207; 20 E. R. 1.

I also do not in any way desire to limit the power that a Court has under O. XIV, r. 5, C. P. C., to frame additional issues. But the additional issues authorised by this rule are such as may be necessary for determining the matters in controversy between the parties, and that I think is a clear indication that it was not the intention of the Legislature that the Judge should travel outside the actual averments and counter-averments of the parties. My learned brother has already referred to the remarks on this point in *Naro Hari* v. *Anpurnabai* (2) and I may further draw attention to the observation in that judgment that what is to be considered is the case made by a party and not the case as "moulded by the astuteness of the Judge." I think that is very applicable to the present case. The Subordinate Judge on a perusal of the record has made out a case for defendant No. 4, which he never set up and never intended to set up, because apparently it was not within his knowledge that the representation had been made which is mentioned by the Subordinate Judge who confirmed the sale. And this applies all the more to a case like the present, where the additional issues are framed after the whole trial has been finished and the case is reserved merely for judgment. The mere fact that the parties were given an opportunity of adducing additional evidence in regard to the further issues does not suffice to validate a procedure opposed to the law laid down by the C. P. C., and the Privy Council in the matter. No doubt there are exceptions when a Court is justified in holding a thing invalid on a ground which has not been pleaded. An instance of such an exception is afforded by *Surajmull Nagoremull* v. *Triton Insurance Company Ltd.* (8) where the Privy Council says :—

"No Court can enforce as valid, that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset [*Nixon* v. *Albion Marine Insurance* (9)]. The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases, for which a penalty is exigible."

Clearly this is not a case which comes under the above category. The Privy Council have frequently drawn our attention to the undesirability of upsetting titles which appear to be valid on the face of them in execution proceedings of Civil Courts, and the law provides a limited period and a limited method for obtaining a cancellation of a Court sale, so as to upset the title based upon it. In any case I agree with my learned brother that the finding about this misrepresentation is based on surmises which do not afford a proper ground for holding it proved that the plaintiff was a party to this alleged fraud. There has been a further disregard of the ordinary requirement that a person who is charged with fraud should, when he is examined in Court, be cross-examined in regard to it and his explanation taken into consideration. But, apart from that, it seems to me that the lower Courts were clearly not justified in considering this particular question of fraud, which had not been raised in the pleadings or evidence of defendant No. 4 and which is not a case of fraud prohibited by Statute in the public interest.

Then, as regards the finding that the sale was illegal because no notice had been served upon defendant No. 4. it seems to me that this is not a case like that of *Khiarajmal* v. *Daim* (10) or that of *Shankar Daji* v. *Dattatraya Vinayak* (4). In cases of that kind there is no proper representation of the party or they have not been parties to the proceedings in which the sale takes place. And even if there had been an objection that a person was not a proper legal representative, the Court had never applied its mind to the matter. But in this case a notice was ordered to issue to defendant No. 4 and the bailiff made a return that it had been duly served by fixing it upon the house, where defendant No. 4 was living at the time. The Court naturally accepted this report, which was supported

(8) 86 Ind. Cas. 545; 27 Bom. L. R. 770 at p. 773; 23 A. L. J. 105; (1925) A. I. R. (P. C.) 83; (1925) M. W. N. 257; L. R. 6 A. (P. C.) 66; 52 C. 408; 29 C. W. N. 893; 49 M. L. J. 136 (P. C.).

(9) (1867) 2 Ex. 338; 36 L. J. Ex. 180; 16 L. T. 568; 15 W. R. 964.

(10) 32 C. 296; 7 Bom. L. R. 1; 9 C. W. N. 201; 2 A. L. J. 71; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.).

by the affidavit of the bailiff. Even assuming that it is true that, as a matter of fact, defendant No. 4 was not in that house and that the notice was not properly served, still this is no sufficient ground for now saying that the sale by which the plaintiff obtained his title, was a nullity on that account. I think there can be no clearer authority on this point than that provided by a very similar case in *Paresh Nath Mullick* v. *Hari Charan Dey* (11). There it was alleged that the decree was a nullity because the summons had not been served upon the party contesting the validity of the sale, which arose out of a decree. In subsequent proceeding it was actually held that the summons had not been served and the *ex parte* decree was set aside. But the question still remained whether the sale was a nullity on that account, and Sir Lawrence Jenkins in his judgment, at page 627,* says :—

"Therefore, those conditions were established which entitled the aggrieved defendant to have the decree set aside under s. 108. But though the decree was thus set aside in September, 1906, the Court could not have passed its decree in 1903 without holding that the summons had been duly served : that is the condition laid down by s. 100 of the C. P. C. of 1882. So we have this position, that the Court wrongly, as events have subsequently shown, found that though the defendant was not present the summons had been duly served. The purchaser was entitled to rely on that finding. He had not the opportunity or the means of questioning the propriety of the decision at which the Court had arrived when it determined that the conditions were established entitling it to pass an *ex parte* decree; and the Court should have much hesitation in visiting a purchaser at one of its sales with the consquences of an irregularity or defect of procedure which was not discovered by the Court, or its officers, and was not apparent on the face of the record."

Those remarks apply appositely to the present case, where the Court could not proceed to order a sale unless it found that notice had been duly served on defendant No. 4. I am quite aware that in this case it is alleged that the plaintiff himself procured an improper service, but that aspect of the case is not supported by any actual evidence and is based on pure surmises from a perusal of the record in the execution proceedings, so it is not a finding which can, in my opinion, be held to have been arrived at on proper materials.

Accordingly, in my opinion, the case is not one like those considered in *Khiarajmal* v. *Daim* (10) and *Malkarjun* v. *Narhari* (12). I think, therefore, that the decrees of the lower Courts are vitiated by substantial errors in the procedure provided by the Code or any other law for the time being in force, which has led to error in the decision of the case upon the merits. I am very reluctant to interfere in cases where two Courts have held that fraud has been established. But in determining whether there has or has not been any fraud, the lower Courts have gone outside the proper foundation for determination of such a question, and there has been substantial error, which, I think, necessitates our interference. I agree, therefore, in allowing the appeal.

We accordingly reverse the decrees of the two lower Courts dismissing the plaintiff's suit and his first appeal with costs and substitute a decree in favour of the plaintiff for possession of the land in suit as prayed and directing an inquiry as to mesne profits from the institution of the suit until delivery of possession to the plaintiff or the expiration of three years from the date of this decree, whichever event first occurs. The Subordinate Judge should, after ascertaining the amount of such mesne profits, pass a final decree in accordance with O. XX, r. 12, C. P. C., as to the amount of such profits.

The plaintiff-appellant must get his costs throughout from defendants Nos. 3 and 4, each being jointly liable for the costs of the appeal to this Court.

Z. K. *Decree reversed.*

(11) 10 Ind. Cas. 361; 38 C. 622; 15 C. W. N. 875; 14 C. L. J. 300.

(12) 25 B. 337; 2 Bom. L. R. 927; 5 C. W. N. 10; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

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PRIVY COUNCIL.

APPEAL FROM THE LOWER BURMA CHIEF COURT.

July 23, 1925.

Present:— Viscount Finlay, Sir John Edge, Mr. Ameer Ali and Mr. Justice Duff.

MA CHIT SU—APPELLANT

versus

THE NATIONAL BANK OF INDIA, LTD., AND ANOTHER—RESPONDENTS.

Practice—Administration suit pending in one Court

—*Court, other, power of, to grant permission for sale of property—Rules of practice of High Court—Privy Council, interference by.*

When a suit for administration of an estate is before a Court competent to entertain it and to order that accounts should be taken in the suit, no other Court would ordinarily have power to grant permission for the sale of property which forms part of the estate. [p. 435, col. 2.]

Where, however, according to the rules of practice of a particular High Court in India, it appears that a Court other than the one before whom an administration suit is pending would have power to grant permission for the sale of property which forms part of the estate, the Privy Council will not interfere with the operation of such rule of practice. [p. 435, col. 2· p. 436, col. 1.]

Appeal from a decree of the Chief Court of Lower Burma, dated the 11th July 1922.

Messrs. *G. Lawrence* and *E. F. W. Besley*, for the Appellant.

Messrs. *G. Lowndes* and *E. B. Raikes*, for the Respondents.

JUDGMENT.

Sir John Edge.—This is an appeal from a decree of the 11th July 1922 of the Chief Court of Lower Burma, in its Civil Appellate Jurisdiction, which affirmed a decree of the 9th June 1920 of the Chief Court in its Original Civil Jurisdiction. The parties to the appeal are Ma Chit Su, a defendant, who is the appellant, and the National Bank of India, Limited, who was the plaintiff, and Maung Myat Thin, the first defendant, who are the respondents.

The suit was brought against Maung Myat Thin and the Bank of Bengal for a decree for specific performance of a contract to sell immoveable property in Rangoon. The appellant, who is the mother of Maung Myat Thin, was on her own application brought on the record on the 1st March, 1920, as a defendant. The Trial Judge gave the plaintiff a decree for specific performance. From that decree Ma Chit Su appealed. The Appellate Court, by its decree, dismissed that appeal, and from that decree of dismissal this appeal has been brought. The questions in this appeal are—(1) Whether there was a completed agreement for the sale of the property; (2) whether the alleged agreement to sell the property was not subject to a condition that any litigation relating to the property should be settled before the agreement could take effect; and (3) whether the agreement to sell was within the scope of the authority of Maung Myat Thin.

The facts of the case are as follows:—Maung Myat Thin was the eldest child of Maung Shwe Oh and his wife Ma Chit Su. Maung Shwe Oh died on the 5th June, 1906, leaving his wife Ma Chit Su and his nine children surviving him. At the time of his death the property in question in this suit belonged to Maung Shwe Oh and his brother Maung Shwe Goh jointly. They had carried on business in partnership. On the 17th March, 1907, Letters of Administration were, on the application of this appellant, Ma Chit Su, granted by the District Court of Amherst under the Probate and Administration Act, 1881, (Act V of 1881) to Maung Myat Thin to administer the estate of his late father Maung Shwe Oh. After the grant of the Letters of Administration the business, which had been carried on by Maung Shwe Oh and Maung Shwe Goh, was carried on by Maung Myat Thin as such administrator and Maung Shwe Goh in partnership. On the 12th June, 1913, the partnership was by a preliminary decree dissolved, a compromise was agreed to, and by a consent decree Maung Myat Thin became entitled as such administrator to all the assets of the partnership, including the property in question, and became liable to all the debts of the partnership with certain exceptions which are not material and need not be further referred to. On the 27th November, 1913, Maung Shwe Goh executed releases in favour of Maung Myat Thin of all the immoveable property of the partnership, including the property in question.

As such administrator Maung Myat Thin was indebted to the Bank of Bengal for moneys advanced. As security for the loan the title-deeds of the property in question had been deposited with that Bank on the 7th May, 1901, which thereby acquired an equitable mortgage. Maung Myat Thin was involved in some litigation with members of his family. Early in 1914 an administration suit was instituted in the Chief Court of Lower Burma by Ma Chit Su on her own behalf and on behalf of her eight younger children against Maung Myat Thin and others for the administration by the Court of the estate which was in his hands. It will be remembered that Maung Myat Thin was then the administrator who had been appointed by the District Court of Amherst. On the 22nd November, 1916, Maung Myat Thin made a deposition in that suit for administration in the High Court, in which he stated: "So far as I am concerned I consent to its" (the estate) "being administered by the Court. I understand that the administration will be taken out of my

hands." He was alluding to his rights as an administrator on his appointment by the District Judge of Amherst in 1907. On the 22nd November, 1916, the High Court in the administration suit ordered that certain accounts should be taken and certain enquiries made, and that the suit should stand adjourned for making a final decree until the accounts and inquiries had been taken and made. A final decree was at some time made by the Chief Court, but is not before their Lordships. It is true that the Chief Court had not been asked to appoint a Receiver or to issue an injunction to Maung Myat Thin not to continue to act as an administrator under his appointment as an administrator by the District Judge of Amherst. The preliminary decree which was made by the Chief Court on 22nd November, 1916, seems to have been a common form of such decrees in suits for administration in the Chief Court. It appears to their Lordships that it is advisable that that form of decree should be revised by the Court, now the High Court, so that there can in future be no question as to a conflict of authority between the High Court in an administration suit and a District Court which had appointed an administrator of the same estate. Such a conflict could not have arisen as it did in this case if the High Court had either appointed a Receiver or had issued an injunction; either would have determined any right which Maung Myat Thin had under his appointment as an administrator by the District Judge of Amherst.

On the 27th April, 1917, Maung Myat Thin applied to the Court of the District Judge of Amherst for permission to sell the property in question, and on 26th June, 1917, that Court granted to him permission to sell that property. That application was made under s. 90 of the Probate and Administration Act, 1881, as amended by Act VI of 1889.

On the 9th July, 1918, Maung Myat Thin on the introduction of the Bank of Bengal, called on Mr. Smith, the manager of the plaintiff Bank, and they discussed the terms upon which Maung Myat Thin would sell to the National Bank of India, Limited, and that Bank would purchase from Maung Myat Thin, the property in question. After that interview Mr. Smith, on behalf of the Bank, on the 9th July, 1918, wrote the following letter to Maung Myat Thin :—

"National Bank of India Limited,
"Rangoon, 9th July, 1918.

"Messrs. Shwe Oh Bros. & Co.

"DEAR SIRS,

"With reference to your Maung Myat Thin's call to-day, I hereby confirm the arrangement whereby the Bank agrees to purchase the property No. 3, Phayre Street and No. 62, 37th Street, subject to a clear Title, for rupees one lac seventy-seven thousand, say Rs. 1,77,000-

"Your confirmation in writing of above arrangement is requested.

"I am,
"Yours faithfully,
"JAMES SMITH,
"*Manager.*'

In reply to that letter Maung Myat Thin sent the following letter :—

"No. 3, Phayre Street,
"Rangoon, 10th July, 1918.

"The Manager,
"National Bank of India, Limited,
"Rangoon.

"DEAR SIR,

"With reference to your letter of the 2nd (*sic*) instant *re* house No. 3, Phayre Street and house No. 62, 37th Street, I hereby confirm the arrangement for sale of the above properties to your Bank for Rs. 1,77,000 subject to settlement being effected of any litigation relating to the same properties.

"I am, yours faithfully,
(Signed) "MAUNG MYAT THI N

The next thing which happened was that the lawyers who were acting for the National Bank of India, Limited, sent a requisition on title to Maung Myat Thin. The third, fourth, fifth, sixth and eighth requisitions, which alone seem to be of any importance in this suit, with the replies, were as follows :—

"3. On 4th August, 1900, the property was conveyed to Maung Shwe Oh and Mg. Shwe Goh, who were heirs to Maung Shwe Oh. Have any claims been made by any persons other than Mah Hnin Get and Maung Myat Thin to share in the estate of Maung Shwe Oh deceased?"

Reply.—"A suit for administration of Mg. Shwe Oh's estate is pending in Chief Court. Commissioner is inquiring into accounts, etc., and I believe he will decide who are the heirs to the said estate."

"4. In Mr. Myat Thin's letter dated 10th July, 1918, the sale is confirmed 'subject to

settlement being effected of any litigation relating to the properties.' What litigation is referred to in the sentence ? "

Reply —" There is an application pending in Chief Court for execution of decree against Shwe Oh Bros. & Co., by Ma Thein Zin, a decree-holder; also there is the administration suit referred to in answer to question (3)."

" 5. Are there any (and if so what) claims being made or threatened in respect of the above property ? (Give full particulars.")

Reply.—" Whether any claims will be made or not in respect to this property will depend on the finding of the Commissioner referred to in answer to question (3)."

" 6. Are there any (and if so what) persons likely to object to the sale to the National Bank of India, Limited ? "

Reply.—" Same answer as to No. 5 question."

" 8. A certified copy of the order granting leave to sell must be furnished."

Reply.—" I shall write to the Bank of Bengal to send the copy which is, I believe, with them."

On the 7th January, 1919, the Solicitors of Maung Myat Thin informed Mr. Smith, the manager of the National Bank of India, Limited, that he was unwilling to transfer the property in question to the Bank, as his mother was objecting to the sale.

Maung Myat Thin had made full disclosure to the National Bank of India, Limited, of his position and of such right as he had to sell the property in question, and that Bank accepted such title to sell as he had, and brought this suit for specific performance. Their Lordships find that by the 10th June, 1918, Maung Myat Thin and Mr. Smith, as the manager and agent of the Bank with full authority to act on behalf of the Bank, had come to a complete agreement for the sale of the property in question to the Bank. The condition that the agreement should be subject to a settlement of any litigation relating to the property before the agreement should take effect was a condition for the protection of Maung Myat Thin, and the National Bank of India, Limited, took the risk of any such litigation; there was no substantial litigation which could prevent Maung Myat Thin selling

Their Lordships have had some difficulty in arriving at a conclusion that Maung Myat Thin had power to sell the property without having obtained the previous permission of the Chief Court to do so. The suit for an administration of the estate had been entertained by the Chief Court, and was pending in that Court, and it is difficult for their Lordships to understand that the Legislature could have intended that when a suit for administration of an estate is before a Court competent to entertain it and to order that accounts should be taken in the suit, any other Court should have power to grant permission for the sale of property part of the estate; but it appears from the judgments in this suit of the Chief Court that according to some rules of practice of the Chief Court the Chief Justice recognised a power of another Court to grant permission for the sale of property of the estate before the Chief Court.

Mr. Justice Young, who was the Trial Judge in this suit, and had been the Judge who had made the decree in the administration suit, referred to *Berry* v. *Gibbons* (1) as an authority that a judgment in England for administration does not prevent executors from exercising a discretionary power vested in them except so far as its exercise conflicts with the order of the Court. The passage in *Berry* v. *Gibbons* (1) which Mr. Justice Young was considering as applicable to the question before him was evidently a passage in the judgment of Lord Justice James at page 750* of the report. What Lord Justice James is there reported to have said was :—

"The doctrine of *lis pendens* has no bearing on the case, for a mere administration decree, no Receiver having been appointed, nor any injunction granted to prevent the executrix from dealing with the assets, would not take away her legal powers so as to invalidate the title of persons claiming under a disposition made by her in exercise of those powers."

The passage in Lord Justice James's judgment to which their Lordships have referred must be read with a knowledge of what was then the statute law in England, and has no possible bearing on a case in India to which an Act of the Indian Legislature applies.

Their Lordships hesitate to interfere with what appears to be a rule of practice of the Chief Court, and to declare that in this case the Chief Court ought not to have found that the Court of the District Judge

(1) (1873) 8 Ch. 747; 42 L. J. Ch. 89; 29 L T. 88; 21 W. R. 754.

*Page of (1873) 8 Ch.—[*Ed.*]

of Amherst had power to grant to Maung Myat Thin permission to sell the property in question.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *Light & Fultun.*

Solicitors for the Respondents:—Messrs. *Sanderson, Lee & Co.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 214 OF 1922.

June 29, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

NABIN CHANDRA DHAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABDUL GOFUR AND OTHERS—DEFENDANTS—PESPONDENTS.

Jurisdiction of Court—Damages, whether can be awarded in excess of pecuniary jurisdiction.

A Court has no jurisdiction to award damages in excess of its pecuniary jurisdiction.

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 18th June 1921, modifying that of the Munsif, Fatikchari, dated the 22nd of December 1919.

Babu *Narendra Kumar Das*, for the Appellants.

Dr. *Sarat Chandra Basak* and Babu *Chandra Sekher Sen*, for the Respondents.

JUDGMENT.

Newbould, J.—This appeal arises out of a suit which was instituted on the 29th November 1912. The plaintiff brought a suit for specific performance of a contract and other reliefs. The essential facts are stated in the former judgment of this Court dated the 12th April 1918. The only point that now arises is the amount of damages which should be granted to the plaintiff, since he cannot obtain a decree for specific performance of the contract. The Munsif assessed the damages at the sum of Rs. 2,873 odd. On appeal the lower Appellate Court has held that the Munsif could not grant a decree for a sum exceeding Rs. 1000, the amount which was the limit of the Munsif's pecuniary jurisdiction. He accordingly reduced the decretal amount to this sum.

The main contention of the appellant is that since a Munsif in awarding mesne profits can award an amount in excess of his pecuniary jurisdiction there is no reason why he should not also grant a larger sum when assessing damages for breach of contract. In our opinion the two cases are clearly distinguishable. As has been pointed out in the recent Full Bench decision of this Court delivered on the 15th June 1925 the amount of mesne profits which may be recoverable cannot be valued even approximately at the commencement of the suit. But in the case of damages, they have been incurred before the institution and do not depend on events which may happen after that date. We do not think that the previous decision of this Court in this case was intended to in any way enlarge the Munsif's powers. It came to no more than a direction to the Munsif that he ought to have held that the case was one in which damages should be awarded under s. 19 of the Specific Relief Act. Suppose the Munsif, in the first instance, had decided the case correctly and held that the case was one in which the only relief that could be granted to the plaintiff was by way of damages he would not have given the plaintiff a sum exceeding the amount of his pecuniary jurisdiction. We see no reason why the Munsif should have given the plaintiff a decree for a larger amount because it was necessary that he should have a direction of this Court before he could decide rightly. The plaintiff when he brought the suit for specific performance should have contemplated that it was possible that that relief might be refused and the Court of its own motion might decide that he was only entitled to damages for the breach of contract. If he thought that such damages ought to exceed the amount which the Munsif could award he could have brought the suit in the Court of the Subordinate Judge by altering the valuation which in this suit was an arbitrary valuation.

For these reasons I uphold the judgment and decrees of the lower Appellate Court and dismiss this appeal with costs.

Graham, J.—I agree. At one stage of the hearing I was inclined to hold that the decision of the Court of Appeal below

was somewhat hard on the plaintiff-appellant in view of the facts that his suit as originally framed had been brought in a Court of competent jurisdiction and that it had been remanded to that Court as the result of the second appeal to this Court. On further consideration, however, it seems to me to be clear that the unfortunate result for the plaintiff that he has only been able to obtain Rs. 1,000 as damages instead of the sum of Rs. 2,873-12-10 decreed in the Court of first instance has been due to his own fault. He might under s. 19 of the Specific Relief Act have asked for compensation for breach of contract. The reason that he did not do so appears to have been that he did not wish to pay Court-fees on the larger sum.

I agree that the appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

SUIT No. 519 OF 1921.

September 16, 1924.

Present:—Mr. Rupchand Bilaram, A. J. C.

FIRM OF CHOITHSING SHEWASING—PLAINTIFFS

versus

THE SECRETARY OF STATE FOR INDIA (NORTH WESTERN RAILWAY) BY THE DEPUTY TRAFFIC MANAGER, KARACHI—DEFENDANTS.

Carriage of goods—Delivery, open, whether can be claimed—Damages, whether can be recovered.

There is no obligation on a carrier of goods to give open or examined delivery of the goods carried by him to the consignee. In the absence of an express stipulation to the contrary, he does not undertake to do anything more than to tender the specific goods to the consignee at the proper time and the proper place and where he is not protected from loss, to make good the value of such goods as may have been lost or damaged while under his custody, and even where the consignee removes the goods without protest, it is open to him to establish his claim for damages, if it can be proved by reliable evidence that as a matter of fact the loss or damage took place when the goods were in the custody of the carrier. [p. 439, col. 1.]

Where before taking delivery of his parcel from the carrier, the consignee suspects that a part of its contents are either damaged or lost, it is not unreasonable for him to demand that open or examined delivery may be given to him. It facilitates the subsequent inquiry as to any claim for damages preferred against the carrier, and avoids unnecessary evidence being called at the trial. Though on the one hand the refusal of the carrier to give open delivery affords no cause of action against him, on the other hand the refusal of the consignee to take delivery of the parcel unless open delivery was given to him, does not disentitle him to his claim for damages for the portion of the goods actually lost or damaged while in the custody of the carrier, though he may not recover the loss which is the direct result of his refusal to take delivery of the remaining goods. [p. 439, cols. 1 & 2.]

E. I. Ry. Co. v. *Sispal Lal*, 12 Ind. Cas. 596; 14 C. L. J. 472; 16 C. W. N. 329; 39 C. 311, relied upon.

Jwala Persad v. *G. I. P. Ry., Co.*, 21 Ind. Cas. 448; 11 A. L. J. 772, *Secretary of State for India* v. *Sham Lal-Deoki Nandan*, 67 Ind. Cas. 312; 4 U. P. L. R. (L.) 65; (1922) A. I. R. (L.) 418; 109 P. L. R. 1919 and *Sri Gangaji Cotton Mills Co., Ltd.* v. *East Indian Ry. Co.*, 68 Ind. Cas. 961; 44 A. 763; 20 A. L. J. 761; 4 U. P. L. R. (A.) 222; (1922) A. I. R. (A.) 511, referred to.

Mr. *Hassomal M. Gurbuxani*, for the Plaintiffs.

Mr. *Choithram Dewanmal*, for the Defendants.

JUDGMENT.—This is an action against the Secretary of State for India, for recovery of the value of a bundle of cloth consigned to the plaintiffs by one Pitamberdas from Jungshahi to Dabeji on the North Western Railway.

The broad facts of the case are not in dispute. Pitamberdas works as a commission agent at Tatta, a few miles distant from the Jungshahi Railway Station. In compliance with the order received from one Khushaldas, a resident of the village of Gharo, he packed a certain number of pieces of different qualities of cloth into an ordinary bundle stitched with twine and on 29th March 1920 forwarded it to the Jungshahi Railway Station through a cartman, where it was handed over to a Railway clerk who passed a receipt Ex. 12, showing the weight of the bundle as one maund and twenty-two seers. The Railway receipt was made out in the name of the plaintiffs, who work as *muccadams* or clearing and forwarding agents at Dabeji. At the request of the plaintiffs, the Railway staff at Dabeji re-weighed the bundle and found it to be short in weight by six seers or 12 lbs. The plaintiffs declined to take delivery pending further instructions from Khushaldas who arrived the next day and insisted on open or examined delivery of the bundle being given to him by having the bundle opened, and the contents checked with the invoice sent by Pitamberdas to enable him to put in a claim for shortage. This the local Railway staff declined to do, and on a report made to

the District Traffic Superintendent, Karachi one Homer, Traffic Inspector went over to Dabeji to inquire into the matter. On 9th April 1920, the District Traffic Superintendent wired to Homer to give open delivery of the bundle "if admissible after checking with the original *bijak*." Homer, however, declined to give open delivery to the plaintiffs, being of the opinion that the outward condition of the bundle was good, and that under the circumstances open delivery was not admissible under certain Railway rules issued for the guidance of the Railway subordinates to which the public have no access. The District Traffic Superintendent supported the action of Homer and gave the plaintiffs a notice that if they failed to remove the bundle within a certain time, it would be sold under the powers vested in him under ss. 55 and 56 of the Indian Railways Act. As the plaintiffs failed to respond to this notice, the bundle was sent for at Karachi and after a further inspection by Barclay, the then Assistant Traffic Superintendent since deceased, it was opened by the Station Superintendent, Karachi and its contents sold by auction realizing Rs. 85 only. No inventory was, however, made by the Station Superintendent of the contents of the bundle, and there is no evidence to show what pieces of cloth were sold by him. The bundle was admittedly carried at Railway risk.

The plaintiffs contend that the discrepency in the weight of the bundle at Jungshahi and Dabeji was due to a portion of the contents having been extracted in transit between the two stations, and that as the Railway Authorities had re-sold the contents of the bundle without making an inventory with the result that the Court cannot now determine which of the different pieces of cloth had been extracted, the defendant is bound to make good the value of the whole bundle.

On the other hand, it has been contended on behalf of the defendant, that the discrepency in the two weights was due to a difference in the scales at the two stations, that no portion of the contents were extracted from it during transit that the outward condition of the bundle being good, they were not bound to give open delivery of the bundle, and that the plaintiffs cannot claim any thing more than Rs. 85 less Rs. 8-14-0 due as wharfage and freight.

The parties are at issue as to the outward condition of the bundle.

The plaintiff Gajan and his witness Khushaldas state that the bundle showed extrinsic signs of having been tampered with that it was slack and appeared to have been opened at the seams from one end, and to have been re-sewn with black thread in place of the white twine with which the whole of the bundle had been originally sewn. According to Gajan's evidence it would appear that it was the outward condition of the bundle which excited his suspicions and made him to ask for the bundle being re-weighed. Lekhomal, the Assistant Station Master, who re-weighed the bundle, denied that the bundle showed any outward signs of having been tampered with, and states that the plaintiff asked for the bundle being re-weighed as often pieces of cloth are removed from bundles of cloth consigned through the Railway, and the plaintiffs were, therefore, particular to have the parcel of cloth re-weighed before taking delivery. His evidence that the bundle did not show any outwards signs of its having been tampered with, finds support in the evidence of the Station Master, Mangalsing, the report of the Traffic Inspector, Homer, and the notes made by the Assistant Traffic Superintendent, Barclay since deceased.

The correspondence carried on by or on behalf of the plaintiffs by Khushaldas, the owner of the goods, with the Railway, is silent as to the bundle having been found to be slack or re-stitched at one corner with black twine. It is also not difficult for a thief removing a portion of the contents from an ordinary bundle of cloth covered with a gunny and sewn with ordinary twine to undo the twine and to re-stitch it with the same twine in such a way as to avoid detection. Under the circumstances, I am not prepared to accept the interested version of the clearing agent and the owner of the consignment that the bundle showed outward signs of having been tampered with and I hold accordingly. It does not, however, follow from this finding that the plaintiffs are out of Court. Mr. Choithram, the learned Pleader for the defendant, has contended that as the outward condition of the bundle did not show signs of its having been tampered with, the plaintiffs could not claim open delivery, and have, therefore, no cause of action against the defendant. He has

relied on the rulings in *Secretary of State for India* v. *Sham Lal Deoki Nandan* (1), *Jwala Pershad* v. *G. I. P. Ry. Co.* (2) and *Sri Gangaji Cotton Mills Co., Ltd.* v. *E. I. R. Co.* (3) in support of his contention.

The plaintiffs' cause of action in the present case is not the refusal of the Railway Authorities to give open delivery of the bundle, but in effect a claim for the value of certain pieces alleged to have been extracted from the bundle, and as the value of such pieces cannot now be ascertained on account of the act of the defendant in auctioning the contents without making an inventroy, for the full value of the whole bundle, whether any pieces were extracted or not is a question of proof depending on the particular circumstances of this case. As an abstract proposition of law, it may be conceded that there is no obligation on a carrier of goods to give open or examined delivery to his consignee. He agreed to carry goods from one place to another for hire. In the absence of any express stipulation to the contrary, he does not undertake to do anything more than to tender the specific goods to the consignee at the proper time and the proper place, and where he is not protected from loss, to make good the value of such goods as may have been lost or damaged while under his custody. The right of compensation accrues as the result of such loss or damage. Even where the consignee removes the goods without protest, it is open to him to establish his claim for damages, if he can prove by reliable evidence that, as a matter of fact, the loss or damage took place when the goods were in the custody of the carrier: *E. I. R Co.* v. *Sispal Lal* (4).

Where before taking delivery of his parcel from the carrier, the consignee suspects that a part of the contents are either damaged or lost, it is not unreasonable for him to demand that open or examined delivery may be given to him. It facilitates the subsequent inquiry as to any claim for damages preferred against the carrier, and avoids unnecessary evidence being called at the trial. Though on the one hand the refusal of the carrier to give open delivery affords no cause of action against him, on the other hand the refusal of the consignee, to take delivery of the parcel unless open delivery was given to him, does not disentitle him to his claim for damages for the portion of the goods actually lost or damaged while in the custody of the carrier, though he may not recover the loss which is the direct result of his refusal to take delivery of the remaining goods.

In *Jwala Pershad* v. *G. I. P. Ry. Co.* (2) the plaintiffs' suit failed as the boxes were opened in Court and it was found that there was no actual shortage in the consignment. In the *Secretary of State for India* v. *Shama Lal Deoki Nandan* (1) again the plaintiff was held entitled to recover the value of the missing item though he could not recover the difference between the cost of the remaining articles and the price at which they had been re-sold on account of his refusal to take delivery of such articles. In *Sri Gangaji Cotton Mills Co. Ltd.* v. *East Indian Ry. Co.* (3) admittedly the bales of cotton in dispute had been despatched from Jaipur on the B. B. and C. I. Ry. to Mirzapur on the E. I. Ry. The plaintiffs could not maintain a suit against the E. I. Ry. in absence of proof that their cotton was damaged while in the custody of the E. I. Ry. The E. I. Ry. officials having declined to make a record of the condition of the bales of cotton, the plaintiffs treated it as a wrongful refusal to deliver the goods and instituted a suit for damages for wrongful conversion against the E. I. Ry. Under the circumstances the plaintiffs were clearly out of Court.

In the present case the Railway officials were entitled to stand on their legal rights and refuse to give open delivery to the plaintiffs, and if it could be proved as a fact that the real weight of the bundle when it was handed over at Jungshahi was one maund and sixteen seers, or that the contents of the bundle sold by the Station Superintendent, tallied with those shown in the *bijak*, the plaintiffs would have no cause of action against the defendant and could not claim anything more than the sum realized at the auction.

An attempt was made to prove that there are always discrepencies extending to several seers between the weights shown in the Railway receipts and the actual

(1) 67 Ind. Cas. 312; 4 U. P. L. R. (L.) 65; (1922) A. I. R. (L.) 448; 109 P. L. R. 1919.
(2) 21 Ind. Cas. 448; 11 A. L. J. 772.
(3) 68 Ind. Cas. 961; 44 A. 763; 20 A. L. J. 761; 4 U. P. L. R. (A.) 222; (1922) A. I. R. (A.) 514.
(4) 12 Ind. Cas. 596; 14 C. L. J. 472; 16 C. W. N. 329; 39 C. 311.

weights of parcels sent through the Railway. This attempt, however, did not succeed. Habib Ahmed, the Bunder clerk, who gave evidence by reference to his delivery books could not show any instance of a difference in the weights of small bundles weighing about one maund or one maund and a half exceeding a couple of seers at the outside except in the case of one parcel of fresh fruit which showed a discrepancy of four seers. This difference can easily be accounted for as a result of fresh fruit getting damaged or dried in transit.

Hassanand, luggage clerk at Jungshahi, has given evidence that he had correctly shown the weight of the bundle in the Railway receipt. It also appears from the evidence that as thefts from parcels of cloth are not uncommon, the Railway Officials are careful to show correct weights of such parcels. Under the circumstances, the onus was on the defendant to explain this discrepancy of six seers or twelve lbs. It is admitted that at certain intervals the scales at the different Railway Stations are tested. If there was anything radically wrong with the scales at Jungshahi or Dabeji to account for this difference in weight, it was within the power of the defendant to prove by evidence of the testing officer or by evidence that other parcels despatched about the same time also showed similar difference in weight. The defendants have given no evidence to account for this discrepancy. Though no doubt the weight shown in the Railway receipt is not conclusive evidence against the defendant, there is a strong presumption that the weight shown in Ex. 12 was the correct weight of the bundle at the time of despatch. In the absence of any evidence to rebut this presumption, I hold that the correct weight of the parcel at the time of despatch was one maund and twenty-two seers, and that certain pieces of cloth weighing about six seers had been extracted from it while in the custody of the Railway. The plaintiffs have examined Pitamberdas to prove that he packed and forwarded certain pieces of cloth of the total value of Rs. 372-7-0. His evidence finds ample support in the entries made by him in the books kept in the regular course of business and in the *bijak* sent by him to the plaintiffs along with the Railway receipt. I see no reason to disbelieve his evidence. Though the plaintiffs had claimed Rs. 422-11-0 in the suit, they have now confined their claim to Rs. 372-7-0 only. It is no doubt true that only some of the pieces of this bundle were extracted, but the Railway Officials have made it impossible for the Court to ascertain the value of such pieces on account of their having auctioned the contents without making an inventory. They cannot take advantage of their own negligence, and claim that the plaintiffs' suit should fail for want of proof as to the value of such pieces. I hold that under the circumstances the plaintiffs are entitled to the full value of the parcel, *viz.*, Rs. 372-7-0.

My findings, therefore, on the specific issues framed in the case, are as follows:—

1. Did the parcel in question contain the articles alleged by the plaintiffs?	In the affirmative
2. If so, what is their value?	Rs. 372-7-0.
3. Were the plaintiffs entitled to open delivery of the parcel?	In the negative.
3-A. Did the defendant refuse to give open delivery of the parcel contending that the outward condition of the parcel was good?	In the affirmative.
3-B. Was the outwards condition of the parcel not good, and if so, is the defendant estopped from raising the plea that he was not bound to give open delivery of the goods?	(1st part) The outward condition of the parcel was good, but certain pieces had been extracted from it with the result that its weight had decreased by 12 lbs. (2nd part) Not necessary.
4. Was any portion of the goods removed from the parcel as alleged by the plaintiffs?	In the affirmative.
5. If so, did the alleged removal of the goods take place before delivery of the parcel should have been taken by the plaintiffs or afterwards.?	The pieces were removed before delivery of the parcel was tendered to the plaintiffs at Dabeji.
6. If afterwards, is the defendant liable for it?	Does not arise.
7. If so, for what portion, if any of the goods removed from the parcel is the defendant liable?	Ordinarily the defendant would be liable for the value of the pieces which were removed from the bundle, but under the circumstances of the present case where the defendant had auctioned the bundle without making an inventory of its contents he is liable for the whole amount.

8	Did the defendant sell the parcel as alleged in para. 4 of the written statement?	In the affirmative.
9.	If so, what amount was realised from sale?	The defendant realised Rs. 85.
10.	Are the plaintiffs entitled to more than the amount deposited by the defendant?	The plaintiffs are entitled to a decree for Rs. 372-7-0.
11.	If so, to what amount.	
12.	Are the plaintiffs entitled to profits as alleged in memo. B filed with the plaint?	Given up.
13.	If so, at what rate.	
14.	Are the plaintiffs entitled to interest?	The plaintiffs are entitled to interest at 6 per cent. per annum from date of suit till payment.
15.	If so, at what rate?	

16. There will, therefore, be a decree in favour of the plaintiffs for Rs. 372-7-0 (Rupees three hundred seventy-two and annas seven only) with interest at 6 per cent. per annum from date of suit till payment and costs.

Z K. *Suit decreed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2527 OF 1921.

May 8, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Malan.

MUHAMMAD TUFAIL—PLAINTIFF —APPELLANT

versus

Mehr ABDUL MUNIM—DEFENDANT —RESPONDENT.

Vendor and purchaser—Sale—Declaratory suit by reversioner—Consideration partly not found for necessity—Vendee, suit by, to recover amount from vendor—Actual loss, proof of.

A part of the consideration for a sale was found not to be for necessity on the declaratory suit of a reversioner of the vendor. The vendee, who was in possession of the property, thereupon sued the vendor for recovery of the amount not found for necessity. The vendor had adopted the son of the vendee:

Held, that the suit must fail, as no loss had yet been suffered by the vendee, and it was quite possible that he would not suffer any in future as well, as the adopted son, who would succeed the vendor, was not likely to enforce the declaratory decree against his own natural father.

Khonmon Bibi v *Shah Mali*, 4 Ind. Cas. 690; 111 P. R. 1908; 13 P. L. R. 1909; 180 P. W. R. 1908, distinguished.

Second appeal from a decree of the District Judge, Gurdaspur, dated the 25th July 1921.

Mr. *Abdul Aziz*, for the Appellant.

Mr. *Sagar Chand* and Sheikh *Niaz Muhammad*, for the Respondent.

JUDGMENT.—The defendant sold certain land to plaintiff for Rs. 4,500 on 24th January 1916. The deed contained the words:—

"*Basurut zahur tanazah ke main har tarah ka zimma-war hun.*"

The defendant's brother challanged the sale, and got a declaratory decree to the effect that Rs. 2,050 were not for necessity and that the sale should affect the defendant's reversioners only to the extent of the balance Rs. 2,450.

Plaintiff has now sued defendant for Rs. 2,350-10-0, on account of :—(1) Rs. 2,050 the part of the sale money found not to be for necessity.

(2). Rs. 305-10-0, costs in certain suits between the parties.

The Trial Court dismissed the suit and plaintiff's appeal was dismissed by the District Judge.

Plaintiff has now come up on second appeal to this Court. This case may be distinguished from *Khonmon Bibi* v. *Shah Mali* (1), inasmuch as in that case actual damages had been suffered, whereas here (as far as the item of Rs. 2,050 is concerned, the only point pressed in this Court) no loss has yet been suffered by plaintiff, and it is quite possible that he never will suffer any loss. Even if we assume that the stipulation in the deed is wide enough to cover the "*tanazah*" which has occurred that *tanazah* has had no concrete results adverse to plaintiff so far, and may never have any such results. Plaintiff is in possession of the land which he bought from the defendant, and it is more than probable that he will never be disturbed, as his son has been adopted by the defendant vendor and is hardly likely, when he succeeds, to enforce the declaratory decree against his own natural father. Counsel did not argue the claim to the second item, costs of litigation.

(1) 4 Ind. Cas. 690; 111 P. R. 1908; 13 P. L. R. 1909; 180 P. W. R. 1908.

The result is that the appeal is dismissed with costs. Defendant's cross-objections were not pressed, and are dismissed.

N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 8 OF 1925.

September 14, 1925.

Present:—Mr. Dalal, J. C.

Thakur DURGA BAKHSH SINGH—PLAINTIFFS—APPELLANTS

versus

JAGANNATH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Counsel, mistake of—Client, effect on.

The plaintiffs brought a suit in respect of the sale of an entire under-proprietary tenure by the defendants. Their case was two-fold. One that in reality they were owners of 3/5ths of the under-proprietary holding which was wrongly transferred by the defendant vendors without any title, and, secondly, that as regards the 2/5ths they had a right of pre-emption and desired to pre-empt it on payment of a proportionate sum of consideration money. The sale took place in November 1922. In January 1924, the Counsel for the plaintiffs took up the position that he would pre-empt the entire property on payment of the entire price. The position being taken after the expiry of limitation for a pre-emption suit, the suit was dismissed. On second appeal :

Held, (1) that it required neither wisdom nor knowledge of law on the part of the plaintiffs' Counsel to understand that a suit for pre-emption would be time-barred in January 1924;

(2) that this blunder on the part of plaintiffs' Counsel could not deprive them of a decree if in fact the allegations made by them were true, and the suit should be decided in respect of the case of the plaintiffs as originally put forward.

Appeal against a decree of the Additional Sub-Judge, Rae Bareli, dated the 23rd September 1925, affirming that of the Munsif, Dalmau, dated the 29th January 1924.

Mr. *M. Wasim*, for the Appellants.

Messrs. *Radha Krishna* and *H. N. Das*, for the Respondents.

JUDGMENT.—There has been a lot of foolish talk and show of learning in this litigation in the Trial Court but the real issues between the parties have not been decided. The plaintiffs came to Court as pre-emptors and attacked the sale of 9th November 1922. By this sale an entire under-proprietary tenure was sold. The case of the plaintiffs was two-fold. One that in reality they were owners of 3/5ths of the under-proprietary holding which was wrongly transferred by the defendant vendors without any title, and secondly, that as regards the 2/5ths they had a right of pre-emption and desired to pre-empt it on payment of a proportionate sum of consideration money.

The defence was that the vendor defendant No. 5 owned the entire holding. The plaintiffs were so keen to pre-empt the property that they were even prepared to pre-empt the property on payment of the full consideration money. This readiness, however, was not declared till the 7th of January 1924 when the suit would be time-barred if filed for the pre-emption of the entire property. It is obvious that the plaintiffs through some understandable confusion in the mind of their Counsel took up the second position and were ready to pay the entire price. It required neither wisdom nor knowledge of law to understand that a suit for pre-emption would be time-barred on 7th January 1924 when the sale was effected on 9th November 1922.

This blunder on the part of the plaintiff's Counsel cannot deprive them of a decree if in fact all the allegations made by them were correct.

The first question to decide is whether the plaintiffs are or are not owners of 3/5ths of the property in suit. If they are not owners, of course, the whole suit would fail because they desire to pre-empt only a portion of the property sold. If, however, they are able to prove themselves to be owners of 3/5ths of the property then the vendor had a right to sell only 2/5ths and on the plaintiffs succeeding in their claim to a right of pre-emption they will be entitled to pre-empt 2/5ths of the property. There is no dispute as to the sale consideration which is accepted by the plaintiffs who are prepared to pay proportionate price for the 2/5ths belonging to the vendor.

I set aside the decrees of the two Subordinate Courts and remit the suit to the Trial Court under O. XLI, r. 23 for a proper trial after the framing of proper issues in the light of the observations made by me above. Costs here and hereto shall abide the result.

N. H. *Appeal allowed; Suit remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2346 OF 1923.
February 22, 1924.
Present:—Mr. Justice Martineau.
GHULAM NABI—PLAINTIFF—APPELLANT
versus
THAKAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Village abadi—*Succession to non-proprietor—Distant collateral, whether heir—Pre-emption, right of—Punjab Pre-emption Act (I of 1913), s. 15.*

In the absence of a custom to the contrary, it is only a near collateral who can succeed to the house of a village non-proprietor. Where no such custom is proved, a collateral in the seventh degree cannot pre-empt a sale of a house by a non-proprietor under s. 15 of the Punjab Pre-emption Act.

Karam Chand v. *Hakam Singh*, 71 P. R. 1889, relied on.

Second appeal from a decree of the District Judge, Amritsar, dated the 26th July 1923.

Mr. *Ghulam Rasul*, for the Appellant.

Lala *Har Dayal*, for the Respondents.

JUDGMENT.—The plaintiff sues to pre-empt a house sold by defendants Nos. 2 to 4, who are weavers and non-proprietors of the village in which the house is situate, to defendant No. 1, who is a proprietor in the village. The plaintiff is a collateral of the vendors in the seventh degree. The Courts below have agreed in holding that the suit fails, though on different grounds, the Munsif holding that no custom has been proved by which a *kamin* is entitled to pre-emption as against a village proprietor, and the District Judge holding that the plaintiff, not being a near collateral of the vendors, would not have been entitled to inherit the house, and, therefore, has no right of pre-emption under section 15 (*a*) of the Pre-emption Act. The plaintiff has filed a second appeal.

The lower Appellate Court's decision is correct. There is no doubt that in the absence of a custom to the contrary it is only a near collateral who can succeed to the house of a non-proprietor—see *Karam Chand* v. *Hakam Singh* (1) and para. 238 (*a*) of Rattigan's Digest of Customary Law. No custom to the contrary has been proved in the present case, and moreover as the lower Appellate Court's finding that the plaintiff would have no right of inheritance is a finding on a point of custom, the appeal cannot be entertained without a certificate under s. 41 (3) of the Punjab Courts Act. The objection that the question of plaintiff's right to inherit the property was not put in issue has no force as the first issue covers the point. It is contended that the vendors are governed by the r personal law and not by custom, but this contention was not advanced in the Courts below, nor is it put forward in the grounds of appeal in this Court, and I think it can hardly be doubted that the question of succession to the house of a non-proprietor in a village is regulated by custom.

The appeal is accordingly dismissed with costs.

N. H. *Appeal dismissed.*

(1) 71 P. R. 1889.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 63 OF 1924.
March 12, 1925.
Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.
VUPPULURY SOMASUNDARAM—PLAINTIFF—APPELLANT
versus
BHIMISETTI KONDAYYA—DEFENDANT—RESPONDENT.

Execution of decree—Auction sale—Non-transferable property—Judgment-debtor, failure of, to object—Confirmation of sale—Purchaser, rights of—Judgment-debtor, whether bound—Judgment-debtor, whether can resist purchaser as defendant—Civil Procedure Code (Act V of 1908), O. XXI, r. 92.

After a judgment-debtor, with full knowledge of the execution proceedings and full opportunity of raising an objection to the effect that the property sought to be sold in execution is non-transferable, has failed to raise that objection at the time of the sale, it is not open to him, or to a person claiming through him, after the confirmation of the sale, to show that the property was inalienable. As between the purchaser and the judgment-debtor, the property vests in the purchaser on the date of the sale. [p. 447, col 2.]

[Case-law reviewed.]

In such a case as the above, it is immaterial whether the judgment-debtor impeaches the sale as a plaintiff, or resists the suit of the purchaser as a defendant. [p. 446, col. 2.]

Under O. XXI, r. 92, C. P. C., where no application is made to set aside a sale or where such application is made and disallowed, the Court is bound to make an order confirming the sale and it thereupon becomes absolute. Under s. 65 where property is sold in execution of a decree and the sale has become absolute, the property vests in the purchaser. If the judgment-debtor objects under s. 47 to the sale and his objection is overruled, he is bound by the decision of the Executing Court. If being aware of the execution proceedings and having an opportunity to object, he fails to do so, he is likewise bound by the order confirming the sale; in other words, he is, in effect, in either case a party to the order by which

the sale is confirmed equally with the auction-purchaser, and he cannot get behind it. [p. 445, col. 2]

Letters Patent Appeal against the judgment of Mr. Justice Krishnan, dated the 18th February 1924, in S. A. No. 693 of 1921, on the file of the High Court, preferred against a decree of the District Court, Vizagapatam, in A. S. No. 469 of 1918, presented against a decree of the Court of the District Munsif, Yellamanchilli, in O. S. No. 244 of 1917.

Mr. *C. Rama Rao*, for the Appellant.

Mr. *K. Venkatarama Razu*, for the Respondent.

JUDGMENT.

Venkatasubba Rao, J.—This is a Letters Patent Appeal from the judgment of Krishnan, J. I shall briefly state the facts before discussing the question of law that arises. Perumal was the owner of the property and he mortgaged it to the defendant. It was then an unenfranchised *inam*. In execution of a money-decree obtained against Perumal, the property was subsequently sold in Court-auction. Even then it was an unenfranchised *inam*. The plaintiff's vendor became the purchaser at the Court-sale.

This suit has been instituted to redeem the mortgage in favour of the defendant. The defence is that the sale conveys to the plaintiff no title the property having been inalienable. The defendant has had to concede that on this hypothesis the mortgage in his favour is also invalid. He, however, relies upon a sale made to him of the property by Perumal subsequent to the enfranchisement of the property.

These facts cannot be disputed; first, the property was inalienable on the date of the Court sale and consequently no valid title passed to the plaintiff; secondly, by reason of the subsequent enfranchisement, Perumal acquired a right which could be transferred and the defendant having then purchased the property from the owner, acquired a good title. Krishnan, J., relying on these facts has dismissed the plaintiff's suit. In my opinion, the question is not what are the true facts, but what is the effect of the Court sale, in other words, can Perumal or the defendant who claims through him plead that the property was in fact inalienable on the date of the Court sale? If Perumal is precluded from pleading that the land was inalienable, the defendant, who claims through him is equally barred.

It was not disputed before Krishnan, J., that Perumal, the judgment-debtor, was aware of the execution proceedings that culminated in the sale and the argument apparently proceeded on the footing that though he had knowledge, he did not object to the attachment and sale. The plaintiff's learned Vakil before us suggested that, as a matter of fact, Perumal put in a petition objecting to the sale and that his objection was overruled by the Executing Court which thereafter ordered the sale of the property. The petition of Perumal and the order made thereon were not relied on in any of the lower Courts or before Krishnan, J. We do not think it necessary to decide whether this additional evidence should be received or not; for, in our opinion, it is immaterial whether an objection was put forward which was overruled or whether the judgment-debtor having knowledge of the proceedings refrained from objecting. I, therefore, proceed to deal with the case on the footing that Perumal had notice of the proceedings and had an opportunity to object to the attachment but did not put forward any objection.

The Court sale was held on the assumption that the property could be sold. Is Perumal or his representative the defendant now to be permitted to show that this assumption was wrong and that in fact the property was inalienable? In my opinion, there is a preponderance of authority in favour of the position that he ought not to be so permitted.

The first case I shall refer to is *Sheikh Murullah* v. *Sheikh Burullah* (1). In execution of a decree against the defendant, his property was sold and a stranger became the purchaser. The latter transferred his right to the plaintiff and he brought the suit for possession. The defendant raised the objection that the holding was non-transferable by custom and the sale was, therefore, bad. Mitra, J., held that the defendant could have objected to the attachment under s. 244 and he not having done so, was precluded from resisting the purchaser after confirmation of the sale. The learned Judge observes: "As between the purchaser and himself (the defendant) the title to the property vested in the purchaser on the confirmation of sale." Mitra, J., lays emphasis on this aspect, namely, whether the judgment-debtor had knowledge of the

(1) 9 C. W. N. 972.

execution proceedings that culminated in the sale. If he had, he would be concluded by the order confirming the sale. If he did not have knowledge, it would be open to him to object to the sale in subsequent proceedings. Mitra, J., refers to *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2), where what was apparently a contrary view was taken, namely, that the defendant could resist a purchaser although he had not objected to the attachment under s. 244. This case was distinguished on the ground that no question was raised in it as to the effect of the knowledge on the part of the defendant of the execution proceedings leading to the sale. In *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (3) referred to with approval by Mitra, J., the learned Judges were of opinion that knowledge on the part of the debtor was decisive of the question. To quote their words: "If this question (whether the judgment-debtors were aware of the proceedings or not) be answered in the affirmative, then we are clearly of opinion that it is not open to them now to question the propriety of the sale that has already taken place." The view of Mitra, J., was affirmed in Letters Patent Appeal by Maclean, C. J., and Pargiter, J., who expressly followed *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (3).

This point was again considered in *Dwarkanath Pal* v. *Tarini Sankar Roy* (4). The facts were similar to those in *Sheikh Murullah* v. *Sheikh Burullah* (1) and the learned Judges accepting the law as laid down by Mitra, J., express the view that *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) had been sufficiently dealt with by that learned Judge in his judgment.

Lala Ram v. *Thakur Prasad* (5) is also a direct authority on the point. The facts are again similar to those in *Sheikh Murullah* v. *Sheikh Burullah* (1) and the same view of the law was again taken. The principle is stated thus:—

"As between him (the judgment-debtor) and the auction-purchaser the sale has become conclusive and the auction-purchaser has acquired a vested interest in the property sold."

Here again the learned Judges advert to the fact that the judgment-debtor was aware of the execution proceedings and did not object.

The principle underlying these four cases, namely, *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (3), *Sheikh Murullah* v. *Sheikh Burullah* (1), *Dwarkanath Pal* v. *Tarini Sankar Roy* (4) and *Lala Ram* v. *Thakur Prasad* (5) I may state thus: Under O. XXI, r. 92, C. P. C., where no application is made to set aside a sale or where such application is made and disallowed, the Court is bound to make an order confirming the sale and it thereupon becomes absolute. Under s. 65, where property is sold in execution of a decree and the sale has become absolute, the property vests in the purchaser. If the judgment-debtor objects under s. 47 to the sale and his objection is overruled, he is bound by the decision of the Executing Court. If being aware of the execution proceedings and having an opportunity to object, he fails to do so, he is likewise bound by the order confirming the sale; in other words, he is, in effect, in either case a party to the order by which the sale is confirmed equally with the auction-purchaser, and he cannot get behind it.

In my opinion, this is the right principle and I am prepared to follow the four cases mentioned above.

I have dealt with cases from which a definite principle is deducible. There are some other rulings which also negative the right of the judgment-debtor, but which state the principle differently. Before discussing these cases, I may refer to *Pandurang* v. *Krishnaji* (6), which is identical with the four cases cited above excepting that it makes no reference to the knowledge or want of knowledge on the part of the judgment-debtor although it decided that he was barred from contending in the suit that the sale was bad.

In *Gokulsing Bhikaram* v. *Kisansing Guru* (7), the plaintiff was the purchaser at the Court-sale and the defendants were the judgment-debtors in the previous suit. They had not objected in the execution proceedings to the attachment and sale. Could they now object? It was held, they could not. The reason is given thus:—

"Though an auction-purchaser at a Court-sale in execution of a decree is not a party

(2) 24 C. 355; 1 C. W. N. 396; 12 Ind. Dec. (N. S.) 904.
(3) 26 C. 727; 3 C. W. N. 586; 13 Ind. Dec. (N. S.) 1064.
(4) 34 C. 199; 5 C. L. J. 294; 11 C. W. N. 513.
(5) 47 Ind. Cas. 947; 40 A. 680; 16 A. L. J. 691.
(6) 28 B. 125; 5 Bom. L. R. 799.
(7) 7 Ind. Cas. 457; 34 B. 546; 12 Bom. L. R. 539.

to the suit in which the decree was passed and though he is not a representative of either the decree-holder or the judgment-debtor for the purposes of s. 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale is virtually one between the parties to the suit, and if in the decision and result of that question the auction-purchaser is interested, the judgment-debtor ought not to be allowed to attack the sale in a suit."

The learned Judges seem also to think that the result of setting aside the sale would affect a party to the previous suit and the question was thus one virtually between the parties to that suit and ought to be decided under s. 244: (see page 552* last sentence).

In *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* (8), the plaintiff was the judgment-debtor in the previous suit. He sued to get the sale held in execution of the decree against him, annulled. Wallis, J., as he then was, observes that the plaintiff is barred from bringing the suit not by reason of s. 244 but by reason of general grounds of policy which underlie that section. Krishnaswami Iyer, J., states the principle in a different way, for, according to him, the only mode in which the sale can be impeached, is by an application to the Executing Court to set aside the sale. In his opinion unless a sale is set aside in the proceedings between the parties, the suit against the purchaser is not maintainable. With great respect, I am unable to understand the ground of the decision of Krishnaswami Iyer, J.

It is, however, unnecessary to pursue this point further, as, in my opinion, as I have stated, the right principle is that which underlies the decision in *Sheikh Murullah* v. *Sheikh Burullah* (1) and the other three cases which I have mentioned above.

In *Venkataramana Chariar* v. *Meenatchi Sundararam Aiyer* (9) a Bench of this Court approve of *Bhiram Ali Skaik Shikdar* v. *Gopi Kanth Shaha* (2). But I am not prepared to say that the learned Judges have taken a different view from that taken in the later Calcutta cases to which I have referred. In my opinion it must be taken that *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) was understood by this Bench in the way it was, by Mitra J., in *Sheikh Murullah* v. *Sheikh Burullah* (1).

It was strenuously contended by the learned Vakil for the respondent that whereas the judgment-debtor as a plaintiff cannot impeach the sale, he may as a defendant resist the suit. This distinction is artificial and I can find no justification for it. The case that was most relied on for this proposition, *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) cannot any longer be regarded an authority in support of it. It is true that Miller, J., in *Thathu Naick* v. *Kondu Reddi* (10) accepts this proposition but on the facts of the case his observations seem to be *obiter*, for Sankaran Nair, J. the Third Judge to whom the case was referred on a difference of opinion between Miller, J., and Abdur Rahim, J., points out at page 252* that the judgment-debtors were not aware before the confirmation of the sale, of the facts which were sought to be relied on to invalidate the sale. There is nothing in this case to suggest that the principle on which *Sheikh Murullah* v. *Sheikh Burullah* (1) rests is not sound.

It was next contended that the sale of an unenfranchised *inam* is absolutely void and the plaintiff's suit should on that ground be dismissed. I cannot follow this contention. As I have said, we are not here concerned with the true facts of the case but only with the result of certain proceedings. Is the defendant to be permitted to plead that the land was inalienable at the time of the Court-sale? The effect of the order confirming the sale is that the land can be alienated. The order is conclusive, and it must be deemed that there is an adjudication that the property can be sold. In this view, it is unnecessary to consider *Raja of Vizianagaram* v. *Dantivada Chelliah* (11), *Vaddadi Sannamma* v. *Koduganti Radhabhayi* (12) and *Narhari Sahu* v. *Siva Korithan* (13) and other cases cited on this point.

The appeal must, therefore, be allowed.

According to our judgment the plaintiff has become the owner of the property and this assumes that the defendant is not. The District Munsif though purporting to decide Issue No. I has really decided Issue

(8) 8 Ind. Cas. 429; 34 M. 417; (1910) M. W. N. 662; 9 M. L. T. 152; 21 M L. J. 928.

(9) 1 Ind. Cas. 193; 19 M. L. J. 1.

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(10) 1 Ind. Cas. 221; 32 M. 242; 5 M. L. T. 248.

(11) 28 M. 84; 14 M. L. J. 468.

(12) 43 Ind. Cas. 935; 41 M. 418; 22 M. L. T. 532; 34 M. L. J. 17; (1918) M. W. N. 23; 7 L. W. 234 (F. B.).

(13) 19 Ind. Cas. 881; (1913) M. W. N. 415; 24 M. L. J. 462.

*Page of 32 M.—[*Ed.*]

No. II. We have now reversed his decision on that Issue. Issues Nos. I, II, III and IV remain to be decided. The decision on the first issue is reversed and the suit is remanded to the District Munsif's Court for disposal in regard to the other issues. The defendant will pay the costs incurred by the plaintiff in the first Court, the lower Appellate Court and in this Court.

There will be a refund of Court-fee on the memorandum of appeal in this Court and in the lower Appellate Court.

Madhavan Nair, J.—I have had the advantage of reading the judgment of my learned brother with which I agree. The facts of the case have been clearly stated in that judgment and they need not be re-stated here. The plaintiff is a transferee from the auction-purchaser and his suit is to redeem a mortgagee held by the defendant and subject to which the property was sold at the auction. The defendant pleads that the property being an *inam* land is inalienable and, therefore, the sale conveyed no title to the auction-purchaser and further, that subsequent to the auction-sale the land was enfranchised by the Government in the name of the judgment-debtor, Perumal, and that he is now holding it as the purchaser—from the said Perumal. The question for decision arising in these circumstances is whether it is now open to the defendant to put forward these pleas by way of resistance to the plaintiff's suit for redemption. It may be stated at the very outset that arguments have proceeded on the assumption that for the purposes of this case the defendant may be taken to represent Perumal, the judgment-debtor, and that he claims through him. It has also been assumed throughout the arguments that Perumal was aware of the execution proceedings and did not object to the same. It has also not been disputed that the defendant himself during the course of the execution proceedings put forward his mortgage interest and that the property was ordered to be sold subject to such interest.

The auction-sale was held on the assumption that the property sold was alienable. Is it now open to Perumal or the defendant to plead that the property is inalienable? In my opinion the decision in *Lal Ram* v. *Thakur Prasad* (5), *Dwarkanath Pal* v. *Tarini Sankar Roy* (4) and *Pandurang Balaji* v. *Krishnaji Govind* (6) conclusively show that it is not open to him to raise these contentions now. In *Lal Ram* v *Thakur Prasad* (5), a house was sold by auction in execution of a decree obtained against the defendant in the case and it was purchased by the plaintiff. When he failed to get actual possession, he instituted a suit for its recovery, but his claim was contested on the ground that the house was not liable to sale in view of the provisions of s. 60 (*c*) of the C. P. C. The learned Judges held in that case that "after that sale and confirmation of sale, it was open to the defendant at this stage to question the validity of the sale and the title which the plaintiff had acquired under it". In the course of their judgment, the learned Judges observe as follows:—"Under O. XXI, r. 92, after a sale has taken place and has been confirmed the auction-purchaser acquires a title to the property. In the present instance no objection to the sale was raised before it took place or at any time. It is not suggested in the pleadings that the defendant-judgment-debtor was not aware of the execution proceedings. As between him and the auction-purchaser the sale has become conclusive and the auction-purchaser has acquired a vested interest in the property sold...in the present case no objection having been taken and the sale having become conclusive as between the parties, it is not open, in our opinion, to the defendant after the lapse of so many years from the date of the sale to contend that the sale ought never to have taken place and conveyed no title to the purchaser". This view is supported by the decision in *Dwarkanath Pal* v. *Tarini Sankar Roy* (4). In overruling the contention similar to the one raised in the present case, the learned Judges in that case refer with approval to the opinion of Mr. Justice Mitra in *Sheik Murullah* v. *Sheik Burullah* (1) to the effect that "after a judgment-debtor with a full knowledge of the execution proceedings and full opportunity of raising an objection to the effect that the holding was an occupancy holding and non-transferable, had failed to raise that objection at the time of the sale, it was not competent to him to resist the purchaser after the confirmation of the sale and that as between the purchaser and the judgment-debtor the title to the property vested in the purchaser on the confirmation of the sale". The apparently contrary opinion expressed in *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2), in favour of the

view that the defendant could resist the auction-purchaser's suit though he did not object to the attachment and sale had been sufficiently explained in the case in *Sheikh Murullah* v. *Sheikh Burullah* (1) which has been referred to in *Dwarkanath Pal* v. *Tarini Sankar Roy* (4). The decision in *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) has, no doubt, been mentioned with approval in two Madras cases, *viz.*, *Venkataramana Chariar* v. *Meenatchi Sundaram Aiyer* (9) and *Thathu Naick* v. *Kondu Reddi* (10), but as has been clearly pointed out in my learned brother's judgment there is nothing in these cases to suggest that the "principle on which *Sheikh Murullah* v. *Sheik Burullah*, (1) rests is not sound." The decision in *Pandurang* v. *Krishnaji* (6) also supports the view put forward on behalf of the appellant. Applying the principle laid down in these cases, it follows that the defendant must be considered to be bound by the order confirming the sale in favour of the auction-purchaser and that it is not open to him to question the validity of the Court sale in the present case.

The above conclusion is supported also by the decisions in *Gokulsing Bhikaram* v. *Kisansing Guru* (7) and *Nadumuni Narayana Iyengar* v. *Veerabhadra Pillai* (8) which state that principle in a slightly different way. In *Gokulsingh Bhikaram* v. *Kisan Singh* (7) it was held that the judgment-debtors who had not objected in the course of execution to attachment and sale of the suit properties could not afterwards question the validity of the sale in a suit instituted by the auction purchaser. The learned Judges observe thus:—"Though an auction-purchaser at a Court-sale in execution of a decree is not a party to the suit in which the decree was passed and though he is not a representative of either the decree-holder or the judgment-debtor for the purpose of s. 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale is virtually one between the parties to the suit, and if in the decision and result of that question the auction-purchaser is interested, the judgment-debtor ought not to be allowed to attack the sale in a suit". In *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* (8), the plaintiff (who represented the judgment-debtor in the prior suit) sued to set aside the sale of a temple office which was made in execution proceedings in favour of the defendent-auction-purchaser. It was held by Wallis, J., that he was precluded from bringing the suit by reason of "the general intention of the Legislature" as manifested in s. 244. The same conclusion was arrived at by Krishnaswami Iyer, J., who states the principle thus: "The auction-purchaser derives his rights from the sale which the party to the execution proceeding should not be permitted to impeach except by application to the Executing Court." It seems to me that in all the above decisions which we have examined the learned Judges give effect to the broad principle that the proper place to raise objections to attachment and sale is the Executing Court and that the judgment-debtor who has had notice of the execution proceedings must be deemed to be bound by the order passed in such proceedings confirming the sale in favour of the auction-purchaser. As already pointed out it follows, therefore, that the defendant is now precluded from raising his present contentions.

In the view it is not open to the defendant to plead that the suit land is inalienable inasmuch as he is bound by the order confirming the sale which amounts to an adjudication that the land can be sold, the question whether the sale of an unenfranchised *inam* is absolutely void does not strictly arise in this case and the decisions cited in support of that contention *viz.*, *Raja of Vizianagaram* v. *Dantivada Chelliah* (11), *Vaddadi Sannamma* v. *Koduganti Radhabhayi* (12) and *Narhari Sahu* v. *Siva Korithan Naidu* (13), need not, therefore, be considered.

In the result, I agree that the decision of Krishnan, J., should be set aside and the case should be remanded to the lower Court for disposal as pointed out by my learned brother. The defendants will pay the costs of the plaintiff up to date.

V. N. V.
N. H.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2033 OF 1922.

June 16, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

DAMODAR PODDAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JADUNATH DUTT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence, admissibility of—Documents between third parties—Recitals of boundaries, whether admissible—Admission of document without objection in Trial Court, effect of.

Recitals of boundaries of other lands in documents between third parties are not admissible in evidence either with regard to a question of boundaries or as to the nature of the land in dispute in the suit.

Pramatha Nath Choudhuri v. *Krishna Chandra Bhattacharjee*, 84 Ind. Cas. 420; 28 C. W. N. 1092; (1924) A. I. R. (C.) 1067, followed.

The mere fact that no objection is taken as to the admissibility of a document in the first Court would not make it admissible.

Appeal against a decree of the Officiating Subordinate Judge, Pabna, dated the 1st of April 1922, reversing that of the Munsif, First Court, Pabna, dated the 29th of June 1921.

Mr. *Sarat Chandra Roy Choudhury* and Babu *Dwijendra Krishna Dutta*, for the Appellants.

Babu *Phanindra Lal Moitra* for Babu *Dinesh Chandra Roy* and Dr. *Radhabenode Pal*, for the Respondents.

JUDGMENT.—In this case the plaintiff sued for a declaration that the land of the Cadastral Survey plot No. 321 appertained to his *jote* of 8 annas held by him under defendants Nos. 1 to 3. The suit was dismissed by the Trial Court but on appeal that decision was reversed and the plaintiff was granted a decree. Against that decree defendants Nos. 4 and 5 have appealed. The land in suit is included within the *brohmottar* land of defendants Nos. 1 to 3 and defendants Nos. 4 and 5 have been granted a lease of this land. The Record of Rights which was finally published in 1914 records the land as being held by defendants Nos. 1 to 3 through their *bargadar* defendant No. 12. The lease to the appellants was granted in 1323 B. S. The first Court held that the presumption arising from the entry in the Record of Rights has not been rebutted. The lower Appellate Court held to the contrary.

It is contended on behalf of the appellants that in coming to the conclusion favourable to the plaintiff the lower Appellate Court has been directly influenced by the two documents which were not admissible in evidence. These documents are Ex. 3 a *chitta* and Ex. 4 a *kabuliyat*. The *chitta*, Ex. 3, was prepared by an *amin* under the direction of the superior landlord of the *mouza* within which these lands are. We are asked to hold that it was admissible in evidence on the ground that no objection was taken in the Trial Court as to its admissibility. This is no ground for allowing a document to be proved if the evidence is not admissible. It is contended on behalf of the respondents that cl. 2 of s. 32 of the Evidence Act makes this document admissible The lower Appellate Court has held that this entry in the record is a statement made by a deceased person as to what he found in the spot and which he had to ascertain and record in the usual course of his business. We have some doubt whether the preparation of the *chitta* on behalf of a private *zemindar* can be said to be made in the ordinary course of business. But we certainly think that it was no part of the *amin's* business to record the name of the person in occupation of the land. The *zemindar* thought that he had a right to survey the *brahmottar* land within his estate and had no concern with the person by whom the holding was actually occupied. We hold that this document should not have been admitted in evidence or taken into consideration in deciding the present case.

The second document to which an objection is taken on behalf of the appellants is a *kabuliyat* of Pous 1307, Ex. 4. This document was admitted in evidence because two of these plots are the boundaries of the disputed land. We have recently held in agreement with the decision in *Pramatha Nath Choudhuri* v. *Krishna Chandra Bhattacharjee* (1) that the recitals of boundaries of other lands in documents between third parties are not admissible in evidence either with regard to a question of boundaries or as to the nature of the land. It is suggested that a distinction can be made in the present case because the writer of the document and also the recipient of the *kabuliyat* were examined as witnesses. But the writer of the *kabuliyat* in his evidence stated nothing about Ex. 4 and the plaintiff's witness No. 8 gave no evidence as to the occupation of

(1) 84 Ind. Cas. 420; 28 C. W. N. 1092; (1924) A. I. R. (C.) 1067.

the land at the time the *kabuliyat* was executed since he knew nothing about the land for more than 15 or 16 years before he gave his deposition in 1921. It cannot, therefore, be contended that this *kabuliyat* though ordinarily inadmissible is admissible under special circumstances of this case as corroboration of either of these two witnesses. It is further contended on behalf of the appellants that the view taken by the lower Appellate Court as to the entries in the rent receipts having been proved was a wrong view. That was a matter for decision for a Court of fact and we express no opinion on this point.

We allow this appeal, set aside the judgment and decree of the lower Appellate Court and remand the case for re-hearing of the appeal after excluding from the record and consideration the two documents Exs. 3 and 4.

Costs will abide the result.

Appeal allowed.

Case remanded.

N. H.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 223 OF 1923.

February 10, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Phillips and Justice Sir Kumaraswami Sastri, KT.

APPASWAMI PADAYACHI—PETITIONER

versus

V. A. ETHIRAJULU NAIDU AND ANOTHER—RESPONDENTS.

Municipal Election—Local Rules—Election petition—Charges, amendment of—Civil Procedure Code (Act V of 1908), provisions of, application of.

An Election Tribunal should be guided whenever possible in its procedure by the provisions of the C. P. C., and in a proper case with proper safeguards it is competent to an Election Court to entertain an amendment to an election petition adding to the charges originally relied upon.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Mayavaram, in Original Petition No. 137 of 1922.

Mr. *K. S. Jayarama Iyer*, for the Petitioner.

Mr. *S. Muthiah Mudaliar*, for the Respondents.

JUDGMENT.

Coutts Trotter, C. J.—Four points were taken in this petition The first was that the respondent here had no *locus standi* as he was not on the roll of voters. What happened was that his name had been on the draft roll of one ward and when the fair roll was made his name was put twice over in two wards, ward No. 2 and ward No. 3. When they looked through the roll, the Chairman struck his name out of ward No. 2 because it was in ward No. 3, and then apparently by an oversight or slip of memory he struck his name out in ward No. 3 because it was in ward No. 2. He put it right by restoring the name to the proper ward, whichever it was, on the ground that under the rules what was done was a clerical error. It is quite unnecessary for us to say whether it is superabundently clear that this is a clerical error. We are inclined to think it is pretty clear that it was, but all that is necessary for us to say is that it was a matter entirely within the power and jurisdiction of the learned Judge to deal with and he has dealt with it.

The next point taken was that it was illegal under the Electoral Rules to add a fresh charge after the original charge had been filed. It is quite clear that the intention was that the Tribunal should be guided wherever possible, in its procedure by the provisions of the C. P. C. and it is obvious that it would be a great hampering to the course of justice if, in a proper case with proper safeguards, the learned Judge were not allowed to entertain an amendment in accordance with the evidence.

The third point was that a certain vote has been rejected by the Chairman who had done that which we have held in a former case cannot be done, gone behind the roll and enquired into the qualification of an elector whose name was on the roll. The answer to it is that that was not what he did. What he really did was to treat this voter as having been guilty of personation and the matters about his having paid taxes and so forth are apparently merely grounds given by the learned Judge for his position, and that being so, it is a mere finding of fact with which we cannot interfere. I am glad to be able to say that my learned brothers are quite clear that that is what the learned Judge really did mean to say because speaking for myself, that paragraph of the judgment is

to me absolutely unintelligible and I find it difficult to be sure as to what he did mean and what he did not. But it is quite clear, when that paragraph is read in conjunction with the pleadings that he only meant to decide a question of fact. That is the only possible interpretation.

The fourth point made by the petitioner was that the learned Judge had refused to go into certain objections of his to certain votes. The objection was put forward in this vague form in para. 13 of his written statement, "This respondent also understands and believes it to be true that in the matter of the counting of votes, some invalid votes have been improperly received and taken into account in petitioner's favour and at the same time some valid votes in this respondent's favour have been improperly rejected and not taken into account." No particulars were given, no names were mentioned and the learned Judge declined to go into it, and rightly so because it would have involved an opening of all the ballot boxes and a roving enquiry over the whole range of votes. That was entirely within the discretion of the learned Judge and he very properly refused to exercise it in favour of the petitioner.

The petition is dismissed with costs.

The memorandum of objections is dismissed.

Phillips, J.—I agree.

Kumaraswami Sastri, J.—I agree.

V. N. V.

N. H. *Petition dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 1105 OF 1923.

June 16, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

JNAN CHANDRA DHUPI AND OTHERS— DEFENDANTS—APPELLANTS

versus

RAY SATISH CHANDRA CHAUDHURY BAHADUR—PLAINTIFF—AND OTHERS *Pro forma* DEFENDANTS—RESPONDENTS.

Adverse possession—Landlord and tenant—Service-tenure—Assertion of title—Limitation, operation of.

When a tenant enters upon land as a service-tenure-holder, but subsequently asserts a title of his own, the fact that the landlord does not sue to eject him within 12 years of such assertion, does not confer on the tenant any higher title than he had when he entered into possession. [p. 452, col. 1.]

Appeal against a decree of the Subordinate Judge, Fourth Court, Mymensingh, dated the 22nd of December 1922, reversing that of the Munsif, First Court, Jamalpur, dated the 29th of August 1921.

Mr. *Atul Chandra Gupta* and Babu *Radhika Ranjan Guha*, for the Appellants.

Babu *Jogesh Chandra Ray* (with him Babu *Jatindra Nath Sanyal*), for the Respondents.

JUDGMENT.

Ghose, J.—This is an appeal from the judgment and decree of the Subordinate Judge, Fourth Court of Mymensingh, reversing the decision of the Munsif, First Court of Jamalpur.

The plaintiff's suit was for possession of 2/3rds share of a certain piece of land and a tank by ejecting the defendant. His case was that the property in dispute was given to one Har Kishore, the father of the defendants as a service-tenure, free of rent, in lieu of service as washerman. The Subordinate Judge finds that owing to no service being rendered the defendants were trespassers and that they had no right to retain possession of the lands as against the plaintiff. It appears, however, that the plaintiff's case was that the tenancy terminated with the death of Har Kishore, the last service-holder and the defendants had no right to be on the land. The Munsif dismissed the suit on the finding that it was the ancestral *lakheraj* land of the defendants. On appeal, the Subordinate Judge refers to certain documents dating from the year 1858 and comes to the conclusion that the defendant Har Kishore and his father held the tank and the homestead rent free in lieu of service. The Subordinate Judge amongst other documents refers to certain *chittas* of the plaintiff's *sherista*, the settlement *khatian* and the Municipal notice dated 1876, under which the plaintiff's predecessor was required to clean the tank as owner and the Subordinate Judge accepts the evidence that the plaintiff's predecessor had borne all the expenses for cleaning the tank. On all these findings, he has come to the conclusion in favour of the plaintiff. It is contended on behalf of the defendants, who appealed to this Court that the findings of fact lead to the only inference that the defendants held the lands in dispute as a per-

manent hereditary rent-free tenure. The argument is that the origin of the tenure is not known. There has been long possession by the defendants from the time of their grandfather. The property was inherited at least in one instance and there is no evidence that it was being held in lieu of service, and from these facts it is contended that it should be inferred that the defendants have a rent-free interest. It was further contended that this right was set up in 1903 when a person named Jamal purporting to have taken a settlement of this property from the landlord brought a suit for ejecting the defendants' father Har Kishore from the land and in that suit Har Kishore filed a written statement claiming absolute *niskar* right to this property. With regard to the contention that it was absolute *niskar* we have to say that the circumstances proved are not sufficient to lead to that inference although the origin of the tenancy is not known. It appears from the old documents, which the Subordinate Judge has believed, what the nature of the tenancy was. There has been only one instance of the son succeeding the father and the Subordinate Judge has held that both of them held the land in lieu of service. On the other hand there is the evidence of the settlement record which according to the contention of the appellants means that the property was a grant with the burden of service, but that seems to be not conclusive. Because in one column it is stated thatit is *lakheraj* of Har Kishore and in the remarks column it is stated that it is held as *chakran* as washerman. That may mean that the property is not liable for any rent but it was held in lieu of service to be rendered. It is, therefore, difficult for us to say that the finding of the Subordinate Judge is erroneous. The allegation on the part of Har Kishore as to his absolute title to the property after disputes had commenced between him and the plaintiff is of very little avail to the defendants. The landlord had gone against Har Kishore for some reason or other and at that time Har Kishore was asserting a title of his own. The fact that the landlord did not proceed to eject him within 12 years of such assertion of his right does not confer upon Har Kishore any higher right than what he had when he entered into possession of the property as a service-tenure-holder under the plaintiff.

In this view it cannot be said that the Subordinate Judge is wrong in his conclusion and the appeal must be dismissed with costs.

Greaves, J.—I agree.

N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1771 OF 1922.

August 5, 1925.

Present:—Mr. Justice Phillips.

NAMULA RAMAYYA—PLAINTIFF—APPELLANT

versus

NADIPINENI APPAYYA *alias* SYAMABRAYUDU AND ANOTHER—DEFENDANTS NOS 2 AND 3—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Unregistered document showing nominal nature of prior sale-deed, admissibility of.

An unregistered document which merely shows that a registered sale-deed executed previously in respect of certain immoveable property was only nominal in its nature is admissible in evidence inasmuch as it is not used as evidence of any transaction affecting immoveable property. [p 453, col. 2.]

Yerraguntla Seshacharlu v. *Mukkumalla Chinniah*, 25 Ind. Cas. 721, followed.

Pydah Venkatachalapathi Garu v. *Muthu Venkatachalapathi*, 23 Ind. Cas. 409; 26 M. L. J. 151; (1914) M. W. N. 178; 1 L. W. 157 and *Putti Sesha Aiyar* v. *Kuppachar*, 49 Ind. Cas. 699; (1919) M. W. N. 87; 10 L. W. 1; 26 M. L. T. 291, distinguished.

Second appeal against a decree of the Court of the Additional Subordinate Judge, Guntur, in A. S. No. 23 of 1922 (A. S. No. 281 of 1921, District Court, Guntur), preferred against that of the Court of the Second Additional District Munsif, Guntur, in O. S. No. 213 of 1920, (O. S. No. 74 of 1920 on the file of the Court of the Principal District Munsif, Guntur).

Mr. *A. C. Sampath Iyengar*, for the Appellant.

Mr. *V. Suryanarayana*, for the Respondents.

JUDGMENT.—The main question at issue in this appeal is whether a document marked as Ex. J is admissible in evidence. The District Munsif rejected the document, but it has been admitted by the Subordinate Judge. On the 9th October 1918, the second defendant executed a sale-deed, Ex. H, in favour of the plaintiff. The plaintiff claimed the lands sold in some execution proceedings but his claim was dismissed, and, therefore, he has brought this suit

to declare his right under the sale deed. Defendants Nos. 2 and 3 contend that the sale to the plaintiff was a purely nominal transaction which was not intended to take effect and in order to prove this, they rely on this document Ex. J. The plaintiff says, amongst other things, "I am entitled only to money, not to lands". This recital was made almost immediately after the sale-deed for the lands had been executed in plaintiff's favour. I cannot possibly conceive that, if the plaintiff had really purchased those lands, he would have made this statement immediately afterwards. It was, I think, clearly made in order to protect the second defendant's interest, the sale-deed having been executed for the same purpose, namely, to protect the second defendant against his creditors who were then pressing him. I agree with the learned Subordinate Judge that Ex J is very strong evidence of the nominal character of Ex. H, and I most certainly think that there is no reason to set aside his finding on this question of fact, as it is justifiable on the evidence of Ex. J. If he is entitled to rely on Ex. J, his finding that the sale was only nominal would be justified and must be accepted. As regards the admissibility of Ex. J, the appellant-plaintiff relies on the Full Bench decision reported as *Pydah Venkatachalapathi Garu* v. *Muthu Venkatachalapathi* (1). He relies on the following passage:

"Assuming the plaintiff is entitled to sue for possession on the ground that no title passed to the defendants under the sale-deed (Ex. A) in order to succeed he must show that by virtue of the unregistered letter, the sale-deed does not affect the immoveable property which is comprised both in the sale-deed and in the unregistered letter, in the way in which the sale-deed purports to affect the property, and would affect the property if the unregistered letter had never been written. This being so, it seems to us the unregistered letter is relied on as evidence of a transaction affecting immoveable property and, being unregistered, is inadmissible in evidence".

The facts of the case are not given in the report but on reference to *Mutha Venkatachalapathy* v. *Pyinda Venkatachalapathy Garu* (2) the judgment of the Division Bench shows that the conflict in that case was whether the document evidenced a sale or merely a mortgage. There was no suggestion that the transaction was wholly nominal, the case on one side being that it was an outright sale and the case on the other that it was only a mortgage. In Mr. Justice Miller's judgment he cites the Full Bench case in *Rajah of Venkatagiri* v. *Narayana Reddi* (3) which he summarises as follows:—"It does not matter that the document may have the effect of proving a transaction affecting immoveable property, if it is used—for the purpose of proving a transaction which does not affect immoveable property in any way, then it may be received in evidence". If the summary of the Full Bench judgment is correct, and I see no reason to think it is not, then it must be applied to the present case where the facts are similar. What the defendants seek to do is to prove that there was a transaction, namely, the execution of a document which does not affect immoveable property because it was the intention of the parties that it should not do so. Therefore, in order to prove that fact or that transaction, this unregistered document, Ex. J., would be admissible in evidence. The other case of this Court relied on by the plaintiff is that reported as *Putti Sesha Aiyar* v. *Kuppacher* (4) where again there was a dispute as to the nature of the interests that passed and no question of the nominal character of the transaction was raised. There is a case exactly in point reported in *Yerraguntla Seshacharlu* v. *Mukkumalla Chinnian* (5) where it was held that an unregistered document purporting to be a sale-deed was admissible in evidence, because it was thereby sought to prove that a prior sale-deed was not a real transaction. That is the very point at issue in this case and if that is correct, and it is nowhere dissented from, Ex. J. is clearly admissible in evidence.

I have already found that if Ex. J is admissible in evidence, the Subordinate Judge's finding that the sale-deed was merely a nominal transaction is justifiable and consequently this second appeal must fail and is dismissed with costs.

V. N. V.

Z. K.

Appeal dismissed.

(1) 23 Ind. Cas. 409; 26 M. L. J. 151; (1914) M. W. N. 178; 1 L. W. 157.

(2) 17 Ind. Cas. 987; 23 M. L. J. 652; 12 M. L. T. 579.

(3) 17 M. 456; 4 M. L. J. 198; 6 Ind. Dec. (N. s.) 316.

(4) 49 Ind. Cas. 699; (1919) M. W. N. 87; 10 L. W. 1; 26 M. L. T. 291.

(5) 25 Ind. Cas. 721.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1701 OF 1922.

July 17, 1925.

Present:—Mr. Justice Phillips.

KUPPUSWAMI MUDALIAR—PLAINTIFF—APPELLANT

versus

CHOKKALINGA MUDALIAR—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 142—Ejectment suit based on dispossession—Limitation—Burden of proof.

Article 142 of Sch. I to the Limitation Act applies to a suit in ejectment based on dispossession by the defendant. In such a case the burden lies on the plaintiff to prove that he was in possession of the property in dispute within twelve years before the date of the suit. [p. 455, col. 2.]

Second appeal against a decree of the Court of the Additional Subordinate Judge, East Tanjore at Mayavaram, in A. S. No. 65 of 1921, preferred against that of the Court of the Principal District Munsif, Tiruvalur, in Original Suit No. 365 of 1917.

Messrs. *C. Narasimha Chariar* and *N. Sundaresa Iyer*, for the Appellant.

Mr. *S. Varadachariar*, for the Respondent.

JUDGMENT.—The facts of this case are stated in the lower Appellate Court's judgment. Both the lower Courts have dismissed the suit as being barred by limitation applying Art. 142. There were three items of property in the suit and although an appeal is preferred as regards all the three, it is not now pressed as regards the third item, as admittedly the suit is barred by O. XXI, r. 63 so far as that item is concerned. As regards the other two items, the appellant's contention is that Art. 144 and not Art. 142 is applicable to this case. It is not disputed that if Art. 142 is applicable, Art. 144 cannot be invoked as it is merely a residuary article. The argument is that Art. 142 has no application to suits for possession based on title but that it refers only to suits based on possessory title, that is to say, that if a man has title and is in possession and is dispossessed, it is open to him to sue under Art. 142, because he was in possession, for the restoration of that possession ; but he need not do that, but may bring his suit under Art. 144 basing his claim on title as opposed to possessory title. There is nothing in the article itself to support this contention nor does the point appear to have been considered in any of the cases cited before me, nor decided one way or the other. The argument seems to be put forward in order to get rid of the applicability of Art. 142. As against this argument I may refer to three cases decided by the Privy Council, namely, *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1), *Mahammud Amanulla Khan* v. *Badan Singh* (2) and *Dharani Khanta Lahiri* v. *Gabar Ali Khan* (3). It is clear that all these three suits were based on title and although an argument has been attempted to show that the title set up was a mere possessory title, I do not think it can be sustained, more especially as regards the case reported as *Mahammud Amanulla Khan* v. *Badan Singh* (2). These three cases were held to be governed by Art. 142, and consequently if we accept the contention now put forward, it necessarily involves the conclusion that these three cases have been wrongly decided. Reliance is placed on other cases decided by the Privy Council in support of the argument put forward by the appellant: *Secretary of State for India* v. *Chelikani Rama Rao* (4), *Kuthali Moothavar* v. *Peringati Kunharan Kutty* (5), *Basanta Kumar Roy* v. *Secretary of State for India* (6), *Radha Gobind Roy Saheb* v. *Inglis* (7) and *Secretary of State for India* v. *Chelikani Rama Rao* (4), the plaintiff was a person who claimed by reason of adverse possession. There was no suggestion that he had ever been dispossessed and, therefore, it was clearly not a suit under Art. 142. In *Kuthali Moothavar* v. *Peringati Kunharan Kutty* (5) the plaintiff established his title to the land and also acts of possession, and against that the defendant set up other acts of possession which were not held to constitute adverse possession against the plaintiff. The question of dispossession does not seem to have been considered at all and, therefore, I cannot consider that this case is an authority for the contention put forward. In *Basanta Kumar Roy*

(1) 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.).

(2) 17 C. 137; 16 I. A 148; 13 Ind. Jur. 330; 5 Sar. P. C. 412; 23 P. R. 1890; 8 Ind. Dec. (N. S.) 629 (P. C.).

(3) 18 Ind. Cas. 17; 25 M. L. J. 95; 13 M. L. T. 185; (1913) M. W. N. 157; 17 C. W. N. 389; 17 C. L. J. 277; 15 Bom. L. R. 445 (P. C.)

(4) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.).

(5) 66 Ind. Cas. 451; 44 M. 883; 14 L. W. 721; (1921) M. W. N. 847; 41 M. L. J. 650; 30 M. L. T. 42; 48 I. A. 395; 26 C. W. N. 666; 24 Bom. L. R. 669; (1922) A. I. R. (P. C.) 181 (P. C.).

v. *Secretary of State for India* (6) and *Radha Gobind Roy Saheb* v. *Inglis* (7), there was no question whatever of dispossession and consequently Art. 142 would not apply. In none of these cases is any reference made to the three cases first mentioned clearly because the facts are quite different. The case in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1) seems to me to be directly applicable here. In *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite* (8), there is an *obiter dictum* of Heaton, J., which is approved by a Single Judge of this Court in *Periya Jeeyangarswami* v. *Mahomed Esoof Sahib* (9): It is as follows:—

"It was indeed urged that it is a general principle that any one suing in ejectment must prove possession within twelve years and the authorities seem to bear out that contention: but the reason for this is that possession is commonly the effective assertion of title which is relied on and the cases accordingly deal with that particular kind of assertion of title. But it is not the only one; there is another which in some cases is equally good; and that is an assertion of title made in Court and established by a decree..... .....(such title) entitles to possession whether the title claimant has or has not been in possession within twelve years."

This exception to the general rule does not appear to be applicable to the facts of the present case. We find morever, another remark in the same judgment.

"I do not think that Art. 142 has any application to claims which neither in terms nor in substance are claims to possession, made necessary by reason of dispossession or discontinuance of possession."

This judgment of Heaton, J. has given rise to the argument that in the present suit there was no dispossession of the plaintiff. It is not disputed that there was dispossession of his predecessor-in-title nor is it disputed that the plaintiff can have no better rights than his vendor. If there had been no dispossession by the defendant, that is to say, if defendant had not come into possession by dispossessing the plaintiff's vendor or some other person, the plaintiff would have no cause of action against the defendant, for defendant would not be in possession if he had never dispossessed anybody for there is no suggestion that defendaut merely occupied the property when vacant. It is admitted in the plaint that he did come into unjust possession by dispossessing Vythilingam, plaintiff's vendor, and in the plaint itself the cause of action is said to have arisen on the 11th of July 1905 the date on which the defendant unjustly took possession in pursuance of an order of Court. The suit is clearly based on this dispossession and the Article applicable is 142. That being so, the burden is on the plaintiff to prove that he was in possession within twelve years of the suit. Both the lower Courts have found that he has not proved this and this finding is not attacked here.

On that finding this second appeal must fail and is dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

(6) 40 Ind. Cas. 337; 21 C. W. N. 642; 1 P. L. W. 593; 32 M. L. J. 505; 15 A. L. J. 398; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 C. 858; 44 I. A. 104 (P. C.).

(7) 7 C. L. R. 364; 3 Suth. P. C. J. 809; Bald. 377 (P. C.).

(8) 8 Ind. Cas. 639; 35 B. 79; 12 Bom. L. R. 956.

(9) 87 Ind. Cas. 386, 21 L. W. 398; (1925) A. I. R. (M.) 834.

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

July 28, 1925.

Present:—Vicount Finlay, Sir John Edge, Mr. Ameer Ali and Mr. Justice Duff.

AHMAD KHAN AND OTHERS—APPELLANTS

versus

Musammat CHANNI BIBI—RESPONDENT.

Custom—Succession—Non-ancestral property—Sister versus collaterals—Khattars *of Attock District—Custom, proof of—Oral evidence, value of—Acquired property, what is--Settlement Officer, duties of.*

Among *Khattars* of the Attock District a daughter or a sister is entitled to succeed to the acquired property of her father or brother in preference to near collaterals of the deceased. [p. 457, col. 1.]

Property which has never been held by the common ancestor cannot be regarded as ancestral property in any sense. [p. 459, col. 1.]

A custom with regard to the rule of succession prevailing in a tribe or family may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy. [*ibid.*]

In the Punjab the Settlement Officer in the early days of British rule combined in his person both judicial and administrative functions. He had to investigate into the actual conditions of the occupation of lands in respect of which the settlement

proceedings were instituted and to give effect to ascertained facts in accordance with the result of his enquiry whether the occupation was by virtue of any right or title. [p. 457, col. 2.]

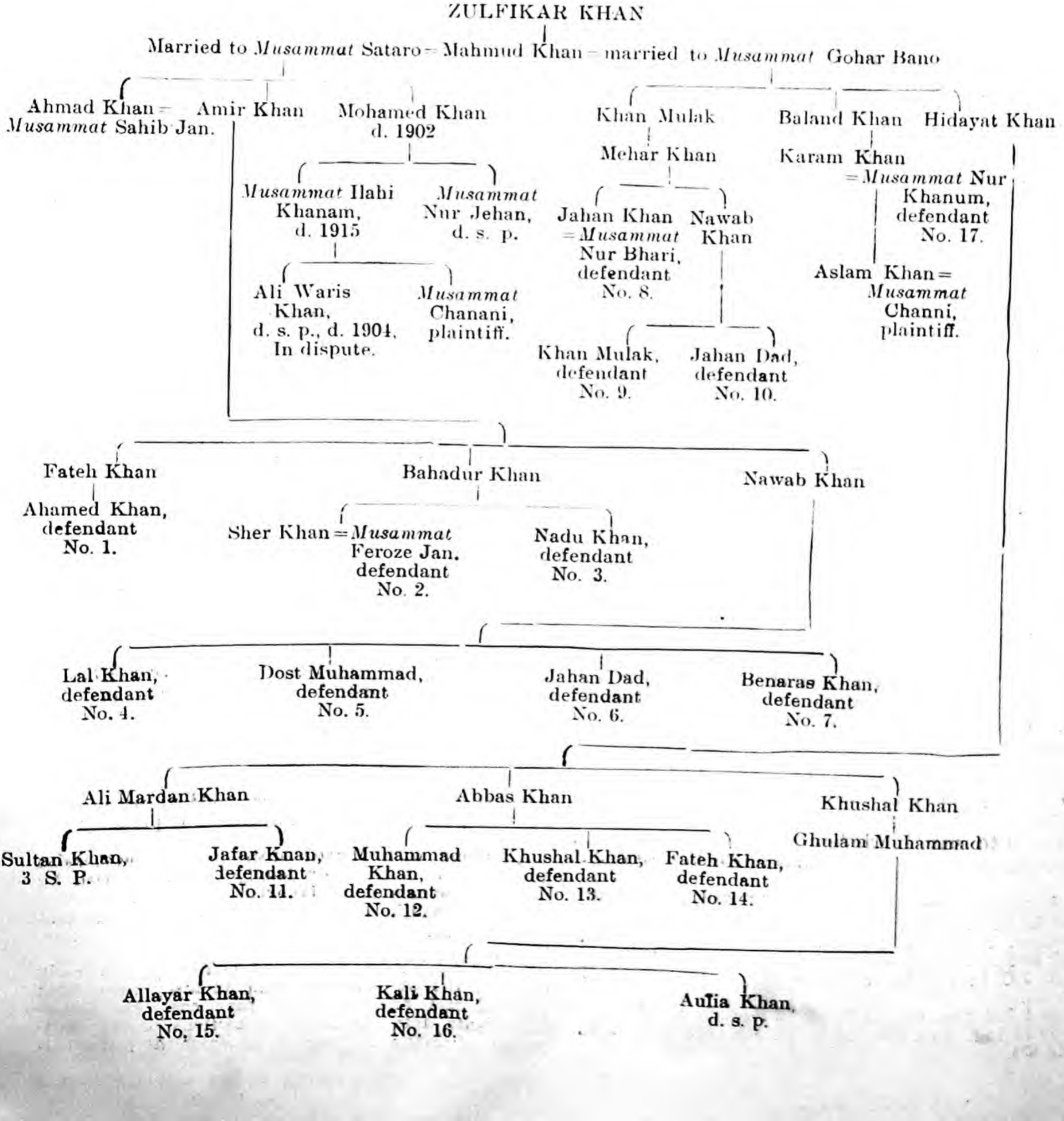
Messrs. *L. De Gruyther* and *E. B. Raikes*, for the Appellants.

Mr. *A. Majid*, for the Respondent.

JUDGMENT.

Mr. Ameer Ali.—This appeal arises out of a suit brought by the respondent *Musammat* Channi Bibi in the Court of the District Judge at Attock, for the establishment of her title in respect of certain lands which she claimed by right of succession to her deceased brother Ali Waris Khan.

The following table will show the relationship of the parties in these proceedings:—



Both trace their descent from one Zulfikar Khan through his son Mahmud Khan. Mahmud had two wives, named respectively Sataro and Gohar Bano. By Sataro he had three sons, respectively named Ahmad Khan, Amir Khan and Mohamed Khan. By Gohar Bano he had also three sons named Khan Mulak, Baland Khan and Hidayat Khan.

It is in evidence that Mohamed Khan died in 1902, leaving him surviving two widows *Musammat* Ilahi Khanam and *Musammat* Nur Jehan. The latter died in 1905. By Ilahi Khanam, who lived until 1915, Mohamed Khan had a son, Ali Waris and a daughter, the plaintiff in this case. Ali Waris died in 1904; and the litigation relates to his inheritance.

The defendants are the descendants of the brothers and half-brothers of Mohamed Khan.

The parties belong to one of the agricultural tribes of the Punjab, called the *Khattar*.

The plaintiff whilst admitting the existence in her tribe of a custom under which a daughter or a sister is excluded in favour of collaterals from inheritance in respect of "ancestral" property, denies its application to "self-acquired property."

She states that there is no special or general custom prevailing in the *Khattar* tribe under which collaterals like the defendants deprive a daughter or a sister of the right of succession to property acquired by the father or brother.

The defendants plead that by the custom prevailing in the tribe or in the family, females are excluded from succession irrespective of the character of the property whether it was ancestral or self-acquired. The parties went to trial on that issue.

There are two properties in dispute, one called Surag Salar, the other Kharala. The Senior Sub-Judge of Attock before whom the case came for trial, found as a fact that Surag Salar was "self-acquired property" within the meaning of the custom alleged by the plaintiff, and that Kharala, save and except 416 *kanals* of land, was "ancestral." But as regards the plaintiff's claim he held that she had failed for absence of specific instances to establish satisfactorily the custom under which she claimed her brother's inheritance. He accordingly dismissed her suit in respect of both the properties.

The High Court of Lahore, on the plaintiff's appeal, have given her a decree in respect of Surag Salar and the 416 *kanals* of Kharala which appears to have been admittedly purchased by Mohamed Khan, and dismissed her suit regarding the ancestral village of Kharala.

The appeal to this Board is by the defendants the collaterals who claimed the succession of Ali Waris in preference to Channi Bibi the sister.

The two points that have been raised before their Lordships really form the kernel of the case.

The first is: does Surag Salar, as has been found by the Courts in India, constitute in fact "self-acquired property" within the meaning of the custom alleged?

The question whether Surag Salar was the "self-acquired" property of the plaintiff's father turns upon the construction of the revenue settlement which began in 1852 and was completed in the year 1863. The settlement was in fact made with Amir Khan and Baland Khan representing the two branches of Mahmud Khan's family.

The settlement papers make it perfectly clear that prior to the Settlement of 1863, the family of Mahmud Khan had no right in Surag Salar. That about the close of the Sikh rule his sons had forcibly ousted another family that had been settled at Surag Salar for over 40 years. As already stated they had no title in the property; they had installed themselves there by force, and on the establishment of British rule in the Punjab, when settlement proceedings were begun they applied for settlement with them on the strength of certain advances or payments they had made to the Sikh Government. The settlement proceedings lasted several years and concluded only in 1863.

In the course of the proceedings a thorough inquiry was made as to title and possession. In the Punjab the Settlement Officer in the early days of British rule combined in his person both judicial and administrative functions. He had to investigate into the actual conditions of the occupation of lands in respect of which the settlement proceedings were instituted and to give effect to ascertained facts in accordance with the result of his enquiry whether the occupation was by virtue of any right or title. There can hardly be any dispute that whilst the settlement proceedings were proceeding Mahmud Khan had

died, for the settlement was made with his sons.

Before the Settlement Officer there were two parties arrayed against each other as claimants to the property of Surag Salar. Ghazan Khan represented the family which had been in possession of Surag Salar for over 40 years. They were placed in the category of plaintiffs; whilst Amir Khan and Baland Khan representing the family of Mahmud Khan were the defendants. Both belonged to the tribe of *Khattar*.

It is not necessary in this judgment to refer in detail to the proceedings which culminated in the settlement; it is enough to state the result of the enquiry embodied in *robakar* Ex. F-7. It runs thus:—

"There is no doubt that the village originally belonged to the plaintiffs. The defendants' possession is of 22 years' standing. The defendants suffered a loss of thousands of rupees. If they had not made the village *abad*, it would have been totally ruined. Now the point for determination is whether the plaintiff's suit is entertainable or not owing to their ejectment which took place 22 years ago. So it is clear that the plaintiff's suit has been pending since 1852, *i.e.*, for the last 11 years. In other words, the defendants' possession is considered to have existed since 11 years before the institution of the suit. The period is a period during which such a suit is cognizable. It is less than 12 years. Under these circumstances the plaintiff's suit is cognizable. The plaintiffs are original proprietors of the village. As a matter of fact, the defendants have no concern with the inheritance. The plea of the defendants that they purchased the village is worthless. They produce a sale-deed which is also worthless because they previously made no mention of the sale, nor is there any proof in respect thereof, nor yet as to their possession before *Sambat*, 1898. The plaintiffs were continuously in proprietary possession before the said *Sambat*. The opinion of Munshi Hukam Chand, Extra Assistant Commissioner, is that either Rs. 10 per cent. should be fixed for the plaintiffs as *taluqdari* dues or the village held the parties property in equal half shares."

. . . . . .

"It is, therefore, ordered that the cultivated land of one-half of the village be considered as the property of plaintiff No. 1 and that of the other half as the property of the defendants. The objection raised by plaintiff No. 2 as to two wells that they were separately sunk by the plaintiffs and that they should be given to them or to plaintiff No. 1 is worthless, because if the defendants had not made them *abad*, while they were in possession (of the village) they would have totally been ruined and useless. They are in working order. They should, therefore, remain the property of plaintiff No. 1 and the defendants in equal half shares.

Again, the proceedings before the Court of the Settlement Officer (Ex. P-8) are instructive:—

"The plaintiff's ancestors again made the village *abad* after it had become desolate. They are, therefore, considered owners. Only the defendants' possession, which is of 20 years' standing, is to be taken into consideration. But it is not worth consideration, because the plaintiffs, suit has been pending since the beginning of the British rule. An appeal was filed therein in the Commissioner's Court which remanded the case to the District Court for further enquiry which was made in this case. Under these circumstances, the ejectment for 12 years during the British rule is not worth consideration, because if a complete enquiry had been made at that time, the plaintiffs would have got their right. The defendants' possession is considered to have existed since 8 years before the British rule. The Extra Assistant Commissioner has two proposals to me. One of them is that the plaintiffs should get Rs. 10 per cent. as *taluqdari* dues. Under the above circumsances I consider the plaintiff's right to be superior thinking that the defendants had been in actual possession since 8 years before the British rule. The other proposal of the Extra Assistant Commissioner is that, in view of the fact that the defendants shared profit and loss, the village should be given to both the parties in equal half shares."

The final decision of the Settlement Officer concerning the half share settled with Mahmud's family is contained in Ex. D-39, as follows:—

"The proprietors descended from Zulfikar Khan and Fateh Khan will collect the produce of the entire land, cultivated by them and by the tenants distribute it among themselves according to the shares shown in the *khewat* papers, and pay the Government revenue according to ancestral shares

in addition to Rs. 17 per cent. on account of cesses as under."

In their Lordships' judgment, the Settlement Officer having regard to the conflicting claims of the plaintiffs on one side and of the defendants on the other, made an equitable division of the property between the two sets of claimants. The plaintiffs (Ghazan's people) had the original title by long occupation ; the defendants had ousted them to a considerable extent and had undertaken some liabilities in respect of the payment of revenue, etc. The Settlement Officer, therefore, came to the conclusion that it would be equitable to settle half of the lands with the descendants of Ghazan Khan who were the plaintiffs in the proceedings, and give the other half to the descendants of Zulfikar Khan. Surag Salar was thus in no sense ancestral property—it had not been acquired by their ancestor Zulfikar or Mahmud Khan and handed down to their successors. The settlement was effected in fact with Amir Khan and Baland Khan as representing the family of Zulfikar Khan and the title of proprietors was declared to be with them for the family. The direction contained in document D-39, page 180, shows the character of the settlement with the defendants' family.

Their Lordships are clearly of opinion that the judgment of the Subordinate Judge and of the learned Judges of the High Court with regard to Surag Salar is right.

As regards the custom in respect of which the two Courts in India have differed, their Lordships think the Subordinate Judge was in error in putting aside the large body of evidence on the plaintiff's side merely on the ground that specific instances had not been proved. They are of opinion that the learned Judges of the High Court are right in holding that a custom of the kind alleged in this case may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy.

There is a large body of oral evidence establishing the custom, wholly unrebutted by the defendants who have relied exclusively on the *Riwaj-i-am*. The Judges of the High Court have commented on these documents, and their Lordships see no reason to differ from them.

The Judges of the High Court have referred to the evidence of Sirdar Mohammed Hyat Khan, a distinguished officer of the Government, which if admissible, would be conclusive in the case; but it is urged by the appellants' Counsel that it cannot be put in evidence as it is not in compliance with the requirements of the Indian Evidence Act I of 1872. Their Lordships are not prepared to say that in the circumstances of the case it was erroneously admitted but assuming it is inadmissible it forms only one item in the mass of evidence on which the plaintiff relied and which has been thoroughly examined by the High Court.

On the whole their Lordships are of opinion that this appeal should be dismissed and they will humbly advise His Majesty accordingly. The appellants will pay to the respondent the costs.

Appeal dismissed.

Z. K.

Solicitors for the Appellants :—Messrs. *Ranken, Ford* and *Chester*.

Solicitors for the Respondent :—Messrs. *Francis* and *Harker*.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1905 OF 1922.

June 26, 1925.

Present :— Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

JADUNATH GUHA RAY AND OTHERS— APPELLANTS

versus

ABDUL HAJEE AND OTHERS— RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 67—Landlord and tenant—Kabuliyat—*Interest on arrears of rent, rate of—Penalty—Additional rent on excess area, assessment of.*

A stipulation in a *kabuliyat* providing for the payment of interest on arrears of rent at the rate of 75 per cent. per annum cannot be regarded as penal. [p. 460, col. 1.]

A landlord suing for arrears of rent on the basis of a *kabuliyat* executed before the passing of the Bengal Tenancy Act, is not entitled to recover interest on arrears at a rate higher than that fixed by s. 67 of the Act. [p. 460, cols. 1 & 2.]

Annada Charan Ray v. *Girindra Kumar Bandapadhaya*, 87 Ind. Cas. 178; 41 C. L. J. 453; (1925) A. I. R. (C.) 722, followed.

A *kabuliyat* provided for the payment of rent which was described as *khajana* at a certain sum per annum and also for the payment of other sums on other accounts. All these sums together with the

rent were amalgamated into a total sum which was described as *jama* or *malguzari*. There was a stipulation in the *kabuliyat* that excess rent (*khajana*) would be payable for lands subsequently found to be culturable:

Held, that the additional rent payable for the excess assessable area must be calculated on the basis of the amount of the *khajana* mentioned in the *kabuliyat* and not on the basis of the total rent mentioned therein. [p. 460, col. 2.]

Appeal against a decree of the District Judge, Noakhali, dated the 12th May 1922, modifying that of the Munsif, First Court, Lakshipore, dated the 27th May 1920.

Babus *Jogesh Chandra Ray*, *Suresh Chandra Taluqdar* and *Mahendra Kumar Ghose*, for the Appellants.

Mr. *Bimala Charan Deb* and Babu *Tarakeswar Mitra*, for the Respondents.

JUDGMENT.--This appeal arises out of a suit for rent and also for a declaration that the plaintiffs are entitled to additional rent for additional area. Only two points have been urged in this appeal. The first is that the lower Courts were wrong in refusing the plaintiffs' interest at the rate of 75 per cent. stipulated for in the *kabuliyat*. The second point is that the lower Appellate Court is wrong in reducing the enhancement of rent which had been granted by the first Court. The *kabuliyat* in this case was executed in the year 1874 before the passing of the Bengal Tenancy Act. The lower Courts have held that the stipulation for interest at that rate is penal and consequently instead of interest, allowed the plaintiffs' damages at 25 per cent. We are unable to agree with the finding that the stipulation for payment of interst at that rate is penal. But we hold that the plaintiffs' claim on this point failed on another ground. The *kabuliyat* in this case appears to be in all its essential terms similar to the *kabuliyat* which was considered in the case of *Annada Charan Ray* v. *Girindra Kumar Bandopadhaya* (1). In that case it was held that the stipulation for payment of interest at the rate of 75 per cent. could not be taken to be penal. But though the ground of the decision of the Courts below was held to be unsustainable that decision that the claim for interest could not be enforced, was upheld on a different ground. It was held there that as the Bengal Tenancy Act came into operation when the tenants did not acquire the rights of an occupancy *raiyat* the claim must be governed by the provisions of the Bengal Tenancy Act and that under s. 67 of the Bengal Tenancy Act the plaintiffs were not entitled to recover more interest than what was fixed by that section. We can see no ground on which the facts of the present case can be distinguished from the facts of that case and following that decision we must hold that the claim for interest at the rate of 75 per cent. per annum on the arrears of rent cannot be enforced.

As regards the second point urged the *kabuliyat* provides for payment of rent at Rs. 37-15-0 per annum and for payment of other sums on other accounts. These are all amalgamated into a fixed *jama* of Rs. 41-8-6. The lower Appellate Court reversing the decision of the first Court on this point calculated the additional rent payable for excess assessable area on the basis of a rental of Rs. 37-15-0. On consideration of the *kabuliyat* we think that the lower Appellate Court was right. The word used for describing the rent as Rs. 37-15-0 is *khajana*. The word referring to the total rent payable is used in another place as *jama* and elswhere as *malguzari*. Now in the condition to pay excess rent for lands subsequently found to be culturable the word used is *khajana* and we think that this indicates that the excess rent was to be assessed on the basis of the *khajana* of Rs. 37-15-0 as found by the lower Appellate Court.

The appeal is dismissed with costs.

The cross-objection taken on behalf of the respondents is not pressed and is dismissed.

We make no order as to costs in the cross-objection.

Z. K. *Appeal dismissed.*

(1) 87 Ind. Cas. 178; 41 C. L. J. 453; (1925) A. I. R. (C.) 722.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 156 OF 1924.

January 8, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

PONNUSWAMI NAICKER—PETITIONER—APPELLANT

versus

T. P. L. S. SUBRAMANIA CHETTIAR—RESPONDENT.

Insolvency—Official Receiver, position of—Unsecured creditor, right of, to maintain application.

The proper person to take proceedings under the

Insolvency Act on behalf of the unsecured creditors is the Official Receiver or the Special Receiver whosoever is appointed. The Receiver represents all the unsecured creditors and an unsecured creditor cannot move the Court in insolvency unless the Receiver has refused to act in the matter.

Where a Receiver applies to the Insolvency Court to stop a sale of the insolvent's property and the Court refuses the application, it is not competent to an unsecured creditor of the insolvent to maintain a fresh application for the same relief.

Appeal against an order of the District Court, West Tanjore, dated the 2nd February 1924, in I. A. No. 11 of 1924, in I. P. No. 54 of 1920.

Mr. *Watrap Subrahmanya Iyer*, for the Appellant.

Mr. *N. S. Srinivasa Iyer*, for the Respondent.

JUDGMENT.—The appellant is a creditor who consented to the composition which was accepted by the Court. He has no right to object to the sale of the charged property by the District Munsif's Court. The proper person to take proceedings under the Insolvency Act is the Official Receiver or the Special Receiver whosoever is appointed. In this case the Special Receiver did apply to the District Court to stop the sale and his application was refused by the District Court. The appellant who is a creditor now applies in the District Court for the same relief which was denied to the Special Receiver. The Special Receiver represented all the unsecured creditors in previous proceedings and the order against him is binding on all the unsecured creditors. The respondent is a secured creditor and an unsecured creditor cannot move the Court in insolvency unless the Official Receiver or Special Receiver has refused to act in the matter. Here he has acted and failed. The appellant is not competent to maintain this appeal. The order of the learned District Judge is right. The appeal is dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 519 OF 1925.

June 25, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

Mir AZIZAR RAHAMAN *alias* *Syed* AZIZAR RAHAMAN—DEFENDANT—APPELLANT

versus

RAM CHANDRA PODDAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment, whether must be addressed to creditor—Mortgage—Recital in sale-deed that mortgage subsists, effect of.

An acknowledgment of liability under s. 19 of the Limitation Act need not be addressed to the creditor or to any one representing him. [p. 462, col. 2.]

Imam Ali v. *Baij Nath Ram Sahu*, 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576, dissented from.

Mylapore Iyasawmy Vapoory Moodaliar v. *Yeo Kay*, 14 I. A. 168; 14 C. 801; 11 Ind. Jur. 397; 5 Sar. P. C. J., 50; 7 Ind. Dec. (N. S.) 531 (P. C.), referred to.

Maniram Seth v. *Seth Rupchand*, 33 C. 1047 at p. 1058; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165 (P. C.), followed.

A recital in a sale-deed that there is a mortgage subsisting on some of the properties comprised in the deed amounts to an acknowledgment of the mortgage within the meaning of s. 19 of the Limitation Act. [*ibid.*]

Appeal against a decree of the Subordinate Judge, First Court, Barisal, dated the 6th July 1922, modifying that of the Munsif, Second Court, Barisal, dated the 30th July 1921.

Mr. *Heramba Chandra Guha* (with him Babu *Jnan Chandra Roy* for Babu *Mukunda Lal Roy Choudhuri*), for the Appellant.

Babu *Surendra Nath Das Gupta*, for the Respondent.

JUDGMENT.—This is an appeal by defendant No. 7 in a mortgage suit. The mortgage is dated the 25th February 1911 and is executed by defendant No. 1 in favour of the plaintiff. The last due date for payment under the mortgage was the 13th April 1908. On the 26th January, 1919, the martgagor executed in favour of defendants Nos. 2 to 15 a *kobala* in respect of some of the mortgaged properties which refers to the mortgage as still subsisting. The suit was commenced on the 12th April, 1920 and was brought against the mortgagor alone. Subsequenty, on the 22nd November, 1920 defendants Nos. 2 to 15 were added as parties and it is contended by one of them—defendant No. 7 who is the appellant before us, that the claim is barred by limitation. The only question that really arises is whether the statement con-

tained in the *kobala* of the 26th January 1919 has the effect of an acknowledgment so as to create a new period of limitation as from the 26th January 1919.

It is argued before us on behalf of the appellant that this does not amount to an acknowledgment because it is not addressed to the mortgagee and reliance is placed by the appellant on the case of *Imam Ali* v. *Baij Nath Ram Sahu* (1). There, a Division Bench of this Court decided that an acknowledgment of a debt to be operative under s. 19 of the Limitation Act must be addressed or communicated to the creditor or to someone on his behalf and in the judgment of the Court reliance is placed on a decision of the Judicial Committee in *Mylapore Iyaswamy Yapoory Mudaliar* v. *Yeo Kay* (2) which, it is said, is an authority for the proposition that an acknowledgment within the meaning of s. 19 of the Limitation Act must be addressed to the creditor. On examination of the report in 14 Indian Appeal we do not think that the passage relied on can be taken as an authority for the proposition for which it is cited and reference to a later decision of the Judicial Committee, *viz.*, to the case of *Maniram Seth* v. *Seth Rupchand* (3) shows that it has there been expressly laid down by the Judicial Committee that having regard to the "explanation" given in s. 19 an acknowledgment under s. 19 need not necessarily be addressed to the person entitled, that is, to the creditor. In that case, there had been dealings between one Motiram and Seth Rupchand. After Motiram's death an application was made by Seth Rupchand and others for Probate of the Will of Motiram. Seth Rupchand applying for Probate stated that there had been open and current accounts for the last five years between him and Motiram, and stated that the alleged indebtedness, that is to say any indebtedness that might be found on taking accounts did not affect his right to apply for Probate. This was not an acknowledgment addressed to the creditor but merely a statement of liability for an indebtedness which might be ascertained. But although it was not addressed to the creditor or any representative of his it was taken as a sufficient acknowledgment under s. 19 of the Limitation Act. Clearly therefore, this case is an authority for the proposition that the acknowledgment need not be addressed to the creditor or to any one representing him. It seems to me that the decision relied on by the appellant in the case reported as *Imam Ali* v. *Baij Nath Ram Sahu* (1) to which I have referred, cannot be taken to be good law in view of the statement contained in the judgment of *Maniram Seth* v. *Seth Rupchand* (3) to which I have also referred. Consequently, we think that the Court below rightly held that the statement in the *kobala* of the 26th January 1919 amounted to an acknowledgment under s. 19 of the Limitation Act and that a fresh period of limitation ran from that date with the result that the suit was not barred by limitation.

In this view, the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576.

(2) 14 I. A. 168; 14 C. 801; 11 Ind. Jur. 397; 5 Sar. P. C. J. 50; 7 Ind. Dec. (N. S.) 531 (P. C.).

(3) 33 C. 1047 at p. 1058; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165 (P. C.).

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 69 OF 1924.

February 10, 1925.

Present :—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

SESHAMMAL AND OTHERS—DEFENDANTS Nos. 1 TO 3 —APPELLANTS

versus

KUPPANAIYYANGAR AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 101, O. XLI, r. 23—Remand, order of—Appeal—Grounds of attack—Evidence Act (I of 1872), ss. 50, 65—Relationship, proof of—Family conduct—Repute, evidence of, whether admissible—Secondary evidence—Pedigree, proof of.

On an appeal to the High Court from an order of remand by the first Appellate Court, the only grounds available to the appellant to attack the judgment are those which would be available to him in second appeal. [p. 463, col 1.]

Venganayyan v. *Ramasami Ayyar*, 19 M. 422; 4 M. L. J. 263; 6 Ind. Dec. (N. S.) 1000 and *Joseph Armugam Pillai* v. *Muruga Pillai*, 3 Ind. Cas. 283; 6 M. L. T. 198, followed.

A statement by a person that he derived his information about the relationship existing between certain persons from a pedigree prepared by his father is inadmissible in evidence without the pedigree being produced or a foundation being laid for admitting secondary evidence of the contents of the pedigree. [p. 464, col. 2]

Section 50 of the Evidence Act enacts a rule different from that prevailing in England. According to

English Law "general reputation is admissible to establish relationship". But s. 50 of the Evidence Act is limited to opinion as expressed by conduct, and there is no other provision in the Act under which evidence of general repute would be receivable in evidence to prove relationship. [p. 464, col. 1.]

Mi Me v. *Mi Shive Ma*, 14 Ind. Cas. 475; 39 C. 492 at p. 503; 11 M. L. T. 169; (1912) M. W. N. 204; 15 C. L. J. 276; 9 A. L. J. 276 14 Bom. L. R. 204; 22 M. L. J. 360; 16 C. W. N. 529; 5 Bur. L. T. 65; U. B. R. (1912) I, 111; 39 I. A. 57 (P. C.), relied on.

Appeal against an order of the Court of the Subordinate Judge, Vellore, in A. S. No. 119 of 1922, District Court, North Arcot, in A. S. No. 39 of 1923, dated the 26th July 1923. preferred against the decree of the Court of the District Munsif, Ranipet, in O. S. No. 699 of 1919.

Mr. *C. Padmanabha Iyengar*, for the Appellants.

Mr. *K. N. Rajagopala Sastri*, for the Respondents.

JUDGMENT.—The learned Subordinate Judge has reversed the decision of the District Munsif on the first issue. The District Munsif has found that the plaintiffs have not proved the relationship set up by them. The Subordinate Judge has found that the plaintiffs are the reversionary heirs of the deceased Krishnamachariar and has remanded the suit for trial of the other issues. Although the appeal has taken the form of a civil miscellaneous appeal (appeal against an order of remand) the Subordinate Judge is a final Judge of fact and the only grounds available to the appellant to attack the judgment are those which would be available to him in second appeal: see *Venganayyan* v. *Ramaswami Ayyan* (1) and *Joseph Armugam Pillai* v. *Muruga Pillai* (2). The question, therefore, is, is the judgment of the Subordinate Judge one with which we can interfere in second appeal? The argument on behalf of the appellant is mainly that there is no evidence in support of the finding. After carefully going through the judgment and the material on which that judgment is based, we agree with the appellant's contention.

The learned Subordinate Judge purports to act, firstly, on the oral evidence of three witnesses examined for the plaintiffs. Plaintiff's witness No. 1 says thus :—"I do not know my grandfather or his brothers personally. My father had prepared a genealogy for the relationship. I took information from it". The pedigree prepared by this witness' father would certainly be a statement admissible in evidence under s. 32, cl. (5) or cl. (6) but, unfortunately, this has not been produced. No reason has been given for admitting secondary evidence of this document. Plaintiff's witness No. 1 says nothing further on this subject. The learned Subordinate Judge observes that P. W. No. 1 was not cross-examined with reference to his omission to produce this pedigree. It is scarcely necessary to say that the plaintiffs who endeavoured to make out that they were the reversionary heirs were bound to produce this pedigree, because according to the evidence of P. W. No. 1 that is the foundation of their case. Without the original of that pedigree, P. W. No. 1's evidence amounts to absolutely nothing. It is unnecessary to examine in detail the evidence of the second witness for the plaintiff. All that he says is this "Plaintiff's grandfather Krishnama Chari told me that he had three brothers when I was learning Veda at Punnai." Who are these three brothers? That is not explained. And what is the connection between Krishnamachariar and Kuppan Iyengar? This is also not explained. His evidence, therefore, is of no use to the plaintiffs. Plaintiff's witnsss No. 3 is a Naicken, whereas the parties to the suit are Vaishnava *Brahmins*. All that he says in his evidence is: People say that plaintiffs are 1st defendant's *dayadis*". The learned Subordinate Judge is of the opinion that this is admissible but he seems to overlook the provisions of s. 50 of the Indian Evidence Act. "Family conduct" to use a compendious expression, is admissible to prove relationship. But there is no evidence of family conduct here at all. The illustrations to the section make the point very clear. Illustration A runs thus:—

The question is, whether *A* and *B* were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant. There is a casual observation in the judgment of their Lordships of the Privy Council in *Mi Me* v. *Mi Shive Ma* (3): "In the absence of direct

(1) 19 M. 422; 4 M. L. J. 263; 6 Ind. Dec. (N. S.) 1000.

(2) 3 Ind. Cas. 283; 6 M. L. T. 198.

(3) 14 Ind. Cas. 475; 39 C. 492 at p. 503: 11 M. L. T. 169; (1912) M. W. N. 201; 15 C. L. J. 276; 9 A. L. J. 276; 14 Bom. L. R. 204; 22 M. L. J. 360; 16 C. W. N. 529; 5 Bur. L. T. 65; U. B. R. (1912) I, 111; 39 I. A. 57 (P. C.).

proof consent may be inferred from the conduct of the parties or established by reputation". But a perusal of the judgment will show that the evidence which was accepted by the Privy Council was evidence of family conduct. As Messrs. Amir Ali and Woodroffe point out in their book on Evidence. Section 50 enacts a rule different from the law in England. According to English Law he says "General reputation is admissible to establish the fact of parties being married. Accordingly, general evidence of reputation in the neighbourhood, even when unsupported by facts, or when partially contradicted by evidence of a contrary repute, has been held receivable in proof of marriage. The present section is limited to opinion as expressed by conduct, and there appears to be no other provision in the Act under which such evidence of general reputation would be receivable". We cannot construe the judgment of their Lordships of the Judicial Committee as laying down a rule of law completely at variance with the clear rule of the Indian Evidence Act.

This then is all the oral evidence in support of the pedigree put forward by the plaintiffs. It is noticeable that the 1st plaintiff has not chosen to go into the box to support the case set up.

Turning now to the documentary evidence we have first Ex.-D. This is a previous statement made by the 1st defendant in this case. She deposed in O. S. No. 324 of 1918, "Janaki Ammal is the wife of my senior father-in-law". This is evidence of the fact that 1st defendant's father-in-law had an elder brother whose wife was Janaki Ammal. This proves nothing more. Whether Janaki Ammal is the wife of Ilayalwar brother of Krishanamchariar or whether she is not, on this point, no light is thrown by this deposition. Then, the plaintiffs strongly rely upon Ex.-B. That purports to be a sale-deed by Janaki Ammal in favour of Vijaraghava Iyengar the father of the plaintiffs. It contains the following statement:—"Deed of sale in favour of Vijaraghavachariar son of Krishnamachariar by Janaki Ammal wife of Krishnamachariar's younger brother Illayalwar". There is no evidence worth the name to establish the identity of Janaki Ammal of this document with Janaki Ammal referred to in the deposition of the 1st defendant. Granting, however, that the evidence is sufficient for this purpose, what do we have? Exhibit B is an unregistered sale-deed. No doubt it comes from the custody of the plaintiffs. It is more than 30 years old, but is it really necessary that the presumption under s. 90 should be drawn in favour of its genuineness? The Court is permitted to presume that an ancient document produced from proper custody is genuine. But the circumstances of the case do not justify such a presumption being made. The District Munsif refused to make that presumption. The document is attested by two persons. We have been told nothing as to whether these persons are alive or they are dead. The document refers to a usufructuary mortgage and a *kychit* and they have not been produced. In these circumstances, it is extremely difficult to hold that Ex. B is genuine. As regards the *kychit*, we may observe that the District Munsif says in his judgment that the plaintiffs had "kept back" the *kychit*. The learned Subordinate Judge points out that the *kychit* was filed but was not exhibited at the trial and was later taken back by the parties. An application was made to the Sub-Judge to make it evidence in the appeal but he refused to allow that.

We were pressed in the course of the argument that we ought to receive this document in evidence. In the first place there is no application before us to receive additional evidence and, secondly, even the document is not before this Court. It is after all an unregistered *cadjan* document. The suggestion now made is, that the *kychit* would conclusively have proved the plaintiff's pedigree. If that be so, why was it not filed in evidence? As we have said, in the lower Court an attempt was made but unsuccessfully to obtain permission to file this document. We cannot in these circumstances comply with the request that we should permit the *kychit* to be received in evidence.

There remains only one other matter and it is this. It is said that some of the properties which were at one time in the possession of Krishnamachari are later in the possession of Kuppanna Iyengar the *propositus*. It is true that distribution and devolution of family property is often very valuable evidence of "family conduct" under s. 50. But, in this case, the material is wanting from which any inference in favour of the plaintiffs can be drawn. It is possible that Kuppanna Iyengar purchased, as any stranger might have done, the property which was once in the possession of

Krishnamachari. It is for the plaintiffs to make out that there was devolution of property which would support their case. The statement of the learned Judge that the natural inference is that there was a family partition is not borne out by any evidence.

For these reasons we are constrained to interfere with what is apparently a finding of fact and we reverse the decision of the Subordinate Judge and allow this appeal with costs. The result is that the suit is dismissed with costs throughout.

V. N. V.
Z. K. *Suit dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1256 OF 1921.
April 7, 1924.
Present:—Mr. Justice Martineau
and Mr. Justice Moti Sagar.
Musammat SHAM DEVI—DEFENDANT—APPELLANT
versus
RAM NATH—PLAINTIFF—RESPONDENT.

Hindu Law—Religious endowment—Succession—Nomination of successor—Shebait, *power of.*

In the absence of any terms regulating succession in the trust deed, if any, or the usage of the institution, the management of a Hindu religious endowment passes by ordinary rules of inheritance, unless such devolution is opposed to the purpose of the trust, and the *shebait* or manager is incompetent to nominate a successor by Will. [p. 466, col. 2.]

Rajeshwar Mullick v. *Gopeshwar Mullick*, 35 C. 226; 12 C. W. N. 323; 7 C. L. J. 315, *Goswami Puran Lalji* v. *Ras Behari Lal*, 67 Ind. Cas. 328; 44 A. 590; 20 A. L. J. 527; 4 U. P. L. R. (A.) 119; (1922) A. I. R. (A.) 285, followed.

Mancharam v. *Pranshanker*, 6 B. 298; 6 Ind. Jur. 426; 3 Ind. Dec. (N. S.) 655, distinguished.

First appeal from a decree of the Subordinate Judge, First Class, Lahore, dated the 9th May 1921

Lalas *Jagan Nath Aggarwal* and *Jagan Nath Bhandari*, for the Appellant.

Pandit *Sheo Narain*, R. B., and Mr. *Kanwar Narain*, for the Respondent.

JUDGMENT.—This is an appeal from a decision of Pandit Omkar Nath Zutshi, Subordinate Judge of Lahore, dated the 29th May 1921, awarding plaintiff a decree for possession of certain houses and shops in the city of Lahore. The property is admittedly *debutter* and belonged originally to one Radha Kishan who dedicated it to religious purposes by a deed of endowment dated the 10th *Phagan, Sambat* 1899 (corresponding to 24th February 1843). One Behari Lal was appointed manager of the endowed property, and he was succeeded in the management thereof by his son Balak Ram. Balak Ram has now died and the plaintiff Ram Nath, who claims to be his adopted son, has brought this suit for possession, alleging that as an adopted son he is also entitled to succeed to the management by the ordinary rule of inheritance. The defendant *Musammat* Sham Devi professes to be the widow of the deceased and claims to be in possession under a Will alleged to have been executed in her favour on the 16th April 1917. The validity and due execution of the Will are denied by the plaintiff and it is also denied that the defendant was lawfully married to the plaintiff's adopted father Balak Ram. A further contention is raised to the effect that, even if the Will was duly executed, the deceased under the law had no power to make a testamentary disposition of the management of the endowed property and that the Will was, therefore, wholly inoperative. The only relevant issues in the case with which we are now concerned are the following:—

(1) Was plaintiff validly adopted by the deceased Balak Ram?

(2) Did Balak Ram make a valid Will in favour of the defendant and did he possess any power under law to make such a Will?

(3) Was defendant lawfully married to Balak Ram and was she entitled to succeed to the management of the endowed property independently of the Will?

The Subordinate Judge found in favour of the plaintiff on all these issues and decreed the suit.

It is clearly proved by the evidence that the plaintiff had been validly adopted by the deceased Balak Ram, and in fact the finding of the learned Judge of the Court below on this point has not been seriously contested by the defendant in this appeal. The adoption is supported not only by the oral testimony of the witnesses produced on behalf of the plaintiff but also by the admissions made from time to time by the deceased Balak Ram himself. We must accordingly hold that the adoption has been fully established and that there is no force in the first two grounds of appeal.

The question relating to the due execution of the Will also does not admit of any doubt whatever. The execution is proved by large number of witnesses whom there is no reason to disbelieve, and there can be no doubt that the deceased was in a free disposing state of mind when the document is alleged to have been executed. The finding of the learned Subordinate Judge on this point is that the Will was executed under undue influence and that the defendant was exercising dominating influence over Balak Ram's mind which prevented his bringing an unbiassed and free mind to the disposal of his property. This finding, in our opinion, is wholly unsupported by any evidence and cannot, therefore, be accepted. The onus of proving undue influence was clearly upon the plaintiff and he has wholly failed to discharge it. We must, therefore, hold that due execution of the Will has been clearly proved and that the Will is not bad by reason of any undue influence having been exercised over the deceased.

The next question for consideration is whether the defendant was lawfully married to the deceased. The decision of this question appears to us to be wholly unnecessary as, in our opinion, the decision of the case turns really upon the determination of the question as to whether in law the deceased had or had not the power to make a testamentary disposition of the management of the endowed property.

It is contended by Mr. Jagan Nath for the appellant that the onus of proving that the plaintiff as an adopted son was entitled to succeed to the management to the exclusion of defendant was upon the former and that he had wholly failed to discharge it. He further argues that in the absence of any provision in the deed of endowment as to the succession, and in the absence of any evidence on the record of any custom or usage in this institution regulating the devolution of the office of *shebait*, the defendant was entitled to remain in possession, and that the plaintiff's suit should have been dismissed. Pandit Sheo Narain, on the other hand, contends that the onus was upon the defendant and that as she had produced no evidence in support of any custom regulating the mode of succession the plaintiff's suit has been rightly decreed. We have carefully considered this matter and have consulted the various authorities cited by the learned Counsel in support of their respective contentions and the conclusion which we have arrived at is that the plaintiff's contention is right and that the defendant's appeal must fail. The rule of law relating to the devolution of trusts in such cases is thus stated by Mayne in para. 439 of his well-known treatise of Hindu Law and Usage:—

"The devolution of the trust, upon the death or default of each trustee, depends upon the terms upon which it was created, or the usage of each particular institution, where no express trust-deed exists. Where nothing is said in the grant as to the succession, the right of management passes by inheritance to the natural heirs of donee, according to the rule that a grant without words of limitation conveys an estate of inheritance unless such devolution is inconsistent with, or opposed to, the purpose the founder had in view in creating the trust."

This rule is in complete harmony with the principles of equity, justice and good conscience and appears to us to be the correct rule which ought to be followed in cases of the present nature. The rule is not unsupported by authority. In the case of *Rajeshwar Mullick* v. *Gopeshwar Mullick* (1) it was ruled that *shebait* is a manager or *quasi* trustee for the benefit of the idol and has, therefore, no power to alienate the hereditary office of *shebaitship* by Will. The High Court of Allahabad has taken much the same view as the Calcutta High Court: *Goswami Puran Lalji* v. *Ras Behari Lal* (2). The case of *Mancharam* v. *Pranshankar* (3), on which reliance has been placed by the learned Vakil for the appellant, is clearly distinguishable. It has not been shown in the present case that the devolution of trust according to the ordinary rules of inheritance is inconsistent with, or opposed to, the purpose the founder had in view in creating the trust or that a different custom or usage prevailed in this institution. Indeed it is admitted that on the death of Behari Lal, the first incumbent, his son, Balak Ram, succeeded to the management of the trust. It would thus appear that the ordinary rule of inheritance prevailed in this institution, it having been recognised without any challenge or objection for a very long

(1) 35 C. 226; 12 C. W. N. 323; 7 C. L. J. 315.
(2) 67 Ind. Cas. 328; 44 A. 590; 20 A. L. J. 527; 4 U. P. L. R. (A.) 119; (1922) A. I. R. (A.) 285.
(3) 6 B. 298; 6 Ind. Jur. 426; 3 Ind. Dec. (N. s.) 655

period. We, therefore, agree with the learned Subordinate Judge in holding that Balak Ram was incompetent to nominate a successor by Will to the managership of the property in suit, and that the document relied on by the defendant, even if she was lawfully married to the deceased was invalid.

The result is that the appeal fails and is dismissed with costs.

N. H. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NOS. 36, 38 AND 43 OF 1925.

August 31, 1925.

Present :—Mr. DeSouza, A. J. C., and Mr. Tyabji, A. J. C.

IN No. 36 OF 1925.

SALIGRAM—APPELLANT

versus

OFFICIAL RECEIVER—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 27, 43—Civil Procedure Code (Act V of 1908), s. 148—Adjudication—Failure of debtor to apply for discharge within time fixed—Adjudication, whether must be annulled—Extension of time.

Per *Tyabji, A. J. C.*—Although the language of s. 43 (*a*) of the Provincial Insolvency Act is mandatory that if a debtor fails to apply for an order of discharge within the period specified by the Court in its order of adjudication the adjudication shall be annulled, the Court has, under s. 27 (2) of the Act, power to extend the period within which the debtor must apply for his discharge, even after the original period fixed for the purpose has expired, with a view to enable the insolvency proceedings to be carried through to completion. [p. 469, col. 2; p. 470, col. 1.]

Per *DeSouza, A. J. C.*—The words "shall be annulled" in s. 43 (*a*) of the Provincial Insolvency Act are directory and discretionary and not mandatory or peremptory and it is, therefore, within the discretion of the Court in the circumstances of a particular case, where the debtor has failed to apply for his discharge within the time originally fixed, whether to annul the adjudication or to extend the time within which the debtor must apply for his discharge. [p. 470, col. 2.]

Messrs. *C. M. Lobo, Dipchand Chandumal* and *Sri Kishindas H. Lulla*, for the Appellants.

Messrs. *Kimatrai Bhojraj* and *Tahilram Maniram*, for Opposing Creditor.

Mr. *Tolasing K. Advani*, for the Opponent.

JUDGMENT.

Tyabji, A. J. C.—These are appeals from an order refusing an application under s. 43 of the Provincial Insolvency Act praying that the adjudication order against the insolvent should be annulled. The original petition for adjudication as an insolvent was presented to the Court in its insolvency jurisdiction as long ago as 13th March 1918. An order of adjudication was thereupon made but not till the 15th November 1920.

In accordance with s. 27 (1) it was specified in the order of adjudication that the debtor should apply for his discharge within 2 years of the order, *i. e.*, on 15th November 1922. The debtor did not apply for his discharge, as he was bound to do under s. 41 of the Provincial Insolvency Act, which provides that the debtor shall within the period specified by the Court apply to the Court for an order of discharge.

On 22nd April 1925 one Saligram claiming to be a creditor of the insolvents, made the above-mentioned application for annulment of the adjudication order, purporting to be so under ss. 35 and 43 of the Provincial Insolvency Act of 1920 or s. 42 of Act III of 1907. The learned Judicial Commissioner in the exercise of his insolvency jurisdiction refused to annul the adjudication order with the following remarks :—

"As regards the annulment application I do not regard it as incumbent upon me to annul the adjudication even assuming that the insolvency is one to which the provisions of Act V of 1920 apply. Nothing can be received by the creditors except in insolvency and the object of the application is to defeat the body of creditors to the benefit of the insolvent and his friends. No doubt he is strictly bound to make his application within the fixed time. No doubt the Act goes on to say that the Court when asked shall annul it. But it is not intended by the Legislature that persons who have misbehaved should be allowed to profit by their own misdeeds. It is clear to me that if this adjudication is now annulled it might work considerable benefit to the insolvent and possibly the opposing creditor Saligram but would work considerable loss to the other creditors. And I think, therefore, it would be very improper for this Court to annul the adjudication on the grounds stated. The question as to failure to act under the Act if Act V of 1920 applied may be decided later. But I do not propose myself to use my powers to benefit the insolvent for conduct which rather calls for punishment".

The applying creditor as well as some

other creditors have appealed. The insolvent himself has appeared before us through Counsel and we have heard arguments on his behalf that the adjudication order ought to have been and ought now to be annulled.

The argument before us has been in the main that the learned Judicial Commissioner had no discretion in the matter, and that the provisions of s. 43, Provincial Insolvency Act, being imperative, an annullment order should have been made as a matter of course.

The provisions of s. 43 are in the nature of a penalty upon the insolvenet for failure to apply for his discharge. Yet it is the insolvent and a minority of the creditors that desire to invoke the penalty upon the insolvent, and the insolvent does so, not in a spirit of penitence, but because he says that the interests of the creditors, in the first instance, and ultimately his own will be best served in this manner. The Official Receiver with the concurrence of a majority of the creditors, on the other hand, opposes this application: not in a spirit of forgiveness, but because they fear the insolvent even if he appears in a penitential garb, and consider that their interests will be best served if they can have the facilities of the Insolvency Act for the purpose of getting or retaining possession of the insolvents' assets; of proving their claims, of setting aside some of his dealings, or attempts at dealings with his property, which they say are fraudulent, and ultimately of having the assets equitably distributed amongst themselves.

In these circumstances we have scrutinized with some care some of the proceedings during the $7\frac{1}{2}$ years that have elapsed since the first attempt was made to bring the debtor to the Insolvency Court. In the result we have no doubt left in our minds that the creditors who support the Official Receiver have a sufficiently clear and correct conception of what is to their interest and that if these interests are to be served it would be disastrous to annul the adjudication order. The learned Judicial Commissioner had arrived at the same conclusion.

The question then arises whether s. 43 leaves any discretion in the Court: whether it empowers us to act otherwise than by annulling the adjudication order.

The operative part of s. 43 (1) with which we are concerned is that the order of adjudication *shall* be annulled. It was elaborately argued and authorities cited to show that these words mean that the Court *may* annul the order. Speaking for myself, I think the words are quite plain, and that their interpretation neither needs, nor gains by, the citation of authorities. I am unable to interpret these as meaning otherwise than that the adjudication shall be annulled. No paraphrase of these words can, it seems to me, explain them, or make their meaning clearer. The fact that in the corresponding s. 41 of the Provincial Insolvency Act the words are *may annul* is not unimportant.

While I am opposed to interpreting this clause of s. 43 (*a*) otherwise than in its natural grammatical sense, I am equally opposed to ignoring the rest of the subsection which lays down the condition precedent when the operative words above referred to are to come into force.

The conditions consist of two alternatives:—

(1) The first is:—"if the debtor does not appear on the date fixed for hearing of his application for discharge or on such subsequent day as the Court may direct." This evidently has reference to the day fixed by the Court under s. 41 for the hearing of the application for an order of discharge. (2) The second alternative is- "if the debtor does not apply for an order of discharge within the period specified by the Court." This, no doubt, refers to s. 27 (1), which requires that the Court shall specify in the order of adjudication the period within which the debtor shall apply for his discharge.

The duration of this period must obviously be so fixed as to permit the necessary proceedings in insolvency being carried through on the insolvent's application for being discharged which s. 41 requires him to make, the Court may refuse to do so except on terms. The original period during which the application may be made may also be extended under s. 27 (2) if sufficient cause is shown.

From the facts that have been stated it is clear that the time at which the question whether the insolvency should be discharged (if at all), and on what terms, has not arrived, in the present case, as the proceedings that ought to be completed within the period referred to in s. 27 have not been completed. The insolvent is, no doubt, in our opinion, responsible for the state of

affairs but he nevertheless, more mindful of the duty imposed on the Court under s. 43 than of that imposed on himself under s. 41, contends that the Court is bound to annul the adjudication order. The Official Receiver, on the other hand, places before us the obvious suggestion that the insolvency proceedings instead of being annulled ought to have their period extended, and applies for extension of the period under s. 27 (2).

Various objections are made to this application. One of them is that the period originally fixed, having expired, the application is now too late. This contention is opposed to *Abraham* v. *Sookias* (1) and *Bhagwandas Bagle* v. *Haji Abu Ahmed* (2), which are themselves based partly on s. 148 of the C. P. C. that provision being imported into insolvency proceedings by s. 59 of the Provincial Insolvency Act. Another futile objection is that the Insolvency Act, s. 27, gives the power of extending the period to "the Court" which by virtue of s. 3 of that Act means the District Court, and that we are now sitting with the High Court powers and that these circumstances somehow deprive s. 107 of the C. P. C. of all effect. Thirdly, it was argued that any extension of the period is meaningless in view of the fact that the insolvent has not, so far obeyed and has no intention hereafter of obeying, the directions of s. 41 and will never apply for his discharge. The reply is obvious. The period is sought to be extended not to enable the insolvent to follow the directions of the Legislature in spite of his avowed unwillingness to do so, but to enable the insolvency proceedings to be carried out in the manner most beneficial to the creditors.

It is argued that the result of extending the period is that the words "*shall* annul" are taken as meaning nothing else than "may annul." If by this argument it is meant that, on a proper interpretation of the sub-section as a whole, the Court's hands are not tied down, but that (by reason of the control that the Court can exercise over the matters which form the condition precedent to the mandatory portion of the sub-section coming into effect) the Court can (in such a case as the present when the insolvency proceedings have to be prolonged, beyond the period originally fixed) exercise its discretion, then I quite accept this argument. But if, on the other had, the argument is meant to imply that the earlier portion of the sub-section is not to be read in connection with the rest of the section or that the powers given to the Court under the other provisions of the Act are paralysed by the over whelming force of the word shall occurring in this sub-section then I feel bound to confess that the argument comes upon me as a novelty in the canons of interpretation, and I am unable to accept it.

In other words I am not aware of any reason why the sub-section should not be interpreted on the following basis: that the Legislature has laid down that the Court *shall* annul the order provided a certain event takes place ; but that the Legislature has at the same time given to the Court in certain indicated circumstances power over the event, so that the Court can, in the said circumstances, prevent the event occuring. In any case, it seems to me evident from the preceding consideration of the sections of the Act that the Legislature has done so in this instance.

On the other hand, the appellant's argument in this connection can be of avail to him only if it is meant thereby that if "shall annul" means "shall annul" then the Court is thereby rendered incapable of exercising powers conferred upon it by other sections of the Act. This seems to me to be contrary to all principles of construction.

The argument is, however, pursued further: it is said that at any rate once an application for annulling is made after the period originally specified has elapsed, then the Court cannot exercise the powers of extending the period elsewhere conferred on it. But the limitation on the powers of the Court (if any exists) must be contained either within the section under which the powers are originally conferred ; or in the section in which the circumstances are referred to by reason of which the alleged limitation comes into operation. There is no such limitation either in s. 27 or s. 43. To come from generalities to particulars. The appellant's argument amounts to this that by the use of the word shall in s. 43 (1) the Legislature had introduced a proviso to s. 27 to the effect that "the Court, though it has power to extend the period after the period originally specified has expired (s. 148 of C. P. C.) yet it shall have no power so to extend it if an application has been

(1) 81 Ind. Cas. 584; 51 C. 337; (1924) A. I. R. (C.) 777.
(2) 16 B. 263; 8 Ind. Dec. (N. S.) 654.

made unders. 43 (1) for having the adjudication annulled, on the ground that the debtor has not applied for an order of discharge within the said originally specified period". Much as I believe in the force of language, I feel that to put the weight of all the above provisions on the shoulders of the single word shall in s. 43 (*a*) is cruetly to words unbecoming a Court of Justice.

In my opinion the proper order in this case is that under s. 27 (2) the period within which the debtor shall apply for his discharge, should be extended so that the operation of s. 43 is delayed until the insolvency proceedings have had time to be carried to completion. I would accordingly extend the period for two years from this day. This will in all essentials be upholding the order under appeal, and the appellant will pay the costs of the respondent in each appeal.

The *interim* stay in the appeal is discharged.

DeSouza, A.J.C.—I agree that this is not a case in which the order of adjudication should be annulled in spite of the provisions of s. 43 (cl. 1) of the Provincial Insolvency Act V of 1920. The debtor has failed to apply for an order of discharge within the period specified by the Court in the order of adjudication. In such a case the section provides that "the order of adjudication shall be annulled". The question arises whether these words make the annulment of the order of adjudication so clearly *ex debito justiciæ* that the Court has no discretion in the matter.

Normally it is the debtor who is penalised by the annulment of the adjudication order. It was to protect the honest creditors against the dishonest bebtors that the Legislature enacted s. 43 of Act V of 1920. The penal consequences to the debtor which ensue on the annulment are specified in cl. 2 of the section. But this case is peculiar. There is here an inversion of the rules. As pointed out by the learned Judicial Commissioner if the order of adjudication is annulled the general body of creditors stand to be damnified. The dishonest debtor and his friends stand to be benefited. The consequences which are enacted in *poenam* of the dishonest debtor here redound to his advantage. He has made common cause with the appellant who is one of the creditors and invites those consequences on himself. Should he be allowed to take advantage of his own misdeeds?

My learned brother is of opinion that the words of the section are imperative and mandatory and that the Court has no discretion in the matter but to annul the order of adjudication if the debtor does not apply for an order of discharge within the period specified by the Court. But he is of opinion that even after an application for annulment is made on the lapse of the period the Court has power to enlarge the period under s. 27 (2) of the Act and on the merits he proposes to enlarge the period by a further period of 2 years.

This was the view of Krishnan, J., Waller, J. dissenting, in *Arunagiri Mudaliar* v. *Kandaswamy Mudaliar* (3), who held that the power conferred by s. 27 (2) of the Provincial Insolvency Act to extend the time fixed for applying for discharge is not exhausted by the period originally fixed having expired and that there is nothing in the Act to prevent the Court from extending the time after the period originally fixed has expired under s. 43 of the Provincial Insolvency Act.

But Krishnan, J., felt that to make this position logical it must also be held that the words "shall be annulled" must be interpreted as directory and not mandatory and cited the analogy of the decision of the Privy Council in *Badri Narain* v. *Sheo Koer* (4) which was applied by the Bombay High Court in *Bhugwandas Bagla* v. *Haji Abu Ahmed* (2).

To my mind it seems that if the words "shall be annulled" are to be construed as mandatory and peremptory the only course open to the Court when it is moved to annul the adjudication in consequence of the insolvent's omission to apply within the time fixed is to pass an order of annulment, and if the order of adjudication has automatically to be annulled, there would be no proceeding before the Court in which to extend time. The power to extend time implies the power to keep the proceeding alive. And that implies that the Court has discretion to refuse to pass an order of annulment, in other words that the words "shall be annuled" are to be construed as directory and discretionery and not mandatory or peremptory.

(3) 83 Ind. Cas. 955; 19 L. W. 418; 34 M. L. J. 170; (1924) M. W. N. 331; (1924) A. I. R. (M.) 635.

(4) 17 I. A. 1; 17 C. 512; 5 Sar. P. C. J. 493; 8 Ind. Dec. (N. S.) 881 (P. C.).

In re Thurlow, Ex parte Official Receiver (5), Esher, M. R., in construing s. 20, sub s. 1, of the Bankruptcy Act 1883, said:—

"The word 'shall' is not always absolutely obligatory. It may be directory. It may no doubt be absolutely obligatory, but one would not be inclined to construe it to be so in the case of the Court of Bankruptcy, if he could avoid it. It appears to me that the Court of Bankruptcy is a Court to whose procedure the rule, that, as far as possible, mere technicalities should be brushed away in favour of what is fair and just, is especially applicable."

The Provincial Insolvency Act is based on the Law of England. I think this is eminently a case where the considerations which weighed with Esher, M. R, should prevail. The circumstances are such that any reasonable person can see that the result of the annulment of the order of adjudication would be to defeat the general body of creditors and to enable the dishonest debtor to reap the benefit of his fraudulent dealings. To construe the words "shall be annulled" as if they were mandatory would have the result of tying the hands of the Court in such a manner as might be productive of great injustice.

I would, therefore, refuse to annul the order of adjudication and would concur in the order proposed by my learned brother to extend the time within which the debtor shall apply for his discharge to a further period of two years from this day.

Order accordingly.

Z. K.

(5) (1895) 1 Q. B. 724; 64 L. J. Q. B. 479; 14 R. 320; 72 L. T. 612; 43 W. R. 403; 2 Manson 158; 59 J. P. 309.

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

July 23, 1925.

Present:—Lord Sumner, Lord Blanesburgh, Sir John Edge, Mr. Ameer Ali and Lord Salvesen.

LAL BAHADUR AND OTHERS—DEFENDANTS—APPELLANTS

versus

AMBIKA PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Alienation of family property—Consideration, portion of, applied towards payment of mortgage which cannot be challenged effect of.

Where a portion of the consideration for a sale of family property is applied towards the payment of the amount due on a mortgage, the validity of which could not be challenged by the reversioners owing to the fact that none of the reversioners was in existence at the date when the mortgage was made, the sale cannot also be challenged to the extent to which the sale consideration has been applied in paying off the mortgage. [p. 474, col. 1.]

Appeal from the decree of Mr. Dalal, A. J. C. and Mr. Simpson, A. J. C., Oudh, dated the 20th February 1923, printed as 83 Ind. Cas 840, reversing that of the Subordinate Judge, Gonda, dated the 30th June 1921.

Messrs. *A. M. Dunne, S. Hyam* and *Bhagwati Nath Srivastava*, for the Appellants.

Messrs. *L. DeGruyther* and *J. M. Parikh* for the Respondents.

JUDGMENT.

Lord Blanesburgh.—Two only of the questions which in this case were dealt with by the Trial Judge remain for consideration by their Lordships, and the facts which raise or surround them can be shortly stated.

The respondents are members of a joint Hindu family governed by the Mitakshara Law. Ram Din, their grandfather, and his brother Pateshwari were in 1895 the managers of the joint family property, and on the 6th August in that year they executed in favour of one Chote Lal, a predecessor-in-interest of the present appellants, two mortgages the first, a simple mortgage of a portion of the ancestral family property to secure an advance of Rs. 2,000 and interest; the second, a usufructuary mortgage for Rs. 8,000 upon another portion of the family property, namely, a 4-anna share in the village of Tendwa Takya.

Ram Din, one of these joint managers, had two sons, Awadh Behari and Jantri Prasad. In 1895 Awadh Behari was about 13 years old, Jantri Prasad about 3. The respondents-plaintiffs in the suit are sons of Awadh Behari. In 1895 they were still unborn. This, as will later appear, is one of the most important facts in the case. It follows from it that these two mortgage-deeds have always been binding on the respondents. The only joint family estate to an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated.

On the 12th September 1904, Pateshwari

Din and Ram Din carried out the transaction which it is sought in this suit to impeach, that is to say, a sale by registered deed of the 4-anna share in the village of Tendwa Takya, already the subject of the usufructuary mortgage in favour of Chote Lal and in his possession as such mortgagee. The purchasers under the deed are by name Ragho, Bindra and Asharfi Lal. It would appear, however, that they were one or some or all of them nominees of Chote Lal, whose interest in the purchase was throughout his life dominant. The sale is expressed to be a sale to the purchasers of the property in suit for Rs. 14,000 free from encumbrances. Of the purchase money Rs. 2,105-3-9 are in the deed stated to have been paid to the vendors on its execution, while Rs. 11,894-12-3 are stated to have been left with the purchasers for the purpose of making the payments, of which the following is a compendious statement :—

(1) Rs. 1,633-12-3 in satisfaction of three decretal amounts recovered against the vendors, and as to one for Rs. 290 by Chote Lal.

(2) Rs. 2,261 in payment of interest then accrued on the simple mortgage of the 6th August 1895, held by Chote Lal on other family property.

(3) Rs. 8,000 in satisfaction of the usufructuary mortgage held by Chote Lal on the property sold.

The result, it will be seen, was that of the Rs. 14,000 purchase-money, Rs. 10,551 was retained by or paid to Chote Lal, the mortgagee in possession of the property purchased.

It is now common ground that these sums were, in fact, retained or applied in the manner prescribed. As to the sum of Rs. 2,105-5-9 paid in cash to the vendors, it was given in evidence by the appellants at the trial that it was at the time represented by the vendors to the purchasers, and it was said, truly represented that the money was required by the vendors for payment of Government revenue, underproprietary rent, the purchase of bullocks and household expenses, and that it was, in fact, so applied.

Now, their Lordships are not insensible that this bare statement of the transaction suggests possibilities which invite inquiry. If, in fact, it was really one under which a mortgagee and decree-holder in possession had obtained for himself in satisfaction of his decree and mortgage-debts a valuable ancestral property in consideration of a relatively trifling sum in cash paid to its joint managers, the transaction would not have belied its appearance as so stated.

But there is no suspicion that the three decrees were not all of them valid and enforceable against the vendors. The respondents cannot be heard to say that the two mortgages were not valid and subsisting. It is nowhere suggested in the evidence that the sale was disadvantageous in the sense that the purchase price did not represent the full value of the property sold; still less that it was an inadequate price. Their Lordships on the evidence must take it that the price paid was a full price. Indeed, the only ground on which, in evidence, the sale was challenged by the respondents was that the transaction was induced by no family necessity, and was, for that reason, not binding upon them, and they analysed the manner in which the purchase-money was applied for the purpose of making good that position.

Of the answers made by the appellants to this attack of the respondents two only, as has been said, remain for consideration by their Lordships. The first answer puts in issue the competency of the respondents to maintain the action at all. So far as Ambika Prasad is concerned the suit, the appellants contend, is barred by lapse of time ; so far as Adita Prasad is concerned the suit is not maintainable at his instance for the reason, so it is said, that he was not in existence at the date of the sale-deed—he had not then been born. The second answer of the appellants goes to the substance of the matter. The sale-deed, they say, was, in fact, executed for the benefit and needs of the family and for the payment of antecedent debts, or, at any rate, so far as these were mortgage-debts, for the satisfaction of secured debts by which, as such, the respondents were bound.

Both of these contentions of the appellants were upheld by the Trial Judge, the Subordinate Judge of Gonda, who, on the 30th June 1921, dismissed the respondents' suit with costs. On appeal both were rejected by the Court of the Judicial Commissioner of Oudh, which by a decree of the 20th February 1923*, set aside the impugned deed on terms which their Lordships need not at the moment pause to par-

*See 83 Ind. Cas. 480.—[*Ed.*]

ticularise. Against that decree the defendants appeal.

Their Lordships will deal first with the answer of substance which the appellants make to the suit. If this answer be well founded, the other issue, more technical in character and one upon which the Courts in India were actually divided, becomes academic.

Was, then, this deed binding on the respondents as having been made for the benefit of the family and for payment of antecedent debts? Was it any the less binding upon them even if the mortgages were not antecedent debts, seeing that these mortgages were both of them unchallengeable by the respondents? The proper answer to these questions, the price obtained for the property sold not being attacked as inadequate, depends upon the propriety of the purposes to which the whole purchase-money was here applied. Upon this the points at issue before their Lordships were few. Mr. De Gruyther for the respondents agreed that the Rs. 1,633-12-3 applied in satisfaction of the decrees against the vendors constituted an item of disbursement to which, in view of concurrent findings against him, he could now take no exception. As to the cash sum of Rs. 2,105-3-9 paid to the vendors, if the money was required and applied for the purposes indicated, it was not suggested that a sale so far as necessary therefor was open to objection. It was contended, however, that there was no sufficient evidence that the money had been so applied, and apparently the Appellate Judges so thought. Their Lordships, however, are not disposed on this point to interfere with the finding of fact of the learned Subordinate Judge in the appellants' favour, more especially because the learned Judges of the Appellate Court, while not prepared to accept the learned Judge's conclusions, did not base their judgment appealed from upon their own view of this part of the case.

Their Lordships agree that the evidence is somewhat vague, perhaps necessarily so after this lapse of time and after the deaths of the parties principally concerned. But the evidence is not, they think, insufficient to support the learned Judge's finding, and it is also, in their judgment, while considering its weight, proper to bear in mind that all the circumstances in connection with the sale were throughout known to the father and uncle of the respondents, who neither of them at any time, although now supporting the respondents in these proceedings, themselves took any steps to impeach the sale on this or any other ground—a reserve all the more striking when accompanied, as it is, by the admission made by the respondents' father in evidence that his inaction was at all events partly attributable to the fact that he could at no time prove that his father, a vendor, had spent the sale consideration after receiving it "in bad company or for illegal purposes."

In the result, if the sale is to be impeached at all by the respondents it must be on the ground that the payment of Rs. 2,261, and Rs. 8,000 out of the purchase-money, the one sum in discharge of accrued interest on the simple mortgage of the 6th August 1895, and the other in discharge of the principal secured by the usufructuary mortgage of the same date, cannot as against the respondents be justified and the learned Judges of the Court of the Judicial Commissioner have so held on the ground that these mortgage-debts, incurred as they were by the grandfather of the respondents, were not "antecedent debts" justifying a subsequent sale of family property for their liquidation. In the language of the judgment in *Sahu Ram Chandra* v. *Bhup Singh* (1) these debts had not been "incurred irrespective of the credit obtainable from immoveable assets which (did) not personally belong to him, but (were) joint family property". Nor, in the opinion of the learned Judges, was the position affected by the fact that the mortgage-debts in question were both of them, as such, binding on the respondents. Now their judgment was pronounced on the 20th February 1923, and the learned Judges had not the advantage of having before them, as their Lordships now have, the explanation of the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) given by the Board on 14th November 1923, in the case of *Brij Narain Rai* v. *Mangla Prasad Rai* (2).

(1) 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 11; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 457 (P. C.).

(2) 77 Ind. Cas. 689; 51 I. A. 129; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.).

The effect of that explanation, in their Lordships' judgment, is to show that in the circumstances of this case both of the mortgages of 1895 were "antecedent-debts" which would justify for their liquidation a sale of family property not otherwise improper. In the present case, however, it is not, in their Lordships' judgment, necessary to invoke any such doctrine in order to counter the objection to the sale now being dealt with. Both mortgages, as their Lordships observe once more, were binding upon the respondents. A sale of family property otherwise unobjectionable, which resulted in the removal from what remained of it of the burden *pro tanto* of these encumbrances, cannot be successfully attacked by those so bound. It follows that, in their Lordships' judgment the sale in question is valid as against the respondents.

In these circumstances the other question, so fully dealt with in both of the lower Courts, need not now be discussed at length. The position with reference to it is that if the respondent Ambika Prasad was 21 years old or more at the commencement of this action, the suit, so far as he is concerned, is barred by lapse of time, and if the respondent Adita Prasad was not born at the date of the sale deed, that deed is binding upon him, and the suit impeaching it, so far as he is concerned, cannot be maintained. In other words, in order to enable the respondent Ambika Prasad to maintain this suit he must not have been over, say, 21 at its commencement, and in order to enable the respondent Adita Prasad to maintain it, he must not at the same date have been under, say, 14½. What, then, were the respective ages of the two respondents at that date. On this point their Lordships are inclined to agree with the learned Subordinate Judge that it is not proved separately that Ambika Prasad was not over 21; nor is it proved separately that Adita Prasad was over 14½. But there is strong ground for affirming that if Ambika was over 21, then Adita was over 14½ and that if Adita was under 14½ then Ambika was also under 21. In other words, there was not between the two brothers an interval of so many as 6½ years. While, therefore, it may not be possible to say on the evidence with judicial certainty by which of the respondents the action is maintainable, the evidence does show that one of them is in that fortunate position.

Their Lordships, however, refrain from pursuing this matter further. They will in agreement with the judgment appealed from, assume, without deciding, that the suit was maintainable by both respondents. Even so, for the reasons already given, it fails.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed and the judgment of the learned Subordinate Judge restored.

The respondents must pay to the appellants their costs here and below; but the costs of adding Asharfi Lal as an appellant must in accordance with the order of the 25th July 1924 be paid by the appellants, and there will be a set off as regards these costs.

Z. K. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. *Barrow, Rogers & Nevill.*

Solicitor for the Respondent.—Mr. *E. Dalgado.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2438 OF 1922 AND 646 TO 649 OF 1923.

June 22, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

IN NO. 2438 OF 1922.

AHMAD ALI AND ANOTHER—DEFENDANTS NOS. 1 AND 3—APPELLANTS

versus

MALHIUL ALAM CHOUDHURY—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 6 (e)—Revenue sale—Auction-purchaser, whether entitled to recover arrears of rent—Transfer of right to recover arrears of rent, validity of.

Section 6 (*e*) of the Transfer of Property Act is no bar to the transfer of an estate with the right to recover arrears of rent due to the owner of the estate. [p. 475, col. 2.]

A purchaser at an auction-sale held under Bengal Land Revenue Sales Act is entitled to recover mesne profits from tenants whose tenancies were not annulled till the institution of the suit, such mesne profits being limited to the amount payable by the tenants as rent. [p. 475, col. 2.]

Durga Chunder Roy v. *Koilas Chunder Roy*, 2 C. W. N. 43, *Kocharla Seetamma* v. *Pillala Venkataramanayya*, 21 Ind. Cas. 387; 38 M. 308; 14 M. L. T. 319; 25 M. L. J. 410; (1913) M. W. N. 918 and *Ram Ratan Kapali* v. *Aswini Kumar Dutt*, 6 Ind. Cas. 69; 37 C. 559; 11 C. L. J. 503; 14 C. W. N. 849, referred to.

Appeals against the decrees of the Second

Subordinate Judge, Chittagong, dated the 30th June 1922, reversing that of the Second Munsif, Satkania, dated the 22nd February 1921.

Babu *Narendra Kumar Das*, for the Appellant.

Babus *D. L. Kastgir*, *Nagendra Nath Bose* and *Shamadas Bhattacharya*, for the Respondent.

JUDGMENT.—These five appeals arise out of five suits which were heard together in the first Court. These appeals from those decisions were also heard together in the lower Appellate Court. The plaintiff-respondent in these appeals is the transferree of Sherjan Khan who purchased an estate at a sale for arrears of revenue under Act XI of 1859 on the 4th May 1908. The plaintiff brought these suits to recover *khas* possession with mesne profits of the lands held by the different principal defendants in each suit as tenure-holders under the proprietor whose interest was sold at the revenue sale. All the suits were dismissed by the Munsif who tried them. On appeal these decisions were reversed and the suits decreed. Against these decrees the principal defendants have preferred these appeals to this Court.

At the hearing of these appeals before us only three points were urged

(1) That the defendants are occupancy *raiyats* and, therefore, not liable to be ejected from their holdings.

(2) That if they are tenure-holders they are protected under the record exception to s. 37 Act XI of 1859.

(3) That the mesne profits claimed for the period before the plaintiff's purchase on the 14th November 1919 are not recoverable by the plaintiff.

On the first point the Record of Rights is against the appellants and both the lower Courts held that the presumption arising in the plaintiff's favour from the entries therein had not been rebutted. The appellants claim to be *raiyats* and not tenure-holders depended on their being able to prove descent from the persons who were recorded as cultivating the land at the time of the Maghi Survey. The finding that they could not prove this descent is one of fact which we must accept in second appeal.

On the second point it is contended that the defendants' tenures have been in existence since the time of settlement of the estate purchased by the plaintiff. The Munsif held that the estate was settled in 1845 and from the fact that the tenures were in existence in 1890 has presumed that the tenures were in existence at the time of the settlement. The learned Subordinate Judge has refused to draw this presumption. The presumption as to the existence of the tenancy in 1845 is a presumption of fact. We cannot hold that the lower Appellate Court committed any error in law in refusing to draw this presumption. The rulings that have been cited on behalf of the appellants at most show that a Court of fact might have drawn this presumption but are no authority for holding that it was bound to do so.

The last point urged is based on the contention that s. 6 (*e*) of the Transfer of Property Act bars the transfer of the right to mesne profits by the auction purchaser to the plaintiff. Reliance is placed on a decision of this Court in *Durga Chandra Roy* v. *Koilas Chandra* (1) and of the Madras High Court in *Seetamma* v. *Venkataramanayya* (2). The former case might be distinguished on two grounds that what had been transferred to the plaintiff was a bare right to recover mesne profits. The plaintiff in the present case as transferee of the estate with the right to mesne profits is in a way in the strongest position. But we think that the argument advanced by the learned Vakil for the plaintiff-respondent is sound. The decision of this Court in *Ramratan Kapali* v. *Aswini Kumar Dutt* (3), supports his contention that the mesne profits claimed by the plaintiff in the present suits are not, as they usually are, damages recoverable from a trespasser. The defendants' tenures were not annulled until the plaintiff or his predecessor the auction-purchaser exercised his option to annul them and this was not done until the institution of the present suits. The defendants were, therefore, not trespassers but tenants until the institution of the suits and the mesne profits recoverable will be limited to the amounts of rent payable by them as tenure-holders. Section 6 (*e*) of the Transfer of Property Act is no bar to the transfer of an estate with the right to rent due to the owner of the estate.

The appeals, therefore, fail and are dismissed. In those appeals in which the respondent appeared he will get his costs.

Z. K. *Appeals dismissed.*

(1) 2 C. W. N. 43.

(2) 21 Ind. Cas. 387; 38 M. 308; 14 M. L. T. 319; 25 M. L. J. 410; (1913) M. W. N. 918.

(3) 6 Ind. Cas. 69; 37 C. 559; 11 C. L. J. 503; 14 C. W. N. 849.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 22 OF 1921.

December 6, 1924.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

Musammat BHAGWANTI—PLAINTIFF—APPELLANT

versus

THAKUR MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Gift—Self-acquired property — Maintenance of son's widow.

A man has absolute right under the Hindu Law to dispose of his self-acquired property in any way he chooses, and his son's widow cannot follow it in the hands of the alienee or donee for her maintenance.

Rangammal v. *Echammal*, 22 M. 305; 9 M. L. J. 14; 8 Ind. Dec. (N. S.) 217, referred to.

Second appeal from a decree of the District Judge, Hissar, dated the 31st August 1920.

Mr. *N. C. Mehra*, for the Appellant.

Lalas *Kanshi Ram* and *Balwant Rai*, for the Respondents.

JUDGMENT.—This is a suit by a widow claiming from her father-in-law and his three nephews to whom he had bequeathed by gift certain immoveable property. She claimed that this was co-parcenary property in which her husband held a share at the time of his death, and she was awarded a decree by the Trial Court against all the defendants. The nephews alone appealed and their appeal succeeded, it being found by the learned District Judge as a fact that the whole of the property in suit was self-acquired property of the father-in-law, that he was fully entitled to do what he wished with his own and that he had gifted it free of all obligation or charge to his nephews, and that the widow could not pursue it in their hands.

On second appeal before us Counsel contends that although there is a moral obligation on the father-in-law during his lifetime to maintain his son's widow after his death that moral obligation crystalizes into a legal charge against the self-acquired property left by him and inherited by his heirs. He relies on *Rangammal* v. *Echammal* (1) in which it was held that even where the father-in-law has made a Will the widow can after his death pursue the property in the hands of the devisee. He argues with some force that by analogy she should be allowed to pursue the property in the hands of the alienees or donees on the reasoning that it is ultimately the property from which she has to recover her maintenance and, although she has no legal right to recover it during the father in-law's lifetime and while the property is in his hands, if he alienates the whole of his property during his lifetime and his title in the property disappears, and she should be allowed on equitable grounds to realize her maintenance from that same property when in the hands of the donees.

Whatever may be said on widow's behalf on equitable grounds the fact remains that it is clearly established that a man has absolute right under the Hindu Law to dispose of his self-acquired property in any way he chooses. This being so, as the widow has no sort of right or control over his alienations during his lifetime, she cannot possibly be allowed to realize her maintenance from the property which he has seen fit to sell or gift. This doubtless has the effect in this case of depriving the widow of her legal rights of maintenance before they are fully born, for during the father-in-law's lifetime her rights are merely in embryo, being nebulous moral rights which she cannot enforce. This is inevitable, as any other decision would be irreconcilable with the all important proposition that a man may do what he wills with his own self-acquired property.

We dismiss the appeal with costs.

N. H. *Appeal dismissed.*

(1) 22 M. 305; 9 M L. J. 14; 8 Ind. Dec. (N. S.) 217.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 136 OF 1924.

April 27, 1925.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir Jwala Prasad, KT.

INCOME-TAX COMMISSIONER, BIHAR AND ORISSA

versus

SHIVA PRASAD SINGH

Income Tax Act (XI of 1922), s. 12—Jharia Water-Supply Act (III of 1914), s. 45—Bihar and Orissa Mining Settlement Act (IV of 1920), s. 23—Income derived from royalties on mining leases, assessment of—Cesses and rates, amount of, whether to be deducted.

In arriving at the taxable income derived by an assessee as the owner of royalties under mining leases, the assessee is not entitled to deduct cesses or rates imposed upon him as the owner of such royalties under the Jharia Water-Supply Act and the Bihar and Orissa Mining Settlement Act. [p. 478, col. 2.]

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar

Babus *Naresh Chandra Sinha* and *B. B. Ghose*, for the Assessee.

Mr. *Sultan Ahmad*, Government Advocate, for the Income-tax Commissioner.

JUDGMENT.

Miller, C. J.—This matter comes before us on a case stated by the Commissioner of Income Tax under s. 66 (1) of the Income Tax Act, 1922. The assessee in the case is the Raja of Jharia who derives a considerable income as the owner of royalties which he receives under mining leases of which he is the lessor, in the Jharia coalfields. The question for our opinion is whether in arriving at the taxable income derived from that source the assessee is entitled to deduct certain cesses or rates imposed upon the owner of such royalties under two local Acts, known as the Jharia Water Supply Act, 1914, and the Bihar and Orissa Mining Settlement Act, 1920. Under the former Act a cess is leviable within the area prescribed both upon the owners of coal mines and upon the holders of royalties from those mines. In the case of mine-owners who are themselves working the mines the cess is a cess on the annual despatches of coal and coke from the mine and would be payable apart altogether from whether any profit is derived from the actual working of the mine. In the case of a person receiving royalties from mines the cess is paid upon the royalities received at a certain rate which is determined by the Board with the approval of the Local Government subject to a maximum of 5 per cent. on the assessed amount of royalty. Under the latter Act of 1920 a somewhat similar rate is imposed under s. 23 both upon the owners of mines and upon persons who receive any royalty, rent or fine from such mines. In this case the assessment is based, in the case of owners of mines, on the actual output of their mines, and here again the assessment in the case of owners is apart from any profit that may or may not be derived from the working of the mine. In the case of Receivers of any royalty, rent or fine their assessment is calculated on a percentage of road-cess payable by such persons. At present the amount is one-fifth, or 20 per cent. of the average yearly road-cess payable by such persons in respect of their royalties during the last three years.

The only question which arises for decision in the case is whether under s. 12 of the Indian Income Tax Act these cesses or taxes can be deducted in arriving at the taxable income for the purpose of income tax. It was decided in the case of *In the matter of Raja Jyoti Pradad Singh Deo* (1), that income derived from royalties came within s. 12 of the Income Tax Act which relates to income derived from "other sources" and not under s. 10 which applies to income under the head of "business". The deductions which may be made from the different classes of income mentioned in the Act are stated in detail in the different sections dealing with the different heads of income, and under s. 12 which applies to the present case it is provided that the tax shall be payable by an assessee under the head "other sources" in respect of income, profits and gains of every kind and from every source to which this Act applies if not included under any of the preceding heads. By cl. (2) of the section—and this is the important part of the enactment—such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee. Now the only allowances or deductions which are permissible in the case of income derived from "other sources" referred to in s. 12 are those already mentioned in cl. (2) of that section, namely, any expenditure incurred solely for the purpose of making or earning any income, profit or gain. It is contended in this case that the deductions leviable under the two Bihar and Orissa Acts to which I have referred are expenditure incurred for the purposes of making or earning such income. The case of *In the matter of K. M. Selected Coal Company of Manbhum* (2), was relied on in support of this contention. But the reasons for that decision do not apply in this case. There the assessee was the lessee of the mines and the income taxed was profits derived from business. The local taxes as already stated in such a case are levied on the output or despatches apart from the profits of the business and whether a profit is made or not, and must be taken into

(1) 60 Ind. Cas. 357; 6 P. L. J. 62; 2 P. L. T. 188; (1921) Pat 81.

(2) 83 Ind. Cas. 920; 3 Pat. 295; (1924) A. I. R. (Pat.) 670; 6 P. L. T. 376.

account in ascertaining whether there is a profit which is subject to income-tax.

The present case appears to me to be governed by the principle adopted in the earlier case of *In the matter of Raja Jyoti Prasad Singh Deo* (1). In that case this Court decided that in determining the taxable income derived from royalties, cesses payable under the Cess Acts, that is to say, road-cess and public works cess, cannot be deducted in arriving at the taxable income under the head of royalties and the only question is whether there is any distinction between the case of a road-cess and the case of the cesses imposed under these two Acts. In that case it was argued as has been argued here, that the taxes should be deducted in order to ascertain what was the actual income. It was pointed out, however, that the cess was leviable upon exactly the same income as the income-tax itself and following the case of *Manindra Chandra Nandi* v. *Secretary of State for India* (3), which held that income-tax could not be deducted in order to ascertain the amount upon which the road-cess was leviable, this Court held that, similarly, you could not deduct the road-cess in order to ascertain the amount upon which the income-tax was leviable because both taxes were imposed upon the same income; and it was there pointed out that the liability to pay the road-cess resulted from the income having been made, and the payment of the cess could hardly be said to form a necessary part in the earning of the income which must come into existence before the liability to cess arises, and, although the payment of cess was a necessary expense arising in connection with the ownership of royalty, it was nevertheless in no sense an expenditure incurred for any purpose incidental to the making of the income. No argument has been adduced before us in this case which distinguishes the case of the cesses imposed under these Acts from the case of road-cess. It seems to me that in both cases the cess is imposed upon exactly the same income and the mere fact that income-tax is also imposed on that income is in itself no reason why the cesses should be deducted in order to ascertain the taxable amount of income any more than it is why the income-tax should be deducted in order to ascertain the amount of cess. I can see no distinction in principle between the present case and the case of *In the matter of Raja Jyoti Prasad Singh Deo* (1), and in my opinion the Income Tax Commissioner arrived at a proper conclusion in the case which he stated for our opinion.

Jwala Prasad, J.—The royalties derived by the owners of lands containing minerals give rise to the following taxes:—

(1) Cess levied under the Cess Act (IX of 1880, B. C.) as amended by the Bihar and Orissa Act I of 1916. That cess is a cess on the annual net profits derived from the mines contained within the *zemindari* in the shape of royalty,

(2) Cess levied under the Jharia Water-Supply Act (Bihar and Orissa Act III of 1914) on royalties derived from mines, and

(3) A tax under the Bihar and Orissa Mining Settlements (Bihar and Orissa Act IV of 1920) assessed on the local cess payable by the *zemindar* who owns the lands in which the mine is situated.

It is thus clear that the sources of the three taxes are the same, namely, the amount of royalty received by the *zemindar* and each of them is to be assessed irrespective of what is paid under the remaining two Acts. Therefore, the payments made with respect to any one of the aforesaid taxes cannot be taken into account in the assessment made for the tax payable under the other Acts. The result is that the taxes payable by the assessee in the present case under the Jharia Water-Supply Act as well as the Bihar and Orissa Mining Settlements Act cannot be deducted from the royalty received by him in assessing the tax payable under the Income Tax Act of 1922. I, therefore, agree with the order of my Lord the Chief Justice.

Z. K. *Order accordingly.*

(3) 34 C. 257; 5 C. L. J. 148.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 3 OF 1924.

June 22, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

MAHENDRA NATH BHUNIA AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

ASHUTOSH PRADHAN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6—Suit for declaration and recovery of possession—

Tenancy, denial of—Limitation—Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Appellate judgment, contents of.

In a judgment of affirmance it is not necessary for an Appellate Court to deal with the matter in dispute at the same length as would be necessary in a judgment of reversal. All that is necessary is that the Appellate Court should properly appreciate the point for determination on appeal and should apply its mind to that point.

The nature of a suit depends upon the allegations made in the plaint and not on the decree actually passed in the suit.

Where in a suit for declaration and recovery of *khas* possession the plaintiff denies the existence of any tenancy between him and the defendant, the suit does not fall within the purview of Art. 6 of Sch. III to the Bengal Tenancy Act.

Appeal against an order of the District Judge, Midnapore, dated the 21st July 1923, affirming that of the Munsif, Third Court, at Tamluk, dated the 25th May 1923.

Babu *Santosh Kumar Pal*, for the Appellants.

Babu *Apurba Charan Mukherjee*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Midnapur confirming an order of the Munsif Third Court, Tamluk. The order was passed on an application for execution and the only objection taken by the judgment-debtors was that the application was time-barred under Art. 6 of the Third Schedule of the Bengal Tenancy Act. Both the lower Courts have over-ruled this objection. On appeal two points have been argued. The first is that the judgment of the lower Appellate Court is not in accordance with law as laid down in r. 31 of O. XLI of the C. P. C. The judgment certainly is very short. But having regard to the simple nature of the issue to be decided in the appeal we are not inclined to hold that we should be justified in setting it aside on this ground. The judgment is one of affirmance and in a judgment of affirmance, it is not necessary for the Appellate Court to deal with the matter in dispute at the same length as would be necessary in a judgment of reversal. Our attention has been drawn to an early decision of this Court in *Kulumutee Koer* v. *Jowahur Lall* (1) where the judgment of the lower Appellate Court is very similar to the judgment we have to consider and it was there held that the judgment was legally sufficient.

The important point is whether the Appellate Court has properly appreciated the point for determination on appeal and whether it has applied its mind to that point. In the present case we have no doubt that the learned District Judge has properly appreciated the point of limitation and has applied its mind to that point. The suit in which the decree sought to be executed was obtained was framed as a suit for recovery of *khas* possession of the disputed lands on declaration of title thereto with an alternative prayer that if for any reason the plaintiff is not granted a decree for *khas* possession he should be given a decree for arrears of rent. The suit was compromised and a decree was granted declaring that the defendant was a tenant of the plaintiff and that he was to pay him a sum of Rs. 200.

The question is whether that suit was a suit between the landlord and tenant to whom the provisions of the Bengal Tenancy Act are applicable so as to make Art. 6 of the Third Schedule of that the Act applicable. In our opinion, the lower Courts were right in holding that it was not. The nature of a suit depends on the plaint and not on the decree. On the plaint the suit was certainly not one brought by a landlord against a tenant. By asserting his right to *khas* possession the plaintiff denied the existence of any tenancy when the suit was filed. That being so, the lower Courts were right in holding that Art. 6 of the Third Schedule of the Bengal Tenancy Act was not applicable to the present application.

We, accordingly, dismiss this appeal with costs hearing-fee two gold *mohurs*.

Z. K. *Appeal dismissed.*

(1) 11 W. R. 318.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1147 OF 1924.

December 18, 1924.

Present:—Mr. Justice Harrison.

RUR SINGH—MORTGAGEE—DEFENDANT—APPELLANT

versus

NAZAR SINGH—PLAINTIFF, AND *Musammat* NARAIN DEVI—DEFENDANT—RESPONDENTS.

Custom—Widow—Husband's debt—Decree against widow—Ancestral property, alienation of—Necessity—Burden of proof.

A mortgage of ancestral land of her deceased husband by a widow, to satisfy a decree passed against her for a debt alleged to have been contracted by her late husband, is not binding on the reversioners, unless it is shown that she had sufficient necessity to create the charge, that is, had no other means to satisfy the decree. The burden to prove the necessity lies heavily on the mortgagee.

Bhambul Devi v. *Narain Singh*, 29 Ind. Cas. 572; 39 P. R. 1915; 103 P. W. R. 1915; 8 P. L. R. 1916, distinguished.

Second appeal from a decree of the District Judge, Amritsar, dated the 16th January 1924, modifying that of the Subordinate Judge, Second Class, Amritsar.

Lala *Bakhshi Ram* for Lala *Din Dayal*, for the Appellant.

Mr. *Lal Chand Mehra*, for the Rospondents.

JUDGMENT.—In a suit brought by the reversioners of one Wadhawa Singh for the usual declaration regarding a mortgage the District Judge has given a full decree to the effect that the mortgagè will not affect in any way the reversionary rights of the plaintiff. The mortgagee appeals, relying chiefly on *Bhambul Devi* v. *Narain Singh* (1).

The mortgage is made up of several items. Counsel has confined itself to the largest—a sum of Rs. 1,400, the payment of which, he contends, was a necessity, inasmuch as it represented a sum decreed against the widow, the decree showing that she was sued on account of a debt alleged to have been contracted by her late husband. No judgment has been put in and we know nothing more except that a decree was passed and that it was not *ex parte* or by consent. Counsel contends that under the circumstances *Bhambul Devi* v. *Narain Singh* (1) establishes his case.

There are, however, two distinguishing features in this case:

(1) that the decree was not passed against the husband in his lifetime: and

(2) that there is a finding of fact in the judgment of the learned District Judge that the widow had a considerable area of land and should have arranged to meet certain expenses out of the income.

This I take to mean that she had a considerable area over and above the land which she mortgaged. Counsel states that there is no evidence in support of this finding. The evidence on this point is meagre and is certainly not the best, which could have been produced, but there is some oral evidencé to the effect that the husband owned some 50 to 60 *bighas* of land that he wasted some of it and the balance went to his widow. The area charged is 15 *bighas*. The evidence in rebuttal which shows that Wadhawa Singh disposed of the whole of his 50 or 60 *bighas* is obviously incorrect. I think this must be treated as the finding of fact and based on evidence meagre though it be. The position, therefore is that it is not so far from its being shown that the widow had not other means to satisfy this decree except by charging the land, it has been shown that she had and that she had not sufficient necessity to create this charge. The burden lay heavily on mortgagee and I think that it has rightly been held that he has failed to discharge it.

I, therefore, dismiss the appeal with costs.

N. H. *Appeal dismissed.*

(1) 29 Ind. Cas. 572; 39 P. R. 1915; 103 P. W. R. 1915; 8 P. L. R. 1916.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2556 TO 2559 OF 1922.

June 17, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

KIRTIBASH DUBEY—PLAINTIFF—APPELLANT

versus

THE INDIAN IRON AND STEEL COMPANY, LTD.,—DEFENDANT—RESPONDENT.

Landlord and tenant—"Nij jote," *meaning of*—*Purchaser of permanent tenure, whether can build permanent structures*—*Appeal, second*—*Injunction granted on findings of fact whether can be interfered with.*

The word "*nij jote*" has a special significance in Bengal and means one's own cultivated land and includes a permanent tenure. [p. 481, col. 1.]

A purchaser of a permanent tenure has the right to build permanent structures on the land comprised in the tenure. [*ibid.*]

Where the grant or refusal of an injunction depends upon findings of fact the High Court will not in second appeal interfere with an order granting or refusing the injunction. [p. 481, col. 2.]

Appeals against the decrees of the Subordinate Judge, Asansole (Burdwan), dated the 11th of May 1922, modifying those of the Munsif, Asansole, dated the 14th of March 1921.

Mr. *Bankim Chandra Mukerji* and Babu *Jotis Chandra Sarkar*, for the Appellant.

Mr. *S. K. Chakravarti* and Babu *Panna Lal Chatterji*, for the Respondent.

JUDGMENT.—These four appeals arise out of four suits which were tried together. The plaintiffs in these suits are the superior landlords of different shares and the defendant Company is the purchaser of the interest of two tenants under the plaintiffs and their co-sharers. The names of these tenants are Thakurdin and Chakar Hazra. Since its purchase the defendant company has erected buildings on the land purchased by it. The principal relief sought in these suits was a permanent injunction restraining the defendant Company from building on the land for a direction that the buildings should be removed. There was a further claim for compensation for use of water of a tank and for *khas* possession. Except as regards one or two details which are now unimportant the plaintiff's suit was decreed by the Court of first instance. On appeal one of the four suits was dismissed entirely and in the other three suits the only relief granted to the plaintiffs was for damages for use of the water of the tank. These appeals have been argued on a single point and that is whether the defendant Company should be restrained by an injunction from building on the land in suit.

So far as the land in Thakurdin's holding is concerned we hold that the rejection of the claim for an injunction necessarily follows from the finding that Thakurdin was the permanent tenure-holder. The learned Subordinate Judge in his judgment has discussed all the incidents of the tenancy and has given good reasons for holding that it was a tenure. On behalf of the appellant this finding was attacked only on the ground that the meaning of the word "*nij jote*" had been misunderstood. Our own experience is the same as that of the Subordinate Judge. *Nij jote* means literally one's own cultivation. This has in Bengal a special significance and the fact that this expression is coupled with the word '*khamar*' in s. 116 of the Bengal Tenancy Act supports this view although that section refers to the rights of proprietors and not tenure-holders. As a purchaser of a permanent tenure the defendant Company has undoubtedly the right to build permanent structures on the land which was included in the holding which they had purchased from Thakurdin. As regards the land of Chakar's holding the question is one of more difficulty. There is a concurrent finding of both the Courts below that the interest of Chakar was that of a *raiyat* at fixed rent. The learned Subordinate Judge has held that under the terms of his tenancy Chakar was not restrained from building on the land.

On behalf of the appellant our attention has been drawn to an unreported decision of this Court in Appeal from Appellate Decree No. 438 of 1921 decided on the 8th June 1922. This is cited as an authority for holding that a *raiyat* whether he is an occupancy *raiyat* or one holding at fixed rate of rent is not entitled to build on the land of his tenancy so as to render that land unfit for the purposes of the tenancy. But that decision is not an authority for holding that in no case can a *raiyat* holding at fixed rent build structures on the land of his holding other than buildings which would be of the kind defined as 'improvement' in s. 76 of the Bengal Tenancy Act. We have not to decide the general question as to the right of *raiyats* at fixed rent to build on the land of their holding. What we have to decide is whether on the facts found by the final Court of fact this is a case in which an injunction should be granted. The case cited on behalf of the appellant was one in which an injunction had been granted on the finding that the tenant had, as a matter of fact, rendered the land unfit for the purposes of his tenancy. As was pointed out in the judgment this finding was a finding of fact which was final on the Court of second appeal and the decision of the Judicial Committee in the case of *Hari Mohan Misser* v. *Surendra Narayan Singha* (1) was cited in this connection. We are in entire agreement that when an injunction is granted on such a finding it cannot be reversed in second appeal. But in the present case the finding is to the contrary. The finding of the first Court was that the disputed land was settled for agricultural purposes. Though there is no express reversal of this finding it is obvious from the judgment of the lower Appellate Court that it did not agree that the disputed land of Thakurdin and Chakar was settled for agricultural purposes only. It has held that these two fixed *raiyati* holdings were not subject to any limitation. The mention of two *raiyati* holdings refers to

(1) 34 C. 718; 12 C. W. N. 794; 6 C. L. J. 19; 9 Bom. L. R. 750; 17 N. L. J. 361; 2 M. L. T. 399; 34 I. A. 133 (P. C.).

Chakar's as well as Thakurdin's since he has dealt with this point on the supposition that Thakurdin might be a holder of a fixed *raiyati* holding if he were not a permanent tenure-holder. He has further held that no restricted covenant against the building on the land can be inferred by implication. As regards the terms of the lease to Chakar there is no document and we must accept the finding of the lower Appellate Court as to the terms on which Chakar took the lease as a finding of fact. The finding is, therefore, contrary to the finding in the case cited that the defendant Company had by building on the land not rendered the land unfit for the purposes for which the tenancy was created. There are other findings of the learned Subordinate Judge which are binding on us in second appeal and would be a bar to the grant of the injunction sought by the plaintiffs in these suits. He has held that if the building of Chakar be regarded as waste it is of the class known as a meliorating waste. It being found that there was no covenant in respect of the building applying the principle enunciated in the decision of the House of Lords in *Doherty* v. *Allman* (2), we must hold that on this finding no injunction should be granted by a Court in the exercise of its discretionary power.

The result is that these appeals fail and are dismissed with costs.

Z. K. *Appeals dismissed.*

(2) (1878) 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2043 OF 1921.

April 24, 1925.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

GUJAR KHAN—DEFENDANT—APPELLANT

versus

GHULAM KHAN—PLAINTIFF—RESPONDENT.

Custom—Collateral succession—Pagwand v. chundawand—*Burden of proof—Special custom, proof of.*

In cases of collateral succession under the Punjab Customary Law, where it appears that the property of the common ancestor was distributed according to the rule of *pagwand*, the burden of proving that the whole blood excludes the half blood is upon the person who asserts it. [p. 483, col. 2.]

Ghulam Muhammad v. *Muhammad Bakhsh*, 4 P. R. 1891 (F. B.), followed.

A special custom cannot be held to be established merely because the evidence inclines very slightly in favour of the person alleging its existence. [p. 483, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Attock at Campbellpur, dated the 24th June 1921.

Mr. *M. S. Bhagat*, for the Appellant.

Dr. Khalifa *Shuja-ud-Din*, for Sheikh *Abdul Qadir*, K. B., for the Respondent.

JUDGMENT.—Bahadur Khan, a Ferozal Khattar of Thatti Gujran in the Fateh Jang Tehsil of the Attock District, died leaving three sons, Ghulam Khan and Ali Khan by one wife and Gujar Khan by the other. His land was mutated in favour of his three sons in equal shares. Subsequently Ali Khan died and his widow re-married. Mutation of Ali Khan's share was effected by the Revenue Authorities in the names of Ghulam Khan and Gujar Khan equally. The suit out of which the present second appeal arises was brought by Ghulam Khan, who contended that under the rule of *chundawand* mutation of his uterine brother's share should have been effected in his favour alone and that his brother of the half blood had no right to share in it. The Courts below have decided in favour of the plaintiff and decreed his claim. Gujar Khan has filed a second appeal to this Court on a certificate granted by the District Judge.

Now it is clear from the above that when Bahadur Khan died succession of his sons to his land was according to the rule of *pagwand* and the question is whether the plaintiff has proved the special custom set up by him, namely, that succession subsequently among the sons of Bahadur Khan is according to the rule of *ckundawand*. In the Customary Law of Attock District by Mr. Kitchin the answer to question No. 2 is that the *pagwand* custom is almost universally prevalent in the District. The first piece of evidence relied upon by the plaintiff was the *Iqrarnama Chakwar* of the *ilaqa* Khatran prepared at the First Regular settlement in 1862. The answer given here was in favour of the defendant's contention and against the special custom set up by the plaintiff, and the answer was supported by a specific instance but three *lambardars* gave a contrary opinion. The entry in this

document, therefore, is partly in favour of the appellant and partly in favour of the respondent. The next piece of evidence relied upon by the plaintiff was a judgment by Mr. Martineau, Divisional Judge, Rawalpindi, dated 26th May 1913 in the case of *Waris Khan* v. *Sher Mohammed Khan* and others, in which the custom set up by the plaintiff was found to obtain. Mr. Bhagat objects to this decision on the ground that it was an *obiter dictum*. In that case the first issue was whether the alienor had power to alienate his property without necessity and it was found that he had such a power. Under these circumstances the finding on the second issue, namely, that the whole blood excluded the half blood was unnecessary, but all the same it is a piece of evidence in support of the custom put forward by the plaintiff. There as here the parties were Ferozal Khattars but they were living in a different district and we cannot think that this instance is of much use for the purpose of proving that a similar custom prevails in a village in the Fateh Jang Tehsil of the Attock District even though this Tehsil formed a part of the old Rawalpindi District. The *chundawand* custom is one which frequently prevails in one family of a tribe and does not prevail in another family of the same tribe. Plaintiff also relied upon a mutation from village Karala dated the 4th of March 1916 which is an exact instance of the rule set up by him. This instance is not of very much importance as the question of succession was subsequently made the subject of a suit which was under appeal when the present case was decided by the District Judge. Counsel are unable to inform us whether the suit has been finally decided yet or not. There is also on the record a copy of the judgment of Khan Bahadur Abdul Ghafur Khan, District Judge of Attock, in which the custom set up by the plaintiff was found to prevail in another family of the same tribe as that to which the parties belonged.

The learned District Judge considered that the balance of evidence in the present case inclined, though very slightly, in the plaintiff's favour and he laid special stress on Mr. Martineau's judgment. In our opinion Mr. Martineau's decision helps the plaintiff very little and we do not consider that a special custom can be held to be established merely because the balance of evidence inclines very slightly in favour of the person alleging its existence.

In *Gholam Muhammad* v. *Muhammad Bakhsh* (1) it was held that in cases of collateral succession arising in the Punjab of which the decision is governed by custom and in which a portion of the property of a common ancestor of the deceased and of the claimants is in dispute when it appears, (*a*) that the property of the common ancestor was distributed according to the rule of *chundawand* or

(*b*) that the property of the common ancestor was distributed according to the rule of *pagwand*:

the Court may presume, until the contrary is proved, in case (*a*) that the whole blood excludes the half blood, and in case (*b*) that the whole blood and half blood succeed together.

Following this it is clear that in the present case the burden of proving that the whole blood excludes the half blood in succession to the share of Ali Khan lay upon the plaintiff and, in our opinion, he has quite failed to discharge it. We, therefore, accept the appeal and setting aside the order of the lower Courts dismiss the the suit with costs in all Courts.

Appeal accepted.

R. L.

(1) 4 P. R. 1891 (F. B.).

PATNA HIGH COURT.

REVISIONAL CIVIL.

March 20, 1925.

Present:—Justice Sir B. K. Mullick, KT., and Mr. Justice Kulwant Sahay.

ANANT POTDAR—APPELLANT—APPLICANT

versus

MANGAL POTDAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 14, O. XLVII, r. 1—Appeal—Non-payment of printing costs—Dismissal for default—Application to set aside dismissal, nature of—Review—Inherent power of Court.

Rule 19 of O. XLI of the C. P. C. has no application to the dismissal of an appeal for default of the appellant, otherwise than by non-appearance. [p. 484, col. 2.]

Under s. 151 of the C. P. C. a Court has no inherent power to set aside its own orders whenever it chooses to do so. [*ibid.*]

An application to set aside the dismissal of an appeal for failure of the appellant to pay the printing costs within the prescribed period must be regarded as one for review under r. 1 of O. XLVII of the C. P. C.,

and does not fall within the purview of r. 19 of O. XLI of the Code. [*ibid.*]

The expression for "any other sufficient reason" in r. 1 of O. XLVII of the C. P. C. would cover a case where an appellant whose appeal has been dismissed for failure to pay the printing costs within the time prescribed, is able to show that there was good ground for not paying the printing costs within the prescribed period. [*ibid.*]

Mr. *M.N. Pal* for Mr. *Muhammad Yunus*, for the Applicants.

JUDGMENT.—The facts of this case are as follows: On the 20th November 1924 this Bench made an order in First Appeal No. 86 of 1924 that unless the printing costs were deposited within four days the appeal should stand dismissed without further reference to the Bench. The printing costs were not paid within the time prescribed and the appeal stood automatically dismissed on the 25th November. On the 18th December 1924 an application was made by the appellant for permission to pay the deficit costs. The stamp affixed upon the application is one of the value of Rs. 3 which would be the proper stamp if the application were regarded as one under O. XLI, r. 19, of the C. P. C. If, however, the appellant is required to file an application for review of judgment, half the fee payable on the original memorandum of appeal is required and the application is insufficiently stamped.

The earlier decisions of this Court proceed upon the decision in *Fatimunnisa* v. *Deoki Pershad* (1) which held that an application to set aside a dismissal of an appeal for failure to file the necessary list must be regarded as one for review under O. XLVII, r. 1. This authority would seem to govern the present case also and has been followed in the following cases:—

(1) Civil Review No. 36 of 1916, decided on the 8th June 1917, by Roe and Jwala Prasad, JJ.

(2) M. J. C. No. 95 of 1918, decided on the 20th June 1918, by Mullick and Thornhill, JJ.

(3) Review No. 31 of 1920, decided on the 11th August 1920 by the Registrar as Taxing Officer.

(4) M. J. C. No. 35 of 1924, decided on the 30th May, 1924, by Das and Ross, JJ.

(5) Review No. 16 of 1924, decided on the 10th June 1924, by the Registrar as Taxing Officer.

On the other hand the following cases since 1923 have taken the view that the appeal can be restored by an application under O. XLI, r. 19, read with s. 151 of the C. P. C.:—

(1) Review No. 35 of 1923, decided on the 19th April 1924, by Jwala Prasad and Foster, JJ.

(2) M. J. C. No. 24 of 1923 and Review No 38 of 1923, decided on the 15th April, 1924, by Jwala Prasad and Adami, JJ.

(3) Review No. 30 of 1924 decided on the 20th November, 1924 by the Registrar as Taxing Officer.

If the decision in *Fatimunnissa* v. *Deoki Pershad* (1) is still good law, then the application under O. XLI, r. 19, does not lie. From the wording of the rule in question it is difficult to see how it can be applied to a case of default otherwise than by non-appearance. It may be said that the Full Bench decision of the Calcutta High Court was made before the present C. P. C. when an order dismissing a case by default was considered to be a decree. But it does not appear that the change in the definition of a decree really makes any difference for the purpose of this case.

What the party is really seeking is reversal of an order, which, if it is not a decree, is certainly a judgment, and if the provisions for review do not apply, then there is no remedy at all given by the Code: Order XLI, r. 19, certainly does not seem to be applicable. We think the words "for any other sufficient reason" in r. 1 of O. XLVII will cover the case where there is good ground for not filing the deficit printing costs. If it does not, then the appellant has no remedy and we do not think s. 151 of the Code becomes applicable in every case in which there is no other remedy. It does not appear that a Court has inherent power to set aside its own orders whenever it chooses to do so.

The application has to-day been stamped as an application for review and the necessary deficit fee has been paid. The fee will be kept in deposit and notice will issue upon the opposite party to show cause why the review should not be allowed.

Z. K. *Order accordingly.*

(1) 24 C. 350; 1 C. W. N. 21; 12 Ind. Dec. (N. S.) 901 (F. B.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 548 OF 1924.

June 24, 1924.

Present:—Sir Henry Scott-Smith, KT., Officiating Chief Justice.

RAJA RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BRIJ LAL—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 26—Easement—Onus.

The onus of proving all the points which are necessary to establish an easement under s. 26 of the Limitation Act is on the person who asserts its existence.

Hari Mohun Thakur v. *Kissen Sundari*, 11 C. 52; 5 Ind. Dec. (N. S.) 792, referred to.

Second appeal from a decree of the District Judge, Karnal, dated the 19th November 1923.

Mr. *Shamir Chand*, for the Appellant.

Lala *Fakir Chand*, for the Respondent.

JUDGMENT.—In the case out of which this present second appeal arises the plaintiffs sued for a perpetual injunction restraining the defendants from discharging water from three *parnalas* shown as F G and H in the plan of the record. In regard to the *parnalas* F and G the plaintiffs admitted that the defendant had been discharging rain water for a long time and that they have raised no objection to this, but alleged that since a few years the defendant had begun to discharge the dirty water of his house also and they asked that he be restrained from doing this. As regards the *parnala* H, they said it was a new one and asked that the defendant should be restrained from passing any water through it. The First Court decreed the plaintiff's claim but the District Judge on appeal dismissed it. The First Court in finding for the plaintiffs relied chiefly upon some applications made to the Municipal Committee by the defendant's deceased brother Lala Basant Lal in 1914 and 1915. The learned District Judge said that there was nothing in these petitions to help the plaintiffs and that the onus was on the plaintiffs which in his opinion they had failed to discharge by anything in the said applications. He did not discuss the rest of the evidence but said in general way that the weight of it was in favour of the defendant.

The learned District Judge also stated that it was unnecessary to go into the question of limitation.

In this Court it is urged that the onus was really on the defendant to prove the existence of the easements claimed by him over plaintiff's property. *Hari Mohan Thakur* v *Kissen Sundari* (1) was cited. The head-note there states that "the right to restrain another from exercising ordinary proprietary rights over his own land is of the nature of an easement different from the ordinary rights of owners of land; the burden of proof would, therefore, lie upon the party alleging such rights." The defendant here claimed certain rights to pass water from his house on to the plaintiff's property. Ordinarily, no person has right to interfere with another person's right to deal with his own property as he likes and, therefore I think that the onus is certainly on the defendant to prove all the points which are necessary to establish an easement under s. 26 of the Indian Limitation Act.

I, therefore, accept the appeal and under O. XLI, r 23, C. P. C. remand the case to the lower Appellate Court that it may decide the appeal upon the evidence on the record and in accordance with the above remarks. Stamp in the Court will be refunded and other costs will be costs in the case.

N. H. *Appeal accepted.*

(1) 11 C. 52; 5 Ind. Dec. (N. S.) 792.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDERS Nos. 55, 130 AND 70 OF 1923.

July 24, 1925.

Present:—Mr. Justice Devadoss and Mr Justice Waller.

Sree Rajah VADIEVU VISWASUNDARA RAO—APPELLANT

versus

VANNAMU PAIDIGADA AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 180, 181—Civil Procedure Code (Act V of 1908), O. XXI, r. 95—Execution of decree—Sale—Auction-purchaser, application by, for delivery of possession—Limitation—Order for delivery, whether can be treated as subsisting till actual delivery—Duty of Court.

An application by the purchaser of immoveable property at a sale in execution of a decree for delivery of possession is governed by Art. 180 and not by Art. 181 of Sch. I to the Limitation Act. [p. 487, col. 2.]

Where on an auction-purchaser's application for

delivery of possession of the property purchased by him the Court makes an order directing delivery of possession, but the order is not carried into effect owing to the default or laches of the auction-purchaser, the Court is justified in dismissing the auction-purchaser's application without giving any notice to him, and on such dismissal the order directing delivery of possession ceases to be operative. If the auction-purchaser thereafter wishes to obtain delivery of possession, he must make a fresh application, and this application will be governed by Art. 180 of Sch. I to the Limitation Act. [p. 487, col. 1.]

Rule 95 of O. XXI of the C. P. C. lays upon the Court the duty to make an order for delivery on an application by the auction-purchaser. Under that rule the Court is not bound to see that delivery is actually effected. [p. 486, col. 2.]

Appeals against the decrees of the Court of the Subordinate Judge, Cocanada, in A. S. Nos. 27, 26 and 28 of 1922, preferred against the orders of the Court of the District Munsif, Cocanada, in C. M. Ps. Nos. 1618, 1617 and 1620 of 1921, in S. C. Ss. Nos. 107, 106 and 110 of 1916, on the file of the Court of the Deputy Collector, Head Quarters Division, Cocanada, respectively.

Mr. *Kameswara Rao*, for the Appellant.

Messrs. *P. Somasundaram* and *P. Satyanarayana*, for the Respondents.

JUDGMENT.—The only point involved in this appeal is whether Art. 180 is applicable to an application by the purchaser of immoveable property at a sale in execution of a decree for delivery of possession, or Art. 181.

The appellant purchased property in execution of a decree and the sale was confirmed on 29th June 1918. The application out of which the present appeal arises was made on 30th July 1921. Both the District Munsif and the Subordinate Judge have held that the appellant's application is barred by limitation under Art. 180 of the Indian Limitation Act. It is contended by Mr. Kameswara Rao before us that an application for execution was made in June 1920 and the District Munsif ordered that the property sold should be delivered to the purchaser and that this order was not carried out by the Court and, therefore, should be considered to be in force. He urges that when a Court passes an order for delivery it is the duty of the Court to see that the delivery takes place and he relies upon the wording of O. XXI, r. 95 and contends that the words "the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser, or any person whom he may appoint to receive delivery on his behalf in possession of the property" lay upon the Court the duty to make an order for delivery on an application by the purchaser. The Court is not bound to see that delivery is actually effected, for delivery may not take place notwithstanding the order of the Court by reason of a third person being in possession or by some resistance offered by a person entitled to object to delivery, or the delivery cannot take place owing to misdescription or wrong description or owing to the absence of the purchaser or his man. In this case the application of June 1920 was dismissed as the warrant of delivery was returned unexecuted as there was no one to take delivery. The contention that the order for delivery is in force till actual delivery takes place is not supported by the wording of O. XXI, r. 95, or by any decided case. The contention that when an order for delivery is made that order is to remain in force till actual delivery takes place is tantamount to saying that an order for delivery is a decree which can be kept alive by periodical applications. To uphold this contention would be to apply Art. 182 to applications for delivery. Article 180 is clear in its terms. It gives three years' time for making an application for delivery of possession from the date when the sale becomes absolute. When there is a specific provision applicable to the case, it is not proper to overlook that Article and apply Art. 181 of the Limitation Act which is a residuary Article applicable to cases not provided for elsewhere in the First Schedule to the Limitation Act or by s. 48 of the C. P. C.

There is only one reported decision of this Court on this point *Nandur Subbayya* v. *Venkatramayya Apparao Bahadur* (1) and the learned Judges, who decided that case took different views on the question. Abdur Rahim, J., held that in a case like this Art. 181 is the proper Article to apply. His view is that when an application for delivery of possession is made and the Court passes an order for delivery, that order should be considered to be in force till actual delivery is effected and he holds that if the Court wanted to dismiss the application it should give notice to the applicant to show cause why the order for delivery of possession should not be dismissed and that if no notice is given to the auction-purchaser to show cause why

(1) 43 Ind. Cas. 155; (1918) M. W. N. 214; 7 L. W. 16.

his application should not be dismissed the dismissal should be considered as shelving the petition for statistical purposes. Where the Court is unable to give effect to its order by reason of the absence of the petitioner, who is bound to be present in order to take delivery, or owing to causes over which he has control, it is not the duty of the Court to give notice to show cause why the petition should not be dismissed. It would be different if the delivery was obstructed by the judgment-debtor; or if owing to anything that the judgment-debtor does or owing to causes which are beyond the control of the auction-purchaser, the delivery is not effected, it may be said that the order for delivery remains in force and a subsequent application to execute that order is a valid application even if that application may be more than three years after the date of the sale being made absolute. Oldfield, J., took the view that Art. 180 was the proper Article applicable to the case. He observes at page 218*, "it has been recognised in a long series of cases [*Thakur Prasad* v. *Abdul Hassan* (2) already referred to] that 'a decree-holder's proceedings can only be held to be legally continued when the interruption to them was not occasioned by any fault of his own, but either by the successful objection of a judgment-debtor, or a third party, or by some obstacle interposed by the Court.'" With very great respect we are unable to follow the reasoning of Abdur Rahim, J., and we respectfully adopt the reasoning of Oldfield, J. Oldfield, J., and Bakewell, J., held in a similar case that Art. 180 was the proper Article applicable to the case C. M S. A. No. 75 of 1916 The decision in *Jit Mal* v. *Jwala Prasad* (3) has no application to the present case. In that case the arrest of the judgment-debtor could not be effected as he concealed himself. It was held that the application was pending as the arrest could not be effected owing to the conduct of the judgment-debtor. But where owing to the default or laches of the auction-purchaser, delivery of possession could not be effected, the Court would be justified in dismissing the application for delivery of possession even though an order for delivery has been made. Article 180 was enacted in the Act of 1908 and the Article is clear in its terms. There is no warrant for extending the period of limitation by applying Art. 181 to a case where owing to the auction purchaser's default delivery could not be effected. We hold that Art. 180 of the Limitation Act has been properly applied to the facts of the case and we dismiss this appeal with costs.

The point involved in C. M. S. A. No. 130 of 1923 is the same and the judgment in this appeal governs that case also. C. M. S. A. No. 130 is dismissed with costs for the reasons given in our judgment in C. M. S. A. No. 55 of 1923. C. M. S. A. No. 70 of 1923 is dismissed without costs.

V. N. V.
Z. K. *Appeal dismissed.*

(2) 23 A. 13; A. W. N. (1900) 178.
(3) 21 A. 155; A. W. N. (1899) 6; 9 Ind. Dec. (N. S.) 809.

*Page of (1918) M. W. N.—[*Ed.*]

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 657 OF 1925.
October 22, 1925.
Present:—Mr. Justice Campbell.

LAKHMI CHAND—DEFENDANT—APPELLANT
versus
THE FIRM CHHAJJU MAL-RATTAN LAL THROUGH RATTAN LAL—PLAINTIFFS AND CHHAJJU RAM—DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 89—Principal and agent—Date fixed for settlement of accounts—Accounts, suit for—Limitation, commencement of.

Where a date is fixed between a principal and agent for the settlement of accounts, limitation for a suit for accounts by the principal against the agent begins to run from the date fixed and not from the date of the last transaction entered into by the agent on behalf of the principal. [p. 488, col. 1.]

Second appeal from a decree of the District Judge, Delhi, dated the 16th December 1924, affirming that of the Senior Sub-Judge, Gurgaon, dated the 16th June 1924.

Lala *Sardha Ram*, R. S., for the Appellant.
Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—In this case the lower Appellate Court has upheld a decree granted to the Firm Chhajju Mal-Rattan Lal against Lakhmi Chand for Rs. 875 due to them on certain transactions in which the defendant acted as the plaintiff's commission agent

In second appeal the only point raised is whether the suit was within limitation. Both parties agree that the Article of the

Limitation Act applicable is 89 and that the suit, which was instituted on the 31st May 1923 should be shown to have been brought within three years of the termination of the agency. The defendant-appellant's contention is that the agency terminated on the 29th May 1920 and that of the plaintiff-respondents is that it terminated on 1st of June 1920. The lower Appellate Court upheld the plaintiff's contention on the ground that the parties had agreed that the account should be settled on the 1st of June although all the transactions of purchase and sale into which the defendant entered on behalf of the plaintiffs might have been completed as alleged by the defendant on the 29th May 1920.

For the defendant-appellant it is argued that there is no proof of any agreement that accounts should be settled on the 1st of June, but there is the sworn testimony on the record of one of the plaintiffs to support the lower Appellate Court's finding on this point. The lower Appellate Court has further accepted the plaintiffs' accounts as correct and has believed the statements of the witnesses produced by them to depose to the nature of the transactions. According to this evidence what took place on the 29th May 1920 was that by that date the purchases and sales made by the defendant on the plaintiffs' behalf were equalized in quantity, that is to say, on that date the defendant had purchased for the plaintiffs 2,700 maunds of gram and had sold the same quantity. The 1st of June, however, was the appointed settling day and until that day was over it could not be said that the defendant had ceased to represent the plaintiffs as their agent and to do acts in that capacity. In view of the lower Appellate Court's finding that the nature of the transactions was as alleged by the plaintiffs there can be no other conclusion but that the agency did not terminate until the 1st of June.

The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2050 OF 1923.

June 19, 1925.

Present:—Mr Justice Chakravarti.

HIRA LAL BANERJEE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SURENDRA NATH SARBANGA AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (xi)—Landlord and tenant—Suit against tenant and trespasser, nature of—Civil Procedure Code (Act V of 1908), O. VII, r. 11—Court-fee, deficiency in—Procedure.

A suit for a declaration of title against certain persons who are treated as tenants of the plaintiff and for a relief against another person on the footing that he is a trespasser, does not fall within the purview of cl. (xi) of s. 7 of the Court Fees Act. [p. 489, col. 1.]

Where the Court finds that the Court-fee paid on a plaint is insufficient, it ought to give an opportunity to the plaintiff to value the suit properly and to pay the necessary Court-fees. It is not proper in such a case to dismiss the suit on discovery of the fact that the Court-fee paid is not sufficient. [*ibid.*]

Appeal against a decree of the Subordinate Judge, First Court, Hooghly, dated the 8th of May 1923, reversing that of the Munsif, Third Court at Serampore, dated the 31st October 1922.

Dr. *Jadu Nath Kanjilal* and Babu *Subodh Chandra Dutt*, for the Appellants.

Babu *Hira Lal Chakravarti*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs and arises out of a suit brought by them against three defendants for ejectment. The plaintiffs' case was that the property in suit originally belonged to the father of these three defendants; and that in execution of a mortgage-decree against their father the property was sold in the year 1907 and purchased by the plaintiffs. They further alleged that after they had taken possession defendant No. 1 and the husband of defendant No. 3 two of the sons of the mortgagor judgment-debtor took a lease of the land in suit under a *kabuliyat* in the year 1919. Defendant No. 3 is the widow of the eldest son of the mortgagor. Defendant No. 2, the third son, did not join in the *kabuliyat*. But it appears that after the lease was granted to defendants Nos. 1 and 3 defendant No. 2, as found by the Munsif, also came and lived on the land. The suit was constituted against defendants Nos. 1 and 3 as an ejectment suit against tenants after the expiry of the term of the lease. The defendant No. 2 was not a tenant. The plaintiffs, therefore, in the plaint asked for a

declaration of their title as purchaser in execution of the mortgage-decree and also asked for a decree against defendant No. 2 as a trespasser.

The learned Munsif found the plaintiff's title under the auction-sale in execution of the mortgage decree and also found that defendants Nos. 1 and 3 were tenants under the *kabuliyat* of 1919. The learned Munsif further found that defendant No. 2 was really licensee of the other defendants and had no title to the land and made a decree in favour of the plaintiffs against all the defendants.

The lower Appellate Court on appeal by defendant No. 2 alone has dismissed the plaintiffs' suit on the ground that the suit was really a suit for ejectment of all tenants as contemplated by s. 7, cl. xi of the Court Fees Act and, therefore, the plaintiffs could get no relief against defendant No. 2 unless a suit properly constituted against a trespasser was brought.

The learned Subordinate Judge is correct in the view to the extent that the Court-fee paid on the suit was as contemplated by cl. xi of s. 7 of the Court Fees Act. But I have had the plaint read to me and I have no hesitation in saying that the plaint was one not strictly within the contemplation of cl. xi of s. 7. The suit asked for a declaration of title and also asked for a relief against defendant No. 2 on the footing that he was a trespasser. The learned Munsif gave a decree to the plaintiffs apparently without any objection as to the insufficiency of the Court-fee paid by the plaintiffs. I think the learned Subordinate Judge in view of the frame of the suit should not have dismissed the suit on the ground that the Court-fee paid was insufficient, but I think he ought to have given an opportunity to the plaintiffs to value the suit properly and to pay the necessary Court-fee and disposed of the matter on the merits trying the suit as made in the plaint with the prayers contained therein.

The result, therefore, is that I set aside the judgment and decree of the lower Appellate Court and send the case back to him to try the appeal on the merits after demanding proper Court-fees from the plaintiffs and when such Court-fee is paid he should dispose of the appeal according to law.

In the circumstances of this case I make no order as to the costs of this appeal. Costs of the Courts below will abide the result.

M. B.
Z. K.

Appeal allowed
Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 583 OF 1922.

March 11, 1925.

Present :—Mr. Justice Ramesam.

GADEPALLI SEETHARAMASWAMI—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF GODAVARI DISTRICT AND OTHERS—DEFENDANTS—RESPONDENTS.

Negligence—Damage caused by wrongful act strengthened by natural causes—Damages, calculation of, basis of—Nominal damages, when to be awarded.

Nominal damages are intended to be awarded only where the plaintiff has sustained *damnum sine injuria*, that is, where a right of his has been infringed but not so as to cause any sensible damage. [p. 491, col. 2.]

Where the plaintiff has sustained damage by reason of the defendant's wrongful act, although such damage would not have been caused if the defendant's act had not been strengthened by natural causes, such as heavy rainfall, and it cannot be ascertained that any definite portion of the damage caused is due solely to the intervention of the natural cause, the plaintiff is entitled to recover damages calculated on the basis of the actual loss suffered by him. [p. 491, col. 2; p. 492, col. 2.]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Cocanada, in A. S. Nos. 5 and 9 of 1921, preferred against that of the Court of the District Munsif, Peddapur in O. S. No. 462 of 1917.

Mr. *C. Rama Rao*, for the Appellant.

Mr. *K. Rama Murthi*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit by the plaintiff for injunction and for damages. The plaintiff is the owner of *jiroyti* land No. 784 in Peddapuram. This land was situated south of a tank called Venkatapathiraju tank. The plaintiffs complained that the defendants extended the tank towards the east, shifted the bye-wash of the tank from north-west to the north-east and in the year 1916 bunded the bye-wash so as to enlarge the water-spread of the tank and cause submersion to plaintiff's land, namely, S. No. 784. Plaintiff claimed Rs. 1,000 as damages.

The first defendant is the Secretary of

State for India and defendants Nos. 2 to 6 are the *ryotwari* tenants under Government, whose lands are irrigated by the tank and whose lands would be benefited by an increase of the water-spread of the tank. The District Munsif found that the tank proper should be confined to S. No. 775 and did not extend to S. No. 760 as contended by the defendants Nos. 2 to 6, that it was not possible to say when the bye-wash was changed from the west to east, but that the western outlet was closed as the result of the opening up of a road and that the eastern outlet was bunded up by the defendants causing damage to the plaintiff. He also found that defendants Nos. 2 to 6 were responsible for the opening up of the eastern outlet and that the first defendant was also responsible inasmuch as he attempted to support the action of defendants Nos. 2 to 6 through his officers, that the plaintiff sustained damage to the extent of one thousand rupees and accordingly gave a decree.

On appeal, the Subordinate Judge finds in para. 9: "All that we see from the records maintained by the Government is that Survey No. 775 is the tank bed..... .....The Government says that its tank is only in Survey No. 775. The bed of the tank and the *bund* must necessarily be confined to that number; but, as a matter of fact, we see that the tank extends some hundreds of feet beyond its eastern limits and all this length is covered by fields of private owners, the *bund* also being owned by them. The Government has not made any attempt to extend the tank *bund* openly and as of right, but permitted the bed to drift for itself according to the whims and the caprices of the adjacent owners". Finally he says in para. 10 that the tank has been in the present extended condition for over thirty years at least. But from his earlier remarks, it is also clear that this expansion was neither proper nor authorised by Government. He finds in para. 11 that the plaintiff cannot complain of the shifting of the bye-wash. In para. 12 he then states: "The only question that remains for consideration is whether the defendants have bunded up the bye-wash and the damage complained of was caused directly by such bunding up". In the course of the paragraph, he first refers to the plaintiff's *arzi* dated the 30th October 1916 (Ex. T). Then, after referring to a stream of *arzis* showing the anxiety of the plaintiff, he refers to the *karnam's* report Ex. T. (1) dated the 30th October 1916 which shows that a *bund* was really put up but was removed. Exhibit T (1) says: "On inspection I found at that place, stakes, a yard high, were set with small palmyrah and date trees, etc, laid across, for preventing the escape of water"..... "On account of the said *bund*, the lands bordering on the interior of the tank are being submerged and crops damaged". The Subordinate Judge then refers to Ex U (2) dated the 9th November 1916, a report to the Minor Irrigation Overseer which also confirms the fact of the existence of the *bund* across the bye-wash. The Subordinate Judge then states that the Minor Irrigation Overseer found that the *bund* which was still in existence at the time of the inspection was 6 inchas higher than the full tank level of the tank. His inspection was on the 6th of November. The Subordinate Judge then states: "Thus the higher level of the *bund* by 6 inches continued from 30th October to the 6th of November". Lower down he refers to a large number of *arzis* upto July 1917. Then he states: "But it does not appear that the *bund* was raised beyond the 4 inches mentioned in Ex. A-3 until July 1917." He then refers to the report of the Overseer on the plaintiff's petition of the 29th July. This report stated that the existing natural bye-wash was bunded up to a height of one foot. The Subordinate Judge then states: "what this F. T. L. was it is difficult to see. Presumably it had the effect of not allowing more than 1 foot of water over 784-A". He then concluded "From the mass of evidence all that I have been able to gather is that the bye-wash was originally bunded up in October 1916 to the extent of one yard by the owners of the adjacent fields but the *bund* was immediately removed by the village officers, that the remnant of the *bund* removed was still 6 inches high when the Minor Irrigation Overseer went and saw it in the beginning of November 1916, that subsequently there was a report again in the end of November 1916 and when the Overseer again inspected it he found 4 inches of the *bund* above the F. T. L., that he got the excess removed but under the orders of the Deputy Collector he had to put it up again, that in July 1917 there was again a *bund* put up which was reported by the plaintiff and on which under the orders of the Tahsildar action

was taken by the Overseer and the *bund* was removed so as to have only one foot of water on the beneficial submsersion land of 784-A." He then says: "We have to see what damages the plaintiff sustained mainly by reason of the *bund* put up and removed from time to time". It is clear from his findings just quoted and also from the statement in para. 16 of the judgment where he says: "The plaintiff cannot be compelled to be in perpetual fear of submersion and damage, and a duty is cast upon the first defendant to keep his tank in such a position as not to cause any damage to the plaintiff the adjacent owner. A mandatory injunction will, therefore, be necessary to have the F. T. L. fixed and the outlet constructed by raising a masonry weir which would discharge the water accumulating beyond the permitted water spread." The Subordinate Judge is of the opinion that there is a wrongful act on the part of the defendants which furnished a cause of action to the plaintiff's suit and which has caused him damage. The Subordinate Judge discusses the question of damages in paras. 13 to 15. At the end of para. 13 he says :—"It is not possible to say what damage was caused by *which of these agencies*. In the absence of positive data, I cannot fix the *entire liability upon* the defendants". The agencies he refers to in the sentence just quoted are other natural agencies, such as heavy rain, overflowing of a feeder channel, etc. In para. 14 he says :—"But because of the abnormal rains which had direct access to the plaintiff's fields and the plaintiff not having been able to show that the *damage* was *mainly* due to the overflow of the tank water and as there has been no wrongful act committed by the Government their attempts having always been to avert damages, I must exonerate the first defendant from liability". In para. 15 he says:— "With regard to the second portion, defendants Nos. 2 to 6 are certainly wrong in having persisted in bunding up the tank first to a height of one yard then to a height of 6 inches and afterwards to a height of one foot. The damage caused by the rise of one yard would have been considerable, but it was immediately averted on the very day. The water of 6 inches depth was allowed to continue for more than a week and water of 4 inches was allowed to continue for some months. The immediate *cause of the whole damage* does not appear to be this slight rise in level, but the plaintiff is entitled to *claim damages to some extent.*" From all the above sentences quoted by me, the Subordinate Judge seems to be of the opinion that the plaintiff has certainly sustained damages in the year 1916 but that the damage could not have been wholly caused by the wrongful act of the defendants in opening up the bye-wash but that other natural causes must have combined with the wrongful act of the defendants in producing the damage.

Accepting these findings of the Subordinate Judge the question arises, whether the Subordinate Judge is right in giving nominal damages. In para. 15 he says:— "For the reasons discussed above in fixing the damages, I do not think that the plaintiff would be entitled to much more than nominal damages". His "reasons discussed above" were not for fixing the damage, but for finding out the causes of the damage. Nominal damages are intended only where the plaintiff has sustained *damnum sine injuria*, that is, where a right of his has been infringed but not so as to cause any sensible damage. In the present case, the plaintiff has sustained damage. A perusal of the whole record in the case, beginning from Ex. T dated 30th October 1916 and ending with Ex. GGG. of 25th August 1917 along with oral evidence including most of the defendants' witnesses, leads only to one conclusion, namely, that the plaintiff has sustained damage by reason of the defendants' wrongful act. It may be the wrongful act would not have caused damage to the plaintiff if it were not strengthened by natural causes such as heavy rainfall in that year and the Subordinate Judge himself, as I have shown from sentences quoted from his judgment, practically means to find out the defendants' acts strengthened by other natural causes, did cause real damage to the plaintiff: (See Ex. VV). In such a case, I do not think that nominal damges is the proper relief to be awarded to the plaintiff.

Mr. Lakshmanna relied on Mayne on Damages, page 572: "Where, however, the plaintiff had evidently sustained some damage, but the Jury, being unable to ascertain the amount, found a verdict for the defendant, the Court permitted the plaintiff to enter a verdict for nominal damages." The case cited *viz.*, *Feize* v. *Thompson* (1) has nothing to do with the

(1) (1803) 1 Taunt 121; 127 E. R. 778.

present case. That was a case in which an action was brought to recover general average upon a policy of goods shipped on account of the plaintiff from Amsterdam to London. The plaintiff proved a sum of 600 guilders to have been paid for a boat which was to be apportioned as general average but he did not make it sufficiently appear to what amount the defendant was liable to contribute. The Jury could not ascertain any given sum to be the proportion due to the plaintiff. On the other hand, two cases are relied onby the appellant which are, I think, more relevant. In *Municipal Corporation of the City of Bombay* v. *Vasudeo* (2) the defendant was the Municipal Corporation of Bombay. It was there found that the Corporation erected some embankments and bridges but in carrying out the works had not taken sufficient care to avoid causing of damage to the plaintiff. The lower Appellate Court held that the work was negligently done in relation to adjoining and neighbouring lands. In the year 1897 there were heavy floods, the floods were no doubt in the nature of a *vis major* but the First Court below held that the *vis major* was the sole or approximate cause of the damage. The lower Appellate Court found that the floods of 1896 were so exceptional and unusual as to be classed under the category of *vis major* but not so exceptional such as by any reasonable man cannot be anticipated. In the present case also, there was a rainfall in 1916 in Peddapuram slightly heavier than the preceding five or six years but not of such an exceptional character as could not be anticipated by a reasonable man. Such years of heavy rainfall occasionally occur once in five or ten years. A glance at the plan shows that the contour of the extended tank is the contour of 100·18 marked in green line on the plan. It submerged not only special rate land 784-A but also a portion of land 784B. It is true as remarked by Sidgwick (*Vide* Vol. III of Sedgiwick on Damages. Sect. 942, page 1948) "Where it was shown that the land would have been flooded by natural causes, but the defendant's act increased the loss, the measure of damages was the increase of loss". But in the present case the Subordinate Judge has not found that some definite portion of the damages sustained by the plaintiff would have been caused by the heavy rains of that year and other natural causes even if the defendants' wrongful act had never existed. I understand his findings to mean that the damage sustained by the plaintiff was caused by all the causes put together, namely, the natural causes and the defendants' wrongful act but that no definite portion of it can be assigned to any one cause if it existed alone. To such a case the principle of *Municipal Corporation of the City of Bombay* v. *Vasudeo* (2), which itself rests on *Fletcher* v. *Smith* (3), applies. In the case before the House of Lords defendant diverted a natural water-course which ran across and over his mine. The diverted water-course was insufficiently constructed and on occasions of certain heavy rainfalls, the water flowed over the walls of the artificial water-course and flooded the plaintiff's mine. It was found that the defendant knew that the water-course was not as efficient as the old one, nor did he construct in such a manner that it would be capable of conveying all the water that might flow into it from all such floods and rainfalls as might reasonably be anticipated to happen in that locality. The Jury's answer was the rainfall was exceptional but the new channel was insufficient. The insufficient condition was an insufficiency to cope with rainwater not exceptional or in other words rainfall such as might reasonably be anticipated. On these findings of the Jury, the plaintiff got a verdict which was affirmed by the Court of Appeal and the House of Lords refused to interfere in the decision. I think the principle of that decision applies to the present case. I cannot, therefore, accept the conclusion of the Subordinate Judge that this is a case in which nominal damages only should be awarded to the plaintiff.

It remains to be found, what are the damages sustained by the plaintiff. If the Subordinate Judge has given a finding on the amount of damages sustained by the plaintiff, but which I was unable to accept, I should call for fresh findings from the lower Court; but, as I have already pointed out, the Subordinate Judge has never addressed himself to the question of the amount of damages sustained by the plaintiff. What he said was that this is a case in which nominal damages only should be awarded. I, therefore, think, it is open

(2) 6 Bom. L. R. 899.

(3) (1877) 2 A. C. 781; 47 L. J. Ex. 4; 37 L. T. 367; 26 W. R. 83.

to me either to find the amount of damages myself or to call for a fresh finding. Both the learned Vakils for the parties are willing that I should find the amount of damages and thus avoid delay in the disposal of the case. The Munsif has not referred to the evidence in detail. It seems to me, his decree for Rs. 1,000 is excessive, as he practically accepted the plaintiff's figure without any discussion. A *batavia* garden, belonging to the plaintiff is beyond the green line, to which I have referred to already. I do not think the plaintiff is entitled to any damage for the loss of the *batavia* trees. The plaintiff says: "The paddy crop was about to be fit to be harvested and water gradually rose and crop that might be a *garce* was hopelessly lost, before it was quite ripe. Two other *garces* of paddy could have been harvested from the rest of the land but the harvesting was not possible as all that also came to be fully under water. The *batavia* and lemon and plantain and chillies plants all died, decaying in the water. Redgram to the extent of about 2 or 3 *putties* was thus lost; horsegram to the extent of about 2, 3 *putties;* chillies to the extent of 4, 5 *putties.*" Taking the smaller figures, given by the plaintiff, it seems to me that the plaintiff is entitled to damages to the extent of Rs. 562. I my add that one sentence in para. 13 of the Subordinate Judge's judgment is unintelligible to me: "The plaintiff raised a small *bund* in his field 784-A so as to conserve water in that field." This *bund* is a small *bund* and cannot operate where the general level of the water rises beyond its level. It can come into operation only when the water goes below the level of the *bund*. To say that this *bund* has anything to do with the flooding of plaintiff's land and the damage caused to it seems to be a piece of special pleading. The Subordinate Judge refers to it as one of the possible causes that had caused the plaintiff damage, but at the same time he was unwilling to say that all the damage is caused wholly by it.

In the result, I partly allow the appeal and modify the lower Court's decree by awarding damages to the extent of Rs. 562 against defendants Nos. 2 to 6 only. It has been stated before me that the plaintiff and the first defendant had compromised the matter and that first defendant had issued orders about the maintenance of the tank to the satisfaction of the plaintiff; and I need not deal with that portion of the appeal, relating to the first defendant. Plaintiff will get proportionate costs throughout from defendants Nos. 2 to 6 on the amount he has succeeded. Defendants will bear their own costs throughout.

The memorandum of objections is dismissed but without costs.

V. N. V.
Z. K. *Appeal partly allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2048 OF 1923.

June 22, 1925.

Present:—Mr. Justice Chakravarti.

SHEIKH MOHARAMDI—DEFENDANT—APPELLANT

versus

SHEIKH ASMAT—PLAINTIFF AND SHEIKH RAHAMAT—DEFENDANT—RESPONDENTS.

Landlord and tenant—Abandonment—Non-payment of rent, effect of—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Landlord and tenant—Suit by tenant to recover possession of holding—Landlord no party to ouster—Limitation

The question whether there has been an abandonment of his holding by a tenant is primarily a question of fact depending on a number of circumstances to be proved in each case. Mere non-payment of rent is not sufficient for establishing abandonment of a *jote* by a *raiyat*. That fact, however, when taken with other circumstances may enable the Court to come to a conclusion one way or the other according to the circumstances of a particular case. [p. 494, col. 1.]

Where in a suit by a tenant for possession of his holding it is found that the landlord had no hand in the ouster and that he recognised the defendant as a tenant after the latter had entered into the land on his own account and had kept the plaintiff out of possession, the suit is out governed by the two years' rule of limitation laid down in Art. 3 of Sch. III to the Bengal Tenancy Act. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Third Court, Mymensingh, dated the 20th of April 1923, affirming that of the Munsif, Third Court, Netrokona, dated the 6th of May 1922.

Babus *Ramendra Chandra Ray* and *Upendra Kumar Ray*, for the Appellant.

Babu *Birendra Kumar De*, for the Respondents.

JUDGMENT.—This is an appeal by the defendant and arises out of a suit brought by the plaintiff for *khas* possession of the land in suit on establishment of his *jote* right. The defence of the defendant was that althought the plaintiff was the *jote*-

dar of the land in suit he had abandoned the land and that after he had left the village the defendant got a settlement of the land from the landlord and was, therefore, rightfully in possession. The defendant also pleaded the special limitation as a bar to the suit. Both the Courts have decreed the plaintiff's suit.

In this second appeal the learned Vakil who appears for the defendant-appellant contends that the finding of the lower Appellate Court that the plaintiff did not abandon the land was erroneous and in support of this contention cited the case of *Gober Sheikh* v. *Alipuddin Sheikh* (1). Now the question as to whether there has been an abandonment of the land by the *raiyat* is primarily a question of fact depending no doubt upon a number of circumstances to be proved in each case. The learned Subordinate Judge has considered the circumstances and has held that there was no intention on the part of the plaintiff to abandon the land and that except that there was non-payment of rent for a number of years there was no fact which supported the plea of the defendant of abandonment by the plaintiff. Now the case cited by the learned Vakil shows that mere non-payment of rent is not sufficient for establishing abandonment of a *jote* by a *raiyat*. No doubt that fact when taken with other circumstances a Court of fact may come to a conclusion one way or the other according to the circumstances of a particular case. Here the learned Subordinate Judge in spite of the fact that there was non-payment of rent for some years in the circumstances of this case has come to the conclusion that the plaintiff did not abandon his holding. In this view, I think, there is no error of law in the finding of the learned Subordinate Judge upon this question.

The next point which was urged by the learned Vakil for the appellant is that the suit upon the findings was barred by two years' limitation. I do not think that this contention is sustainable. The learned Subordinate Judge has clearly found that the landlord had no hand in the ouster and that the defendant was recognized as a tenant after he had entered into the land on his own account and kept the plaintiff out of possession. This ground also fails.

The result is that the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 51 Ind. Cas. 356; 30 C. L. J. 13.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 17 OF 1923.

March 5, 1925.

Present:—Justice Sir Kumaraswami Sastri, KT., and Mr. Justice Krishnan.

N. M. R. NAGAPPA CHETTY AND OTHERS—DEFENDANTS—APPELLANTS

versus

V. A. A. R. FIRM—PLAINTIFFS—RESPONDENTS.

Stamp Act (II of 1899), ss. 36, 61, Sch. I, Art. 1—Limitation Act (IX of 1908), s. 19—Unstamped document, admission of, by Trial Court—Appeal—Admission, whether can be questioned—Acknowledgment—Statement of correctness of accounts, whether liable to stamp duty.

Where an unstamped document has been admitted in evidence by the Trial Judge, the admission is not open to question in appeal which is merely a continuation of the same proceeding. The Appellate Court can only send the document on for the collection of the penalty, if any, payable in respect of the document. [p. 495, col. 1.]

Sitaram v. *Ram Prosad Ram*, 22 Ind. Cas. 858; 18 C. W. N. 697; 19 C. L. J. 87 and *Ahmad Raza* v. *Abid Husain*, 39 Ind. Cas. 11; 38 A. 491; 18 Bom. L. R. 904; 14 A. L. J. 1099; 20 M. L. T. 447; 24 C. L. J. 504; (1916) 2 M. W. N. 518; 21 C. W. N. 265; 5 L. W. 153; 1 P. L. W. 90; 43 I. A. 264 (P. C.), relied on.

Where in reply to a letter sending a statement of accounts, the debtor states that the account sent is correct, the reply amounts to an acknowledgment within the meaning of s. 19 of the Limitation Act, but is not such an acknowledgment as is contemplated in Art. 1 of Sch. I to the Stamp Act and is not, therefore, liable to stamp duty. [*ibid.*]

Appeal from the judgment and decree of Mr. Justice Coutts Trotter, dated the 20th of December 1922, and passed in the Exercise of the Ordinary Original Civil Jurisdiction in the High Court, in C. S. No. 911 of 1921.

Mr. *S. Jagodesa Iyer*, for the Appellants.

Mr. *C. Narainasami Mudaliar*, for the Respondents.

JUDGMENT.

Kumaraswami Sastri, J.—This is a suit by the plaintiffs for the recovery of Rs. 17,919-11-1 with costs and interest due in respect of dealings between the plaintiff firm and the first defendant. The second and third defendants are the sons of the first defendant and they are members of a joint undivided Nattukottai trading family.

The only point now taken in appeal is whether Ex. E is an acknowledgment of liability which requires to be stamped and, therefore, ought not to have been admitted in evidence. There is no other defence to the plaintiff's action. The learned Chief Justice who tried the case overruled the plea that Ex. E requires a stamp and admitted it in evidence. We think that we cannot

in appeal go into the question whether it was rightly or wrongly admitted. Section 36 of the Stamp Act is clear. It says that, where an instrument has been admitted in evidence, such admission shall not except as provided by s. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument was not duly stamped. Section 61 does not touch this case. Where a document has been admitted by the Trial Judge in evidence, we do not think that it is open in appeal which is merely a continuation of the same proceeding to question that admission. I need only refer to *Sitaram* v. *Ram Prosad Ram* (1), *Ahmad Raza* v. *Abid Husain* (2). As regards any penalty to be recovered the law provides the proper procedure. It is open to the Appellate Court to send the document on for the proper collection of penalty. I do not think the letter is one falling within the definition of an acknowledgment. It is written in reply to a letter sending a statement of account Ex. F, and states that the account sent is correct. *Galstain* v. *Hutchison* (3) and *Surjimull Murlidhar Chandick* v. *Ananta Lan Damani* (4) are in point. There are no merits in this appeal. It fails and is dismissed with costs.

Krishnan, J.—In this case the plea taken in appeal is that the claim is barred by limitation because it is contended the acknowledgment relied on, Ex. E, should not have been admitted in evidence as being unstamped. It is not now denied that, if admitted, Ex. E would be a proper acknowledgment under s. 19 of the Limitation Act to save the bar of limitation. It was originally pleaded by the defendant that it was not such an acknowledgment but the argument has not been urged before us. The sole question argued before us is that Ex. E should not have been admitted as it is not stamped. It was contended that under Art. 1 of the first Schedule of the Stamp Act it requires a stamp of one anna and under s. 35 it could not have been admitted even on payment or penalty and the document should have been kept out of the record. Even if we assume for a moment that this argument is correct, such an argument as that could not be addressed to the Appellate Court, the document having been already admitted in evidence by reason of s. 36 of the Stamp Act. That section clearly bars such an attempt in appeal to keep out a document which has already been admitted and acted on by the Trial Court. Apart from that, I am inclined to hold that the document does not really require a stamp at all, for it is not an acknowledgment which in the words of Art. 1 was obtained in order to supply evidence of the debt; for there is plenty of other evidence on the plaintiff's side in their account-books. This was clearly an ordinary acknowledgment so that the parties might not subsequently dispute the correctness of the amount which had been arrived at as the balance due on the particular date. It was not a document which was required by the plaintiffs for the purpose of proving the existence of the debt itself. That being so, the plea taken cannot succeed. On the merits the defendants have no kind of defence at all. In these circumstances I agree that this appeal fails and must be dismissed with costs.

Appeal dismissed.

V. N. V.
Z. K.

(1) 22 Ind. Cas. 858; 18 C. W. N. 697; 19 C. L. J. 87.
(2) 39 Ind. Cas. 11; 38 A. 494; 18 Bom. L. R. 904; 14 A. L. J. 1099; 20 M. L. T. 447; 24 C. L. J. 594; (1916) 2 M. W. N. 548; 21 C. W. N. 265; 5 L. W. 153; 1 P. L. W. 90; 43 I. A. 264 (P. C.).
(3) 15 Ind. Cas. 279; 39 C. 789; 16 C. W. N. 945.
(4) 74 Ind. Cas. 1029; 46 M. 948; 45 M. L. J. 399; 18 L. W. 485; (1923) M. W. N. 743; (1924) A. I. R. (M.) 352.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 13 OF 1924.
September 2, 1925.
Present:—Mr. Wazir Hasan, A. J. C.
SURAJ NARAIN—PLAINTIFF—APPELLANT
versus
GURCHARAN PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Sale by manager of family property—Benefit to family—Future and continuous loss, prevention of.

A sale of family property by the manager of a joint Hindu family will be upheld not only in cases in which the object of the sale is to relieve the estate of an actual pressure or to avert danger but also in cases where a benefit is to be conferred upon the estate. What constitutes benefit to the estate must vary according to the circumstances of each case. Where, however, a sale of family property is intended to avert future and continuous loss to the family, the sale must be held to be for the benefit of the family. [p. 497, cols. 1 & 2.]

First appeal against a decree and judgment passed by the Sub-Judge, Partabgarh, dated the 15th November 1923.

Mr. *Radha Krishna*, for the Appellant.

Mr. *G. N. Missra*, for Respondent No. 4.

JUDGMENT.—This is the plaintiff's appeal. It arises out of a suit for recovery of certain shares of *zemindari* property situate in villages Sarai Shankar, Gharauli and Dehlamou, Perganna Patti, District Partabgarh.

The plaintiff is a minor. His brother was Ram Charan. Ram Charan was made defendant No. 3 to the suit, out of which this appeal arises. Ram Charan was killed during the pendency of the appeal in this Court. His name has consequently been struck off the record of the case. On the 3rd March 1922 Ram Charan sold the property in suit to defendants Nos. 1 and 2, Gurcharan and Sardar Saran Singh respectively under a sale-deed of that date. Babu Hira Singh was added as defendant No. 5 to this suit on the ground that he claimed to be the real purchaser of the property in question. Another defendant No. 4 to this suit was *Musammat* Kailash Kaur. She obtained a decree for pre-emption in respect of the sale of 3rd March 1922. The ostensible consideration as stated in the sale-deed is the sum of Rs. 4,000.

The plaintiff's case is that he and his brother Ram Charan constituted a joint Hindu family; that the property in suit was joint property of the family, that the defendant Ram Charan effected the sale of the 3rd March 1922 without any consideration and without any legal necessity, and that consequently the sale was not binding on the plaintiff, and he was entitled to recover the property in suit from the hands of the defendants. In defence to this suit it was admitted that the plaintiff and Ram Charan were members of a joint Hindu family governed by the law of Mitakshara and that the property in suit was joint family property. It was pleaded that the sale in question was for consideration inasmuch as the sum of Rs. 4,000 was paid in cash to Ram Charan and that Ram Charan made the sale for the benefit of the family. The lower Court has upheld the defence and dismissed the suit.

On the question of consideration the plaintiff's case as disclosed by the evidence is that the real consideration for the sale in question was Rs. 1,000 only and that that was the only amount which the defendant Ram Charan received from the vendees. The recitals in the sale-deed and endorsement made by the Registering Officer, however, show that the vendees paid the sum of Rs. 4,000 to Ram Charan. In explanation of this the plaintiff's case is that Ram Charan had sent Rs. 3,000 to be shown at the registration of the document as paid to him. The evidence in support of this part of the plaintiff's case has been discredited by the Trial Judge, and nothing has been urged in appeal to induce me to disagree with the opinion of the learned Subordinate Judge on this question of fact.

On the question of legal necessity the case put forward by the defendants is that the share of the *zemindari* property situate in villages Shankar Sarai and Gahrauli was a constant source of loss to the family; that the representation made by Ram Charan was that he had decided to sell that property to prevent loss in future and to buy with the sale-proceeds fresh property near the residence of the family. The family lives in village Dehlamou, and a small property situate in that village was included in the sale-deed for the purpose of enabling the registration of the deed at the Partabgarh Registration Office. The learned Subordinate Judge has accepted this case of the defendants as true. On the basis of the recital in the sale deed in question he holds that the necessity for the sale represented by Ram Charan to the purchasers was the same as pleaded by the defendants. He further holds on evidence that there was always difficulty in managing these pieces of property and there was consequently always a loss; that there was no *sir* or *khudkasht* in those villages; that better properties were available nearer home; and that as a matter of fact property worth about Rs. 1,250 was purchased by Ram Charan near the family house. These findings are not disputed in appeal before me. The learned Subordinate Judge holds that in the circumstances Ram Charan was justified as a prudent manager to effect the sale in question.

In appeal before me it is contended as a pure proposition of law that the facts found by the learned Subordinate Judge do not establish legal necessity which always connotes a pressure on and a danger to the estate. According to law, there can be no "benefit to the estate" apart from legal

necessity as so defined. This argument makes "necessity" and "benefit to the estate" convertible terms. I am unable to uphold this argument of the learned Pleader for the appellant. In the case of *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (1) their Lordships of the Privy Council state the law bearing upon the case under consideration in the following words:—

"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate.....Actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." It is thus clear to my mind that a sale by the manager of joint Hindu family property will be upheld not only in cases in which the object of the sale is to relieve the estate of any actual pressure or to avert a danger, but also in cases where a benefit is to be conferred upon the estate. The answer to the question what constitutes "benefit to the estate" must vary according to the circumstances of each case. After referring to *Hunoomanpersaud Pandey's case* (1) and to two other cases, Lord Atkinson in delivering the judgment of the Privy Council in the case of *Palaniappa Chetty* v. *Deivasikamony Pandara Sannadhi* (2) said: "No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description 'benefit to the estate.' It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not." The learned Pleader for the appellant relied on the quotation given above, as if it contained an exhaustive list of benefits to the estate. To my mind it is not so. It is only illustrative. In the case before me, I am clearly of opinion that the sale in question was intended to confer a benefit on the family estate inasmuch as future and continuous loss to the family was to be averted thereby. In the case of *Ishani Dasi* v. *Rajendranath Jash* (3), a Bench of the Calcutta High Court held that a transaction entered into by the guardian of a Hindu minor was valid if it appeared that larger sacrifices would have been inevitable if it had not been effected. I am, therefore, of opinion that the decision of the lower Court on this point is also correct.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 6 M. I. A. 393; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(2) 39 Ind. Cas. 722; 44 I. A. 147; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 40 M. 709; 6 L. W. 222 (P. C.).

(3) 48 Ind. Cas. 303; 23 C. W. N. 858; 23 C. L. J 250.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 433 OF 1923.

February 7, 1925.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

ALLA VIRASWAMI—DEFENDANT No. 3—APPELLANT

versus

POLAVARAPU NAYUDAMMA AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 1 AND 2—RESPONDENTS.

Res judicata—*Widow, suit against—Reversioners, whether bound by decision—Widow not impleaded in representative character—Pleas in opposition to interests of reversioners—Jurisdiction to entertain subsequent suit, absence of, effect of.*

Where a Hindu widow in whom her husband's estate has vested represents the estate in a litigation to which she is a party, the decision in such litigation, fairly and honestly conducted, given for or against her will bind the reversioners, but this rule can be applied only if the widow does; as a matter of fact, represent the estate in the litigation. [p. 499, col. 2.]

If, for instance, she litigates in assertion of an absolute right inconsistent with her representative character, she cannot in any sense of the word be said to represent the estate or the interest of the reversioners in such litigation, and a decision given therein upholding such contention of hers cannot be held to be binding on the reversioners. [p. 500, col. 1.]

Shivagunga case (*Katama Natchier* v. *Rajah of Shivagunga*), 9 M. I. A. 539; 2 W. R. P. C. 31; 1 Suth P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843 (P. C.); *Pertabnarain Singh* v. *Trilokinath Singh*, 11 C. 186; 11 I. A. 197; 8 Ind. Jur. 697; Rafique & Jackson's P. C.,

No. 86; 5 Ind. Dec. (N. S.) 883 (P. C.) and *Risal Singh* v. *Balwant Singh*, 48 Ind. Cas. 553; 40 A. 593 at p. 604; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511; 45 I. A. 168 (P. C.), followed.

Although the rule of *res judicata* as enacted in s. 11 of the C. P. C. is not strictly applicable to such a case inasmuch as, the reversioners do not claim under the widow, the decision in a prior suit for or against the widow would be binding on the reversioners only if the Court which decided the prior suit would have had jurisdiction to entertain the subsequent suit to which the reversioners are parties. [p. 499, col. 2; p. 500, col. 1.]

Misir Raghobardial v. *Sheo Baksh Singh*, 9 C. 433; 12 C. L. R. 520; 9 I. A. 197; 7 Ind. Jur. 107; 4 Sar. P. C. J. 395; Refique & Jackson's P. C. No. 70; 4 Ind. Dec. (N. S.) 941 (P. C.), *Run Bahadur Singh* v. *Lucho Koer*, 11 C. 301 at p. 309; 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960 (P. C.), *Giriya Chettiar* v. *Sabapathy Mudaliar*, 29 M. 65 and *Risal Singh* v. *Balwant Singh*, 48 Ind. Cas. 553; 40 A. 593 at p. 604; 28 C. L. J. 519; 24 M. L. T. 361; 19 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511; 45 I. A. 168 (P. C.), relied on.

Where a widow was impleaded as a party to a suit not in her capacity as representative of the estate which would afterwards devolve upon the reversioners but as a beneficiary under the Will of her deceased husband according to the terms of which the reversioners were disinherited and the widow set up a case in direct opposition to the interests of the reversioners:

Held, that a decision in the suit that the alleged Will was genuine was not binding on the reversioners in a subsequent suit. [p. 500, col. 2.]

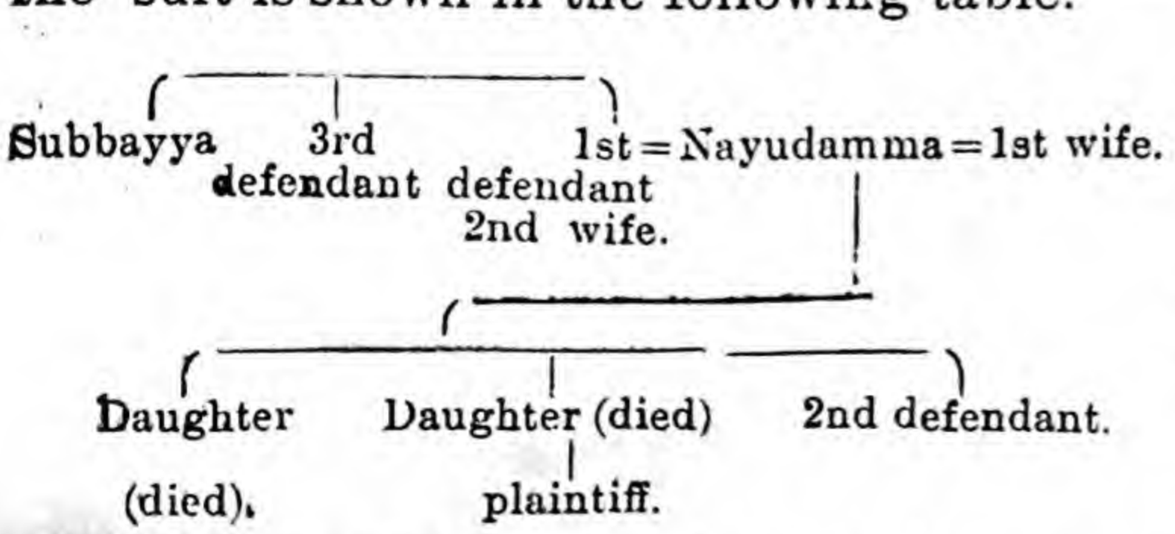
Appeal against an order of the District Court, Guntur dated the 20th August 1923, in A. S. No. 330 of 1922, preferred against a decree of the Court of the Subordinate Judge, Bapatla, in Original Suit No. 73 of 1921.

Mr. *Ch. Raghava Rao*, for the Appellant.

Mr. *S. Varadachariar*, for the Respondents.

JUDGMENT.—This is an appeal by the 3rd defendant against an order of remand made by the District Judge of Guntur in A. S. No. 330 of 1922 on his file which arose out of an original suit instituted in the Subordinate Judge's Court of Bapatla.

The relationship between the parties to the suit is shown in the following table:



The plaintiff is the daughter's son of one Nayudamma by his first wife, the 2nd defendant being his mother's sister. The 1st defendant is Nayudamma's 2nd wife and the 3rd defendant her brother. The suit is for a declaration that a Will alleged to have been left by Nayudamma in favour of defendants Nos. 1 and 3 is not genuine, that he (plaintiff) as the daughter's son is entitled to the properties of Nayudamma after the death of the widow (1st defendant) and of the daughter (2nd defendant) and that the alienations made by defendants Nos. 1 and 2 would not be binding on the plaintiff after their death. The Subordinate Judge dismissed the suit on two preliminary grounds, *viz.*, (1) that the suit is barred by *res judicata* by reason of the prior decision (O. S. No. 100 of 1913 of the District Munsif's Court of Ongole; A. S. Nos. 72 and 74 of 1915, Additional Sub-Court of Guntur) and (2) that the suit is barred by limitation. On appeal, however, to the District Judge, he held that there was no bar by *res judicata*. He also held that on the evidence on record it would not be held that the suit was barred by limitation. He, therefore, remanded the suit to the First Court with a direction to consider the question of limitation afresh in the light of any further evidence that the parties may be willing to offer, and if it comes to the conclusion that the suit is not barred by limitation then to proceed to dispose of the suit on the merits. Against this order of remand 3rd defendant has filed the present appeal; and the learned Vakil who appears for him has argued before us that the District Judge's decision is wrong on both the above points.

As regards limitation, the plaintiff's case was that he came to know of the existence of the alleged Will and of the decision in the prior suit regarding its genuineness only in 1918 and that, therefore, the cause of action must be deemed to have arisen only on that date. As, however, the 2nd defendant, a nearer reversioner knew of the existence of the alleged Will at least on 5th February 1914 the date of her deposition in O. S. No. 100 of 1913, it is clear that the cause of action arose at least on that date. As observed by the lower Court there is nothing on the record to show that either the 2nd defendant or the plaintiff knew of it earlier; we must, therefore, for the purpose of this appeal, proceed on the basis that the cause of action arose only on that date, *viz.*, 5th February 1914. The case is

governed by the six years' rule under Art. 120 of the Limitation Act. The suit was at first filed by the plaintiff on the 23rd December 1919 in the Distirct Munsif's Court of Ongole. It was transferred to the Principal District Munsif's Court of Bapatla from where it was again transferred to the Additional District Munsif's Court of Ongole. On the 4th August 1921 this latter Court returned the plaint for presentation to the proper Court as the subject-matter of the suit was found to be beyond the pecuniary jurisdiction of the District Munsif's Court and it was presented on the next day, *i.e.*, 5th August, in the Subordinate Judge's Court at Bapatla. Plaintiff's case is that he is entitled to a deduction of the time taken by him in prosecuting the suit in the District Munsif's Court (*i. e.* from 23rd December 1919 to 4th August 1921) under s. 14 of the Limitation Act as he had been prosecuting it there in good faith. The learned District Judge has on a consideration of the various circumstances upheld this contention of the plaintiff, and we are not prepared to say that he has gone wrong coming to that conclusion. As observed by him, the fact that the plaintiff had at first asked for relief only as regards $\frac{2}{3}$rds of the properties comprised in the Will is not relevant in considering whether he is entitled to the deduction of the time that the case lasted in the District Munsif's Court. It has been argued that the plaintiff must be held to have purposely undervalued the $\frac{2}{3}$rds portion itself especially as he himself filed a statement Ex. III, before the Munsif on 4th August 1921 saying that the then market value of the properties was Rs. 30,000. There is nothing to show that on the date of the plaint he made the undervaluation purposely. The Court-fee that he would have had to pay was the same, even if he had put the valuation at a higher figure. We, therefore, agree with the District Judge in holding that the plaintiff is entitled to the deduction claimed by him under s. 14 of the Limitation Act.

The facts necessary for the determination of the question as to whether the suit is barred by *res judicata* are briefly these: The widow, the 1st defendant, had made certain alienations from out of her husband's properties in her possession in favour of her brother Subbayya. In 1913 the present 3rd defendant brought a suit, O. S. No. 100 of 1913, in the District Munsif's Court of Ongole against Subbayya, for setting aside the alienations. Defendants Nos. 2 and 3 to the suit were alienees from Subbayya. The plaintiff therein (present 3rd defendant) alleged that under the Will executed by Nayudamma shortly before his death in 1880 the widow (1st defendant) and himself were constituted joint legatees of $\frac{2}{3}$rds of the testator's properties, that they were in possession of the $\frac{2}{3}$rds share in their capacity as such joint legatees and that, therefore, the "widow" alone had no power to make the alienations in question, in favour of Subbayya. The widow was also added as the 4th defendant in that suit and one of the issues raised between the parties was whether the alleged "Will" was genuine—the plaintiff therein (present 3rd defendant) and the widow (the present 1st defendant) maintaining that it was genuine and the other parties saying that it was not. The issue was hotly contested and the Trial Court declared the alleged "Will" to be a forgery; but the Appellate Court reversed its decision and held that the 'Will" was genuine. It is argued for the appellant that, because the widow was a party to the prior suit, the decision in it to the effect that the Will is genuine is binding on the present plaintiff who is a reversioner. It has, no doubt, been held in various decisions by the Privy Council as well as by the High Courts in India that where a Hindu widow in whom her husband's estate has vested represents the estate in a litigation to which she is a party, the decision in such litigation, fairly and honestly conducted, given for or against her will bind the reversioners. The leading case on the point is the well-known *Shivagunga case* [*Katama Natchier* v. *Rajah of Shivagunga* (1)] and it has been followed in several subsequent decisions: [See *Pertabnarain Singh* v. *Trilokinath Singh* (2), *Risal Singh* v. *Balwant Singh* (3) etc.] The rule of *res judicata* as enacted in s. 11 of the C. P. C. is not strictly applicable as the reversioners do not claim under the widow; but the principle of *res judicata* has been held to apply "so as to bind the reversioners by decisions in litigation, fairly and honestly conducted, given for or against Hindu females who represented estates," in such litigation: [*Vide Risal Singh* v. *Balwant Singh* (3)]. This rule can be applied only if the widows did, as a matter of fact,

(1) 9 M. I. A. 539; 2 W. R. P. C. 31; 1 Suth. P. C. J 520; 2 Sar. P. C. J. 25; 19 E. R. 843: (P. C.).
(2) 11 C. 186; 11 I. A. 197; 8 Ind. Jur. 697; Rafique. & Jackson's P. C. No. 86; 5 Ind. Dec. (N. S.) 883 (P. C.).

represent the estate in the prior litigation.

In *Risal Singh* v. *Balwant Singh* (3) the widow brought the prior suit against the adopted son to set aside the adoption pleading that she had no authority from her husband to adopt and that she had not made any adoption according to any ceremony under the Hindu Law. The adopted son contested the suit and the Courts in India dismissed her suit on the ground that she was estopped from setting up this plea in view of an earlier statement by her that she had her husband's authority to adopt and did make a valid adoption. On appeal, however, the Privy Council did not base their judgment on estoppel alone but raised an issue as to her authority to adopt and held on the evidence on that issue that the adoption was valid. The subsequent suit was brought by the reversioner against the adopted son for a declaration that the adoption was invalid and for possession of the estate. The Judicial Committee state at page 603* that "There can be no doubt in their Lordships' opinion that the Rani Dharam Kunwar (the widow) in her suit against Balwant Singh (the adopted son) did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether Balwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the rules in *Shivagunga case* [*Katama Natchier* v. *Rajah of Shivagunga* (1)]" and it was on this ground that they held that the reversioner was bound by the judgment in the prior suit. The question, therefore, in each case will be whether the estate was properly represented by the widow in the prior suit. If, for instance, she had litigated in assertion of an absolute right inconsistent with her representative character, we do not think, that she could in any sense of the word be said to have represented the estate or the interest of the reversioners in such litigation, and a decision given therein upholding such contention of hers could not obviously be held binding on them. Reference might also be made to *Bai Kanku* v. *Bai Jadav* (4) and *Rama Sanku* v. *Daji Naru* (5) for the position that the widow must have represented not only her own interests, but the interests of the reversioners as well in order that the decision might be binding on them. In the present case we agree with the learned District Judge in his view that "the widow was not a party to the suit in her capacity as representative of the estate which would afterwards devolve upon the reversioners, but as a beneficiary under a Will, according to the terms of which the reversioners were disinherited." In contending that the Will, alleged to have been left by the husband, was genuine and that she herself was a joint legatee under it along with her brother, the present 3rd defendant, we think that she was not only not representing the estate or the interests of the reversioners in such litigation, but was setting up a case in direct opposition to their interests. It could not, therefore, be held that the decision in the prior suit that the "Will" is genuine is binding on the plaintiff.

Mr. S. Varadachariar for the respondent (plaintiff) has also sought to support the lower Court's judgment on another ground which has not been referred to by either of the lower Courts. His argument is that the plea of *res judicata* could not be set up by the appellant in the present case inasmuch as the prior suit was in the District Munsif's Court and that Court is obviously incompetent to entertain the present suit as it is beyond its pecuniary jurisdiction. There is ample authority in support of this position; *vide Misir Raghobardial* v. *Sheo Basksh Singh* (6), *Run Bahadur Singh* v. *Lucho Koer*, (7) and *Giriya Chettiar* v. *Sabapathy Mudaliar* (8). These cases decided that "in order to make the decision of one Court final and conclusive in another Court it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit on which the 1st decision is given in evidence as conclusive". In all these cases the prior suit was in the Munsif's Court which by reason of the limit placed on its pecuniary jurisdiction, could not have entertained the subsequent suit and the plea of *res judicata* was rejected on that ground. The answer to this argument that was urged by Mr. Raghava Rao for the appellant is that this condition as to the competency of the First Court to

(3) 48 Ind. Cas. 553; 40 A. 593 at p. 604; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511; 45 I. A. 168 (P. C.).

(4) 53 Ind. Cas. 164; 43 B. 869 at pp. 883, 884; 21 Bom. L. R. 837.

(5) 48 Ind. Cas. 125; 43 B. 249 at p. 254; 20 Bom. L. R. 947.

*Page of 40 A.—[*Ed.*]

(6) 9 C. 439; 12 C. L. R. 520; 9 I. A. 197; 7 Ind. Jur. 107; 4 Sar. P. C. J. 395; Rafique & Jackson's P. C. No. 70; 4 Ind. Dec. (N. S.) 941 (P. C.).

(7) 11 C. 301 at p. 309; 12 I. A. 23; 4 Sar. P. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960 (P. C.).

(8) 29 M. 65.

entertain the subsequent suit though found in s. 11 of the C. P. C. is not observed in the English Law as laid down by the Judges in the *Duchess of Kingstone's case* (8) and that, because in the present case we have not to apply the strict rule of *res judicata* as enacted in s. 11 but only the principle of *res judicata* as mentioned in *Shivagunga case* [*Katama Natchier* v. *Rajah of Shivagunga*, (1)] and other cases, we need not in deciding this case be controlled by the strict provisions of s. 11 but might be guided by the principles of English Law. Assuming that the *Duchess of Kingstone's case* (8) does not lay down the above condition as being necessary for the application of the rule of *res judicata* we think that so far as the Indian Law is concerned this condition must also be satisfied before a plea of *res judicata* could be up held even in a case like the present one. In considering the reasons as to why this condition must be insisted upon, their Lordships of the Privy Council in *Missir Raghobardial* v. *Sheo Baksh Singh*, (6) state thus at page 444*; "In their Lordships' opinion it would not be proper that the decision of a Munsif upon (for instance) the validity of a Will, or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court, for property of a large amount, the title to which might depend upon the Will or the adoption..... ..... and although it may be desirable to put an end to litigation, the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his case". Reference may also be made to *Run Bahadur Singh* v. *Lucho Koer* (7) where their Lordships of the Privy Council after quoting the above passage state thus:—"If this construction of the law were not adopted, the lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire". There seems to be no reason, therefore, so, far as the necessity for this condition is concerned for making any distinction between a case to which the strict rule of *res judicata* as enacted in s. 11 of the C. P. C. applies and a case like the present in which the principle of *res judicata* laid down by the Privy Council in *Shivagunga case* [*Katama Natchier* v. *Rajah of Shivagunga* (1)] *Risil Singh* v. *Balwant Singh* (3) and other cases is sought to be availed of. Therefore, on the alternative ground also relied on by Mr. Varadachariar, we hold that the present suit is not barred by *res judicata*.

(8) 2 Sm. L. C. 11th. Ed. p. 731.

*Page of 9 C.—[*Ed.*]

In the result the appeal fails and is dismissed with costs.

The appeal having been set down to be spoken to this day, the Court delivered the following

JUDGMENT.—Costs in this appeal are allowed to plaintiff (1st respondent) only. Costs are refused to 1st defendant (2nd respondent).

V. N. V.
Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1207 OF 1923.

June 18, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

BENOY KRISHNA GAIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

FANINDRA NATH ROY CHOUDHURI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease for term of years—Covenant for renewal—Mortgage by lessee—Mortgagee, whether entitled to demand renewal.

A lease for a term of years provided that after the expiry of the term the lessee would be entitled to a renewal of the lease for a further period or to a new lease on the terms set out in the renewal clause. Before the expiry of the term of the lease the lessee mortgaged his interest in the property and the mortgage empowered the mortgagee to sublet the property during the time that he was in possession as the mortgagor himself might have done and also to do all acts by using the name of the mortgagor without reference to him:

Held, that the mortgagee was not an assignee of the term created by the lease and that there was no privity of contract between him and the lessor and that consequently the mortgagee was not entitled to demand a renewal of the lease. [p. 502, col. 1.]

Appeal against a decree of the Second Additional District Judge, 24-Parganas, dated the 24th of January 1923, reversing that of the Subordinate Judge, Second Court of that place, dated the 20th of May 1922.

Babus *Braja Lal Chakrabutty* and *Boopendra Coomar Mitter*, for the Appellants.

Dr. *Sarat Chandra Basak* (with him Mr. *Bankim Chandra Mukherjee* and Babus *Sanat Kumar Chatterji* and *Narendra Nath Dalal*), for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiffs against a decision of the Additional District Judge of the 24-Parganas reversing a decision of the Subordinate Judge of the Second Court of that place. The suit out of which this appeal arises is a suit to recover possession from a tenant whose lease has expired. There were four defendants in the suit, defendant No. 1 being the lessee of the land who became insolvent in the year 1917. Defendant No. 2 is the Receiver appointed in the insolvency. Defendant No. 3 is a mortgagee in possession from the lessee and defendant No. 4 is a sub-lessee under the mortgagee. Defendants Nos. 1 and 2 have taken no part in the suit and the contest has been between the plaintiffs on the one side and the defendants Nos. 3 and 4 on the other. The lease is dated the 23rd October 1906. It was granted by three persons Brojeswari, Kebal Krishna and Narayan Chandra who purported to be *shebaits* of a certain deity. Subsequently, there was a suit for partition brought by Narayan who alleged that the property was secular. It was held in that suit (No. 51 of 1906) that the property was secular but was charged with performance of the *deb sheba* of the idol and that the property was liable to be partitioned. On the partition, the land which was subject to the lease fell to the share of Kebal Krishna and his interest has subsequently been transferred to the present plaintiffs. The lessee, on the 10th August 1909, mortgaged the property to defendant No. 3. The lease was for a period of five years from the 23rd October 1906 but under the provisions of cl. (8) of the lease it was to be renewed for a further period of five years on the same terms and conditions. Accordingly, the lease expired on the 22nd October 1916. But the contention put forward by the mortgagee is that by virtue of the provisions of cl. (13) of the lease it is either renewable for a further period or that the lessee is entitled to a new lease on the expiry of the old one on the terms set out in cl. (13) of the lease and that is the real contest between the parties. The difficulty, however, in the way of the mortgagee is that he is not an assignee of the term created by the lease and accordingly, there is no privity of contract between him and the lessor. Accordingly, he is *prima facie* not entitled to enforce the so-called covenant for renewal which is contained in cl. (13) of the lease. It has, however, been argued before us on behalf of the mortgagee that by virtue of the terms of the mortgage itself he is in a position to enforce renewal of the lease under the provisions of cl. (13) thereof. I confess that I have found great difficulty in following the argument of the learned Advocate upon this point and it certainly did not carry conviction to me. It appears to me that the only way under which the argument could be put is that by virtue of cl. (3) of the mortgage to which we have been referred the mortgagee was constituted the agent or attorney of the lessee so as to obtain either renewal of the lease or a new lease under the provisions of cl. (13). It is, accordingly, necessary to examine the provisions of cl. (13) of the lease and also the provisions of cl. (3) of the mortgage. Now cl. (13) provides amongst other things that the lessee is bound to deliver over possession of the land to the lessor after the expiry of the terms fixed thereby. Then comes a further proviso in cl. (13) that if the lessee undertakes to pay rent according to the rates and on the terms and conditions under which the adjoining lands are held he is to remain in possession of the lands included in the *kabuliyat* and shall be bound to execute a *kabuliyat* on those terms. This is a somewhat vague provision; no doubt it may be possible to ascertain the rent of adjoining lands so that this may be fixed but the period of the new lease is somewhat difficult to gather from the terms of cl. (13), and whether it would have been possible to ascertain the prevailing rate and term under which the adjoining lands were let is a matter upon which I feel considerable doubt. But it is not necessary, I think, to pursue this question further. I now turn to cl. (3) of the mortgage upon which the mortgagee mainly relies. We have read this clause several times and it has been read to us both in part and as a whole more than once and the conclusion I have come to is that all that is meant by cl. (3) of the mortgage is that it empowers the mortgagee to let out or rather sublet the land during the time he was in possession as the mortgagor himself might have done. Reliance was placed on the concluding words of the clause which provide that the mortgagee shall be entitled to do all acts by using the name of the mortgagor and without reference to him and it was said that by virtue of these

words the mortgagee was now entitled to call for a renewal of the lease under the provisions of cl. (13) or for a new lease under the provisions of that clause. But, as I have already stated, I think that upon the true construction of cl. (3) nothing of the kind is intended by the parties and all that cl. (3) means is that the mortgagee is to be entitled to sublet the land so long as he remains in possession. It is impossible, therefore, I think, to hold that upon the construction of cl. (3) of the mortgage the mortgagee is an agent or attorney of the lessee to demand from the landlord a renewal of the lease or a new lease under the provisions of cl. (13). If, this is so, then, clearly the mortgagee has no right to renew for as I have already stated the mortgage itself leaves the property in the mortgagor and there is only a charge in favour of the mortgagee, that is to say, there is no assignment of the lease which would entitle the mortgagee to the benefits of the covenants contained in the lease which would run, so far as cl. (13) is concerned, with the land in equity if not in law.

The result, therefore, is, in my opinion, that the judgment of the first Court was right and the judgment of the lower Appellate Court is wrong. But there are one or two points that were placed before us to which it is necessary that I should deal. One of them was the suggestion that the property was *debutter* property of the idol and we were referred to the conveyance of the plaintiffs and to the recitals therein as establishing the *debutter* nature of the property. Both the Courts have found that the property is secular and in view of the decision on this point in the previous suit, whether that decision is right or wrong, we must accept for the purposes of this suit that this is secular and not *debutter* property.

In the result, therefore, the appeal succeeds and the plaintiffs will be entitled to the decree for ejectment which they seek. The question of mesne profits will be decided subsequently in accordance with the provisions of O. XX, r. 12 of the C. P. C. Plaintiffs will be entitled to mesne profits for a period of three years prior to the date of suit and thereafter until possession is given or for a period of three years whichever is the shortest. The plaintiffs will be entitled to the costs in all Courts from defendants Nos. 3 and 4.

Defendant No. 3 will be entitled to remove the *gaddi* and the godowns within a month from the arrival of the record in the lower Court.

The cross-objection is dismissed.

Ghose, J.—I agree.

M. B.
Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1532 OF 1922.
February 11, 1925.
Present:—Mr. Justice Ramesam.

BUDDALA GANGAYYA AND OTHERS—DEFENDANTS NOS. 1 TO 4 AND 10—APPELLANTS
versus
VENNAVALLI SATYANARAYANA AND OTHERS—PLAINTIFFS NOS. 2 TO 5 AND DEFENDANT NO. 11—RESPONDENTS.

Trespass on Government land—Patta, *absence of*—*Assessment, effect of*—*Ejectment suit*—Jus tertii, *plea of, when available*—*Third party impleaded as party to suit, effect of*—*Amendment of pleadings*—*Title subsequently acquired, whether can be put forward.*

When a person who has no *patta* and is, therefore, not a *raiyat* trespasses on land belonging to Government, and cultivates it, the Government sometimes imposes an assessment (somewhat heavier than the usual settlement assessment) called *sivajima* assessment. It amounts to a condoning of the act of trespass but does not amount to a recognition of any right or any undertaking on the part of the Government to permit the occupation for the future, though the occupation may go on for years, the trespass for each year being condoned for that year by the recovery of the assessment. [p. 504, cols. 1 & 2.]

The principle that possession is good against all but the true owner (which is merely another way of stating that a plea of *jus tertii* is a good defence) cannot avail the defendants where the third person whose title is set up is impleaded as a party to the suit and admits the plaintiff's title to the property in dispute. [p. 505, col. 1.]

There is no general rule that an amendment cannot be allowed so as to implead a title acquired after the date of the plaint. [*ibid.*]

When in a suit in ejectment the defendant pleads the title of the Government to the property in dispute, an application for the amendment of the plaint by the addition of the Government as a party for the purpose of attaining finality may be allowed. [p. 505, cols. 1 & 2.]

Second appeal against a decree of the Court of the Subordinate Judge, Kistna at Ellore, in A. S. No. 326 of 1921, preferred against the decree of the Court of the Additional District Munsif, Ellore, in O. S. No. 56 of 1920 (No. 775 of 1917, Principal District Munsif's Court, Ellore).

Mr. *P. Venkatramana Rao*, for the Appellants.

Messrs. *C. V. Ananta Krishna Iyer* and *V. Suryanarayana*, for the Respondents.

JUDGMENT.—The facts of this second appeal may be briefly stated. One Varanasi Ramayya owned an *inam* measuring 2 acres 30 cents. in the suit village of Ramasingavaram. He sold half of it to P. W. No. 3 under Ex. A (14th December 1895). P. W. No. 3 sold half of his moiety (*i. e.*, one-fourth) under Ex. C-1 to K. Lingamaraju who then sold it to plaintiff under Ex. B. P. W. No. 3 sold the other half of his moeity also to plaintiff under Ex. C. (21st April 1914). Thus whatever *inam* Ramayya had, passed to plaintiff. The suit is for recovery of that *inam*.

There is some doubt and confusion as to the identity of the *inam*. As will appear later on, the point is, in my opinion, not material. But I may indicate the nature of the doubt according to the Munsif's findings. The Subordinate Judge has given no finding. According to the District Munsif it appears that the Survey number of the *inam* according to the old Survey was No. 114. In the re-settlement of the village in 1899 or 1900, Survey No. 114 is shown as 236 A. The rest of Survey No. 236 belongs to Government. The Munsif also says "At the time of the sub-division Survey field No. 236A appears to have been shown as Survey field No. 236A-544". Some of the Survey records show interpolations and corrections and show that Survey 236-A544 is south of Survey No. 104: but it is possible that the corrections represent the proper state of things, though it is not clear. The plaintiff's suit is for recovery of the land south of Survey No. 104.

The defendants plead that the land, south of Survey No. 104, is not 236A-544 but 236G and it belongs to Government. They plead no title of their own not even a right to possession under the authority of the true owner. In the written statement, they no doubt pleaded that Buddala people cultivated it and sold it to 10th defendant but, no sale-deed is produced. In fact it was admitted before me that such part of the suit land, as was under the occupation of the defendants, was under their *Sivajima* cultivation, *i. e.*, they are practically trespassers and have no right of any kind. When a person, who has no *patta* and is, therefore, not a *raiyat*, trespasses on a land belonging to Government, and cultivates it, the Government sometime imposes an assessment (somewhat heavier than the usual settlement assessment). This is called *Sivajima* assessment. It amounts to a condoning of the act of trespass but does not amount to a recognition of any right nor any undertaking on the part of the Government to permit the occupation for the future, though, as a matter of fact, the occupation may go on for years, and the trespass for each year being condoned for that year by the recovery of the assessment. (S. O. 15 paras. 23, 24, 25). It is clear that defendants' rights, even as such trespassers terminated with 1918 (see Ex. G).

Thus, the defendants have no substantial defence on the merits. When the original written statement was filed, at the most it amounted to a plea of *jus tertii*, *i. e.*, the right of Government. In 1920 the plaint was amended by making the Government a party and para. 7 (1) was added. The defendants agreed to the amendment and did not oppose it. The result of the amendment was that the Government whose title was pleaded by the defendant as *jus tertii* became a party to the suit and the Government does not support the other defendants and there is no *jus tertii* to be pleaded. A plea of *jus tertii* is no defence unless the defendant can show that the act complained of was done by the authority of the true owner [*Narayana Rao* v. *Dharmachar* (1) citing *Graham* v. *Peat* (2), and *Chambers* v. *Donaldson* (3).] The situation is that plaintiff and Government are the two rival owners of the suit land and parties to the suit and it is a matter to be settled between them and no *jus tertii* is available for the other defendants. At this stage, the Government recognised that the plaintiff is the owner of the suit land and plaintiff and Governnment have filed a compromise petition to that effect (*vide* p. 3 of the pleadings). The Government having found that the plaintiff was the owner of an *inam* and that they *had recognised* him to be the owner of an *inam* (see Exs. D, E, E-1, and J) but that there is some dispute as to its localisation, settled it in the way they liked it best and found most convenient: (Ex. G). I do not see how there is any thing more to be pleaded by the other defendants or to be decided by the Courts after the settlement between the Government and plaintiff, the only two parties who are interested in the matter.

The learned Vakil for the defendants conceded before me that he cannot question the discretion of the lower Courts in

(1) 26 M. 514.
(2) (1801) 1 East 244; 102 E. R. 95; 6 R. R. 268.
(3) (1809) 11 East 65; 103 E. R. 929; 10 R. R. 435.

allowing the amendment and especially as his clients agreed to it and did not oppose it. In the First Court, he contended that a plaint could not be allowed to be amended so as to enable the plaintiff to rely on a title created after the filing of the plaint.

In the present case, no title has been created since the date of the plaint. That the plaintiff was always the owner of an *inam*. That there was an *inam* in Survey No. 236, not belonging to Government, admits of no doubt: (See Exs. D, E, E-1, G and J). That the plaintiff is the owner of it admits of no doubt (Exs. A, B, C, C-1). The only question in this case was about the situation of the *inam*. The question of localisation of the *inam* has been settled by the Government, the owner of the rest of the land who chose to accept such of the Survey records, as support the plaintiff. I do not see that this can be said to be a case of a title created after the filing of the plaint. Again, I do not see how the defendants can raise such a plea. They have no *locus standi* in this case. They have no ownership or right to possession under the real owner (who is either plaintiff or Government). The plea of *jus tertii* ceased to be such after the Government was impleaded and supported the plaintiff. The principle that the possession is good against all but the true owner (which is merely another way of stating that a plea of *jus tertii* is a good defence) cannot avail the defendants as the third person is impleaded as a party and admitted the plaintiff's title to it. If the Government is transferred as a plaintiff, the defendants have no defence to urge.

Even apart from this, I do not think there is any general rule that an amendment cannot be allowed so as to implead a title acquired after the date of the plaint. There was no amendment of the plaint in *Radhaykoer* v. *Ajodhya Das* (4) and *Purkhit Panda* v. *Ananda Gaontia* (5), and otherwise the cases are very dissimilar and do not help the defendants. In *Rai Charan Mandal* v. *Biswa Nath Mandal* (6) there was a devolution during the pendency of the suit and the principle that a Court may take notice of events which have happened since the institution of the suit to do complete justice between the parties was recognised. In the present case, the amendment by the addition of the Government as a party was made for the purpose of attaining finality, (see order, dated the 26th January 1921), and I have already shown that this is not at all a case when the plaintiff's title is acquired after the suit. *Abdul Rahaman* v. *Sarafat Ali* (7) relied on by the Court below is a case of execution sale and does not help us. In *Ramanadhan Chetti* v. *Pulikutti Servai* (8), the amendment was asked at a very late stage *i. e.*, in second appeal and was refused. In this case, the amendment was sought at the earliest possible stage, *i. e.*, before the trial in the First Court was taken up and was granted. The Vakil for the appellant relies on *Evans* v. *Bagshaw* (9) affirming *Evans* v. *Bagshaw* (10). The case in *Evans* v. *Bagshaw* (9) was considered in *Doraisami Pillai* v. *Chinnia Goundan* (11) where Wallis, C. J. observed: "There are no English decisions since the Judicature Act that such a course is.....incompetent and on the other hand as observed in *Kisandas Rupchand* v. *Rachappa Vithoba* (12), the discretion conferred under O. VI, r. 17 of the C.P.C. and O. XXVIII, r. 1 of the English Rules is very wide" and the amendment was allowed to stand. The same view was taken in *Pendekkallu Thimmayya* v. *Pendekkallu Siddappa* (13), and again by Venkatasubba Rao, J., and myself in a recent judgment [*Valluru Appalasuri* v. *Sasapa Kaunanna Nayuralu* (14)] where it was observed that such an amendment ought to be allowed in all cases where there is no question of change of jurisdiction or great delay in making the application, or depriving the opposite party of a defence otherwise available or the necessity of a fresh trial into facts. In the present case, if a fresh suit is filed, the defendants have absolutely no defence. The learned Vakil for the appellants at first suggested that he may apply for a grant for the suit land on *darkhast*; but when it was pointed out that this is not a *darkhast* case and the question is one of the localisation of an *inam* to

(4) 7 C. L. J. 262.
(5) 8 C. L. J, 116.
(6) 26 Ind. Cas. 410; 20 C. L. J. 107.
(7) 31 Ind. Cas. 896; 22 C. L. J. 412; 20 C. W. N. 667.
(8) 21 M. 288; 8 M. L. J. 121; 7 Ind. Dec. (N. S.) 559.
(9) (1870) 5 Ch. 340; 39 L. J. Ch. 145; 18 W. R. 657.
(10) (1869) 8 Eq. 469.
(11) 43 Ind. Cas. 560; 34 M. L. J. 258; 22 M. L. T. 533; (1918) M. W. N. 89; 7 L. W. 335.
(12) 4 Ind. Cas. 726; 33 B. 644; 11 Bom. L. R. 1012.
(13) 75 Ind. Cas. 112; (1925) A. I. R. (M.) 63.
(14) 90 Ind. Cas. 881; 22 L. W. 287; (1925) M. W N. 622; 49 M. L. J. 598.

which the plaintiff is admittedly entitled, he withdrew the suggestion and could not suggest any other defence.

It is also contended that the compromise between the plaintiff and Government does not amount to a conveyance. But this point does not arise on the view I have taken of the facts of the case. The compromise has only the effect of localising the plaintiff's admitted *inam* and no more. Nor has *Dharanikanta Lahiri* v. *Gahar Ali Khan* (15) any application to the facts of this case.

The second appeal is dismissed with costs, one set to be shared equally by Government and plaintiffs.

V. N. V. *Appeal dismissed.*

Z. K.

(15) 18 Ind. Cas. 17; 25 M. L. J. 95; 13 M. L. T. 185; (1913) M. W. N. 157; 17 C. W. N. 389; 17 C. L. J. 277; 15 Bom. L. R. 445 (P. C.).

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS CASE No. 386 OF 1925.

November 11, 1921.

Present :—Mr. Justice Zafar Ali.

THE FIRM GOBIND PARSAD-WAZIR SINGH—DEFENDANTS—PETITIONERS

versus

THE FIRM MANGAL SAIN-DULI CHAND —PLAINTIFFS—RESPONDENTS.

Punjab Courts Act (VI of 1918), s. 41—Appeal, second—Mercantile usage, question of—Certificate, whether necessary.

The question whether a mercantile usage relied upon by one of the parties to a suit does or does not exist cannot be agitated in second appeal in the absence of a certificate granted in accordance with the provisions of s. 41 of the Punjab Courts Act.

Petition for review of an order of Sir Henry Scott-Smith, Kt., and Mr. Justice Zafar Ali passed in Civil Appeal No. 338 of 1925, on the 16th March 1925.

Lala *Sardha Ram Kapur*, R. S., for the Petitioners.

Mr. *Shamair Chand*, for the Respondents.

ORDER.—The lower Appellate Court arrived at the conclusion that according to the mercantile usage prevailing in Delhi cross contracts between the same parties for the sale and purchase of identical goods are settled by payment of difference in prices. The defendants, who denied the existence of the said usage, perferred an appeal against the judgment and decree of the Court below which came up in ***kacha peshi*** **before a Bench consisting of** Sir Hency Scott-Smith, J., and myself. The only point that the appellants' Counsel, Mr. Sardha Ram urged before us was that the finding of the District Judge with regard to the existence of the alleged usage was erroneous. We pointed out to the learned Counsel that an appeal to contest a decision on a question of usage did not lie without furnishing a certificate in accordance with the provisions of s. 41 of the Punjab Courts Act. He argued that no certificate was necessary but could cite no authority in support of his contention. We dismissed the appeal, holding that according to the express terms of s. 41 a certificate was necessary. Subsequently he filed an application to obtain a review of the above order which came up before me as Sir Henry Scott-Smith had retired since from service. I admitted the application but after hearing arguments of Counsel for both parties I can see no reason for changing my opinion.

The main contention of Mr. Sardha Ram is that the alleged usage could not be said to have the force of law and was, therefore, not the usage contemplated by s. 41, but the qualifying phrase "having the force of law" in s. 41 applies to custom as well as to usage and it is clear that no custom or usage can be operative unless it has the force of law. Sections 5 and 7 of the Punjab Laws Act make local customs and usages the rule of decision in certain specified cases and thus a local custom or usage to which ss. 5 and 7 apply acquires the force of law. Section 7 runs as below: "All local customs and mercantile usages shall be ragarded as valid, unless they are contrary to justice, equity or good conscience or have, before the passing of this Act, been declared to be void by any competent authority."

In the present case the usage in question is not contrary to justice, equity or good conscience and is, therefore, valid. Mr. Sardha Ram contends that the usage could not supersede the rule of law which required each contracting party to perform his part of the contract as agreed upon, but in the case of a commercial contract the mode of performance may be regulated or modified by the local mercantile usage and that is what has happened in the present case. I, therefore, dismiss this application. No order as to costs.

Z. K. *Application dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 277 OF 1925.

October 22, 1925.

Present :—Mr. Neave, A. J. C.

RAJA RAM—PLAINTIFF—APPELLANT

versus

JAGANNATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 59, 100—Mortgage—Illiterate executant making mark on deed—Attestation by scribe, validity of—Contingent charge, validity of—Construction of document—Intention of parties—Mortgage-deed of one property, whether can operate as deed of further charge in respect of property previously mortgaged.

Where an illiterate mortgagor purports to execute a mortgage-deed by making his mark on the deed and the scribe thereafter attaches an explanatory note to the mark and also attests the mark, the attestation is perfectly valid. [p. 508, col. 2.]

Deeds and contracts executed by the people of India ought to be liberally construed and where the intention of the parties is clear the form of words employed is immaterial. [p. 509, col. 1.]

In order to find that a document creates a charge upon immoveable property the Court need only be satisfied that the document shows an intention that the person in whose favour it is executed should have the benefit of the security of the land. [*ibid.*]

A contingent charge is not a charge within the meaning of s. 100 of the Transfer of Property Act. [p. 508, col. 2.]

Certain property was mortgaged by the plaintiff with the defendant and subsequently the plaintiff executed a mortgage-deed of some other property in favour of the defendant which contained a recital that if for any reason the mortgagee should lose possession of the property mortgaged with him under the deed or if there was any dispute as to the title of the mortgagor, the mortgagor would be liable to pay the money due under the deed before he could redeem the previous mortgage. The subsequent deed was described as a deed of further charge and the terms and conditions of the previous mortgage-deed were incorporated into the subsequent deed:

Held, that the subsequent deed operated as a deed of further charge with regard to the property previously mortgaged and that that property could not be redeemed without paying off the amount due under the subsequent deed. [p. 508, col. 2; p. 509, col. 1.]

Second appeal from the judgment and decree of the Sub-Judge, Rae Bareli, dated the 17th February 1925, upholding those of the Munsif, Dalmau, dated the 8th March 1924.

Mr. *Ram Prasad Varma*, for the Appellant.

Mr. *Bisheshwar Nath*, for Mr. *A. P. Sen*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit for the redemption of a mortgage dated the 6th December 1901, over three plots of land, and of a deed of further charge dated the 4th January 1917. The defence was that there were also two other deeds of further charge which must be redeemed. These have been marked Ex. A 2 and A3. The plaintiff denied the genuineness of these two deeds. He also denied that they were deeds of further charge.

Dealing first with Ex. A3 it is to be observed that the original of this has admittedly been lost and that it has been found that the executants and the attesting witnesses are all dead. A certified copy from the Registration Department was produced in evidence. The learned Munsif was of opinion that the production of this as secondary evidence relieved the plaintiff from the necessity of proving its execution. He accordingly did not record any evidence as to execution. The lower Appellate Court remanded an issue on the subject of due execution. The plaintiff presented himself as a witness and swore that the executant and the attesting witnesses had all signed the deed in his presence.

It is now contended that the lower Appellate Court was wrong in remanding the case and that the evidence given was insufficient. The ground for the first contention is that it was the duty of the plaintiff to prove his case and to have all evidence necessary for that purpose ready at the hearing in the First Court. The only witness, however, that he could produce or ultimately did produce was himself and it may be presumed that had the Court called upon him to give evidence on the subject, he would have been ready to do so then, but when the Court took the view which it did it was hardly possible for him to insist that his evidence must be recorded. There is no force in this contention. The second argument amounts to this that all that the plaintiff says is that the executants and witnesses signed in his presence. He does not say that the executant signed first in the presence of the attesting witnesses and it cannot, therefore, be said that the deed was duly attested as is required by law. It does not, however, appear that anything was elicited from the plaintiff in cross-examination which would show that the ordinary requirements of the law were not complied with. It must, therefore, be assumed that the attestation was made in the proper way.

It is not now argued that this deed, Ex. A-3, is not a deed of further charge. I agree, therefore, with the Courts below that it was properly executed and that it does operate as a deed of further charge.

The real contest arises over the other deed Ex. A-2. This deed purports to be executed by three brothers Nabi Shah, Mehr Ali and Najaf Ali Shah. Of these Nabi Shah was literate and appears to have signed his own name, the other two were illiterate and appear to have made marks with a pen over their names and a note that they executed the deed have been written by one Lachhman Prasad scribe of the deed who has been called as a witness. It has been found by the Courts below that all the three executants and the other three attesting witnesses are dead. Lachhman Prasad the scribe was himself a fourth attesting witness. He has given evidence and has deposed that Mehr Ali Shah and Najaf Ali Shah made their marks in his presence. The record of his statement made by the learned Munsif is obscure in one point. It reads "This is signed by me. I signed it for Mehr Ali Manna or Najaf Ali. Nabi Shah himself Najaf Ali and Mehr Ali marked the deed in my presence." There appears a gap after the word "himself." It would appear that the Courts below interpreted this as though the word "signed" followed "himself" and this is consistent with the deed produced. It is argued on behalf of the appellant that the Court would not be justified in interpolating this word and that the passage should be read as though Nabi Shah also made his mark. Having regard to the fact that no plea was taken and no argument adduced in the Court below on this point, I think that the interpretation which that Court evidently put up on the words is a correct one and that what the witness meant to say, though the Court in the haste of writing omitted it, was that Nabi Shah himself signed in the witness' presence and that Najaf Ali and Mehr Ali also made their marks in his presence. This being so the witness has at least proved execution by the executants and attestation by himself. He has in cross-examination stated that he does not remember exactly the order in which the deed was signed but here again it is reasonable to presume that the other attesting witnesses also complied with the law.

One objection which has been made to the validity of Lachhman Prasad's attestation is based on the authority of *Sristidhar Ghosh* v. *Rakshakaly Dassi* (1). In that case the writer of a mortgage-bond wrote out the names of the executant who was illiterate and then signed his own name by way of attestation. It was held that the deed was not properly attested as required by s. 59 of the Transfer of Property Act. This ruling was brought to the notice of the lower Appellate Court and the learned Subordinate Judge has rightly distinguished it from the present case. It would appear that in the Calcutta case the scribe purported to sign for the executant who made no mark himself. In the present case the two illiterate executants made their marks. In s. 3 of the General Clauses Act (X of 1897) the word "sign" has been defined as including mark with reference to a person who is unable to write his name. Here then the two illiterate executants had, by making their marks, actually signed their names and what was written by the scribe was no more than an explanatory label attached to what would otherwise have been an unintelligible signature. There was no reason why he should not attest the marks and his attestation of them was prefectly valid.

The next question is whether this document, Ex. A-2, is a deed of further charge. It purports to be a mortgage of certain other property as well as a deed of further charge of the property covered by the mortgage-deed in suit, and the learned Pleader for the appellant argues that the charge on the property in suit is only conditional and, therefore, not a charge in law, as has been held in *Madho Misser* v. *Sidh Binaik Upadhya* (2). That a contingent charge is not a charge within the meaning of s. 100 of the Transfer of Property Act is not denied by the learned Advocate for the opposite party. The only question is of the interpretation of this particular deed. If the charge created is merely a contingent one then it cannot be held to operate as a charge at all. The learned Subordinate Judge has described the deed in a brief abstract. As he points out, it begins by reciting that three cultivated plots of land (which are not now in suit) are mortgaged with possession. It then goes on to say that, if for any reason the mortgagee should lose possession of those plots, or if there is any dispute as to their title, then the mortgagor shall be liable to pay the money due under this deed before he can redeem the original

(1) 63 Ind. Cas. 507; 49 C. 438; 26 C. W. N. 261; (1922) A. I. R. (C.) 168.

(2) 14 C. 687; 7 Ind. Dec. (N. S.) 456.

mortgage of which this deed is described as a deed of further charge. Then comes the third part of the deed which is translated by the learned Subordinate Judge: "Be it known that this deed will be considered as incorporated into and as a deed of further charge in respect of the mortgage-deed dated the 6th December 1901 by which three groves were mortgaged, ...It is agreed that all the terms settled upon between the mortgagors and the mortgagee in the mortgage deed of 6th December 1901 will apply in every way in the case of this deed and so long as the entire sum due on the basis of this deed is not paid, the three mortgaged groves we shall not be entitled to redeem."

The argument on behalf of the appellant is that it is only in the event of the mortgage property failing that the mortgagee would be entitled to treat this property as his security under Ex. A. 2. The deed is primarily a mortgage and this additional security is added as an after-thought.

On the other side it is maintained that this is not the proper construction. The deed is badly worded but as was pointed out in *Janardan Vishnu Kulkarni* v. *Anant Lakshmanshet* (3) on the authority of the well-known case of *Hunoomanpersud Panday* v. *Babooee Munraj Koonweree* (4) deeds and contracts of the people of India ought to be liberally construed, and the form of words used is immaterial. The Court need only be satisfied that a document shows an intention that the person in whose favour it was executed should have the benefit of the security of the land. On analysing the present deed it would appear that the intention throughout is to make the land which was the subject of the mortgage of 1901 security for the further loan. Throughout the present tense is used with regard to the charge and not the future, *e. g.*, "*jiska wasiqa haza zare mazid kiya jata hai.*" It is not only in the event of the other property proving inadequate that the mortgagee will have his remedy against this property but the two properties are equally pledged to him as security.

As has been mentioned the deed may be divided into three parts of which the intermediate part can be excised without making the rest of it meaningless. The third part in which the charge in suit is dealt with can stand by itself and is not, as has been pointed out by the learned Subordinate Judge, entirely dependent on the second part. I agree with this finding that this is a deed of further charge.

The appeal accordingly fails on all grounds and must be dismissed with costs.

Z. K. *Appeal dismissed.*

(3) 32 B. 386; 10 Bom. L. R. 575.

(4) 6 M. I. A. 393 at p. 411; 18 W. R. 81*n*; Sevestre 253 *n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 56 OF 1924.

March 11, 1925.

Present:—Mr. Justice Carr and Mr. Justice Brown.

KYONE HOE TSEE—APPELLANT

versus

KYON SOON SUN—RESPONDENT.

Succession Act (X of 1865), ss. 234, 261—Civil Procedure Code (Act V of 1908), s. 114, O. XLVII, r. 1—Consent order—Advocate, consent of, effect of—Consent based on mis-apprehension—Power of Court to disregard consent—Letters of Administration, proceeding for—Order based on erroneous consent of Counsel—Review, power of.

A Court is not deprived of its general authority over justice between the parties by an unauthorized act of Counsel. It is open to a party to a proceeding to ask the Court not to proceed to decide a matter on the basis of the consent expressed by his Counsel where such consent is given under a misapprehension and has not been authorized by the party himself and the Court has power in such a case to disregard the consent. [p. 511, col. 1]

The right of review is an entirely different right from that given by s. 234 of the Succession Act to revoke a grant of Letters of Administration. The power to review conferred by the C. P. C. is a general one and can be exercised by a Court which has been dealing with a contentious proceeding for the grant of Letters of Administration. [p. 511, col. 2.]

Where an order for the grant of Letters of Administration is made on the basis of the consent of Counsel of one of the parties to the proceeding and the Court subsequently finds that the consent was based on a misapprehension, the Court has power to review its previous order, inasmnch as there is a sufficient reason for review analogous to the discovery of new or important matter or evidence or a mistake apparent on the face of the record. [p. 512, col. 1.]

Appeal against a decree of the High Court on the Original Side, in Civil Regular Nos. 521 and 522 of 1923.

Mr. *Paget*, for the Appellant.

Mr. *Das*, for the Respondent.

JUDGMENT.—On the 1st June 1923 an application was filed on the Original Side of this Court for Letters of Administration to the estate of Kyonah Kyit, deceased, by Kyon Soon Sun. The deceased was a

Chinese Confucian, and the applicant claimed to be his son. The application was contested by the appellant Kyon Hoe Tsee who on the 11th June filed a cross-application. She claims to be the widow of the deceased. The case between the two rival claimants was fixed for hearing on the 7th December. On that date the learned Judge recorded an order to the effect that Mr. Chari who appeared for the applicant Kyon Soon Sun admitted that under the Indian Succession Act the widow had the prior right to Letters, and stated that that being the case his client had no desire at that stage to contest the status of the plaintiff-widow, and consented to Letters of Administration issuing to her. Letters were issued to her accordingly.

On the 12th December application was made on behalf of Kyon Soon Sun to review that order. The reasons set forth for a review were that he had never given instructions to Mr. Chari to agree to a consent-order, and that he denied that the appellant was the legally married wife of the deceased. On the 14th March the Judge passed orders granting the review and setting aside the order granting Letters to the appellant. It is against this order that the present appeal is filed. Since the passing of the order appealed against, Letters have been granted to the mother of Kyon Soon Sun who also claims to be a widow of the deceased, but with that order we are not at present concerned.

Objection to the order appealed against is taken on two main grounds. It is contended in the first place that the respondent was bound by the act of his Counsel, and in the second place that the Court had no power to review the order passed by it.

On the first ground we have been referred to a large number of authorities. There appear to be no decisions directly bearing on this point published in the official reports of any Court in this Province, but two unofficial reports have been referred to. In the case of *Haroon* v. *Ebrahim* (1) Counsel for one of the parties had agreed to a decree being drawn up for the joint possession of certain property. Before the decree had actually been drawn up, the party himself objected to the decree on the ground that his Counsel had agreed to it against his instructions and without his consent. It was also then admitted by the Counsel who had agreed to the decree that he had made a mistake in doing so. It was held that the agreement could not in the circumstances be enforced. In the case of *U Po Yeik* v. *Ba Khaing* (2) it was held that an Advocate had no power to bind his client to a compromise decree without his consent. Both of these cases can be distinguished from the present case, because it appears that in both cases the Advocate who appeared was acting on the general power conferred on an Advocate of the Chief Court and not under powers expressly conferred on him by *vakaletnama*. In the present case the Advocate for the respondent Mr. Chari was acting under a *vakaletnama* which was signed by his client and which amongst other things gave him express power "to compound or compromise the case with any of the other parties in such manner, as to him might seem fit; to make admissions of fact or law and confess judgments on my behalf . . . in Court". These powers are very wide, and it can hardly be contended that they do not confer on Mr. Chari full power to agree to the passing of a consent order. But it does not seem to us that this concludes the matter. An Advocate acting under a *vakaletnama* is no doubt acting as the agent of his client. But it was held by Lord Lindley in the English case *Neal* v. *Gordon-Lennox* (3) where the extent to which a client was bound by the act of his Counsel was in question that "the ordinary doctrines of agency are only half of what is to be considered in a matter of this kind." In England as explained in the case of *Shepherd* v. *Robinson* (4) there are two classes of decided cases. In the one class of cases it was held that if Counsel acts within his apparent authority, the client will be bound by the agreement made by his Counsel and embodied in some order or judgment of the Court. In the other class of cases it was held that the consent given by Counsel or Solicitor might be withdrawn by the client if the Counsel or Solicitor gave it under a misapprehension, before that consent order had been drawn up and perfected. The present case seems to us to fall into the second class. Orders had been passed to the effect that Letters of Administration should issue to the appellant, but no further action

(1) 64 Ind. Cas. 528; 13 Bur. L. T. 224.

(2) 1 Bur. L. J. 1.

(3) (1902) A. C. 465 at p. 473; 71 L. J. K. B. 939; 87 L. T. 341; 51 W. R. 149; 66 J. P. 757; 13 T. L. R 791.

(4) (1919) 1 K. B. 474; 88 L. J. K. B. 873; 120 L. T 492; 35 T. L. R. 220.

had been taken, and no Letters had actually issued when the application in review was filed. In *Neale's case* (3) Lord Halsbury said : "The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on ; and to suggest to me that a Court of Justice is so far bound by the unauthorized act of learned Counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraodinary proposition that I ever heard." In the present case the Court was asked not to proceed with the enforcement of the order passed by it. It is not necessary for us to decide here whether in India Counsel has the same power as in England to bind his client without his consent to a consent-decree. However that may be, we are of opinion that the principles enunciated by Lord Halsbury must be accepted as binding on Courts of Justice in India no less than in England, and that the Courts are not deprived of their general authority over justice between the parties by an unauthorized act of Counsel. It was, in our opinion, open to the respondent to ask the Court not to proceed with the grant of Letters to the appellant on the ground that the order for that grant had been passed under a misapprehension that he had consented to the grant caused by the acts of his Counsel.

As regards the second question which has been raised, it is contended that once Letters of Administration have been granted under the Indian Succession Act they can only be revoked under the provisions of s. 234 of the Indian Succession Act, and that the provisions of O. XLVII of the C. P. C. relating to review are not applicable to proceedings under that Act. It appears to us that there is no justification for this contention. The right of review is given under s. 114 of the Code from a decree or order (*a*) from which an appeal is allowed by this Code, but from which no appeal has been preferred, or (*b*) from which no appeal is allowed by this Code. But in r. 1 of O. XLVII where the right of review is again set forth the words "by this Code" are omitted. The provisions of s. 261 of the Succession Act specifically lay down that where there is contention in dealing with applications for Letters the proceedings shall take as nearly as may be the form of a regular suit according to the provisions of the C. P. C. If this had been a regular suit the right of review would undoubtedly have existed. Section 4 of the C. P. C. provides that in the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force . . . or any special form of procedure prescribed," But there is no provision of the Code confining the right of review to the ordinary jurisdiction of the Courts, whilst s. 261 of the Succession Act specifically provides for the adoption of the rules of procedure of the Code in cases such as the present. The right of review given by the Code is a general one, and we see no reason for holding that it does not extend to orders passed in contested proceedings for the grant of Probate or Letters of Administration. No authority has been shown to us for the contention now put forward, and this contention was never raised in the Trial Court. We have been referred to certain authorities as to the circumstances that must be established before Letters can be revoked. But they deal with applications for revocation under the provisions of s. 234 of the Succession Act or s. 50 of the Probate and Administration Act. There is no discussion in them of the right of review, which is an entirely different right from that given by s. 234 of the Succession Act. We are of opinion that powers of review given by the C. P. C. can be exercised by a Court which has been dealing with a contentious matter in proceedings for the grant of Letters of Administration. And we do not see sufficient reason for holding that the learned Judge on the Original Side was wrong in holding that a good case for review had been made out by the respondent.

In this original application for Letters, the respondent did name the appellant as a widow of the deceased : but before the order for the the grant of Letters was passed, he filed written objection to the grant of Letters to the appellant, and one of the grounds taken was that she was not the legally married wife of the deceased.

On the day on which orders for the grant of Letters were passed, Mr. Chari was not in Court when the case was called for. He was hurriedly sent for and, on his arrival, he conveyed to the Court the impression that the respondent did not contest the right of the appellant to Letters. It appears, however, that, in fact, the respondent had given no consent, and, in his written ob-

jections, he quite clearly contended that the appellant had no legal right to the Letters.

It further appears that Mr. Chari did not intend to agree to a consent order. In passing orders for the grant of Letters, the Court was acting under a misapprehension as to the attitude of the parties.

We agree that that provides a sufficient reason for review analogous to the discovery of new and important matter or evidence, or a mistake apparent on the face of the record.

We are, therefore, of opinion that no sufficient reason has been shown for interference in this appeal. We dismiss the appeal with costs—Advocate's fee five gold *mohurs*.

Z. K. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 10 OF 1924.

October 21, 1925.

Present:—Mr. Neaves, A. J. C.

PIRTHI DIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 2 (6), 28—Standing trees, whether immoveable property—Place of registration—Transferor acquiring property in order to register document within particular District, effect of—Registration, validity of.

Where a transferor does not actually own the property which he purports to transfer, a mere insertion in the deed of transfer of a description of such property will not legalize the registration of the deed in the registration district in which that property is situated. Where, however, in order to enable himself to register a deed within a particular registration district, a transferor first acquires property within that district and then includes that property in the deed of transfer, the registration of the deed within that district is perfectly valid. [p. 513, col. 2; p. 514, col. 1.]

In order to determine whether a standing tree is or is not immoveable property within the meaning of the definition contained in s. 2 (6) of the Registration Act the intention of the purchaser must be taken into consideration. If the intention is sooner or later to sever the tree from the soil and to use its wood for industrial purpose, then it must be regarded as coming within the exception to the definition but not otherwise [p. 514, cols. 1 & 2.]

Appeal against an order of the Subordinate Judge, Gonda, dated the 5th November 1923.

Mr. *B. N. Srivastava*, for the Appellants.

Mr. *S. N. Roy*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for a declaration that a deed of gift executed by one Ganga Ram in favour of Ram Lal is invalid and that the plaintiffs will be entitled to the property after the death of Ganga Ram's widow.

Ganga Ram was an old man of 80 or 85 years of age. He lived and carried on business at Balrampur as a grain merchant. Ram Lal, the donee is the son of Ganga Ram's wife by a former husband. The plaintiffs are the sons of Ganga Ram's brother.

Ganga Ram died on the 1st February 1920. On the previous day a sale-deed was executed in his favour under which one mango tree at Balrampur was transferred to him for Rs. 40. This deed was registered at Balrampur between 1 and 2 P. M. on the 31st of January. On the same day between 3 and 4 P. M. another deed was registered under which Ganga Ram gave to Ram Lal a house at Nawabganj in the Gonda District and the mango tree of which he had just become the owner. The deed was registered at Ganga Ram's own house at Balrampur, the Sub-Registrar visiting him for the purpose. This deed of gift purports to be attested by no less than seven witnesses. Its validity has been assailed in this Court on two grounds :—(1) that it was not signed in the presence of any two of the attesting witnesses and (2) that its registration was invalid. The house conveyed by it is within the jurisdiction of the Sub-Registrar of Tarabganj and not of the Sub-Registrar of Balrampur and it is alleged that the transfer of the mango tree was an entirely fictitious transaction merely entered into in order to enable registration to be made at Balrampur.

The learned Pleader for the appellant has taken the Court through the evidence of the witnesses produced to prove attestation. Among these are four of the persons whose names appear on the deed of gift, another is the scribe and another the Sub-Registrar. Numerous inconsistencies and contradictions in this evidence have been pointed out. The deed of gift is written on two sheets of paper the first of which bears an impressed stamp. Each sheet was signed by Ganga Ram and marked with his thumb-impression. Three of the attesting witnesses signed on the first sheet and four on the second. On the back of the first sheet is the Sub-Registrar's endorsement and the two of the attesting witnesses (Bahadur Lal and Patan Din) identified the executant Ganga Ram

before the Sub-Registrar and signed his endorsement.

Some of the discrepancies relate to the particular sheet on which each of the attesting witnesses signed but the more important ones relate to the time at which the signatures were made and the persons who were present. Three of the witnesses produced depose that the deed was signed and attested after the arrival of the Sub-Registrar and in his presence. This is denied by the Sub-Registrar. There remain, however, two attesting witnesses who positively depose that they saw Ganga Ram sign the deed and that he did this in the presence of themselves and most of the other attesting witnesses. In view of the long time nearly four years which has elapsed between the transaction itself and the date when these witnesses gave evidence it is not surprising that a certain number of inconsistencies are to be found in their statements. I agree with the Court below that the deed is proved to have been attested as required by law.

There remains the question of the validity of the registration. Section 28 of the Indian Registration Act, 1877, provides that every document which by s. 17 is required to be registered shall be presented for registration in the office of the Sub-Registrar within whose Sub-District the whole or some portion of the property to which the document relates is situated. A deed of gift of immoveable property is such a document. As has already been mentioned the house transferred under it is within the jurisdiction of the Sub-Registrar of Balrampur and it is contended on behalf of the appellants that the mango tree situated within *Qasba* Balrampur has been included in the deed simply to enable registration to be effected at Balrampur, and that actually the tree never belonged to Ganga Ram, the so-called sale to him on the same day being merely a fictitious one. There is a further argument that in any case the mango tree is not immoveable property within the meaning of s.2 (6) of the Registration Act.

For the first of these contentions the learned Pleader for the appellants relies on *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (1) and *Biswa Nath Prasad* v. *Chandra Narayan Chowdhury* (2). In the first of these two cases it was found that in order to enable registration to take place at Calcutta a certain house which had no actual existence had been included in mortgage. Their Lordships of the Privy Council held "That this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a District where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration Law and no registration obtained by means thereof is valid."

In the second case it was found that a part of the property included in the mortgage actually existed but that the sale by which it purported to have passed to the ownership of the mortgagor was a fictitious one, that the mortgagor, therefore, had no interest in it and the parties to the mortgage never intended that it should form part of the security. It was held that the case stood on the same footing for the purpose of the Registration Act as *Harendra's cases* (1).

Now it is clear that in both these cases the principle is the same: that where a transferor does not actually own the property which he purports to transfer a mere insertion in a deed of a description of such property will not legalise the registration of the deed in the registration District in which that property is situated. The important question, therefore, for decision in this case is whether at the time when the deed of gift was registered Ganga Ram had actually acquired a title to the mango tree.

The vendor of the tree, one Abdul Rahman, has appeared as a witness and has testified quite frankly that Ganga Ram asked him to sell the tree simply in order that he might by owning it be able to get a deed registered in Balrampur. It is suggested that this proves that the whole transaction was merely a colourable one intended to evade the Registration Law. I am unable to agree to this point of view. It is not a question of evading the law but only of complying with the requirements of the law. If Ganga Ram desired to obtain registration at Balrampur, and if he could

(1) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.).

(2) 63 Ind. Cas. 770; 48 C. 509; 48 I. A. 127 (P. C.).

only do this by including in his deed of gift immoveable property situated in Balrampur and if, in order to put himself in this position, he acquired such immoveable property, it seems to me that he was merely doing what he had a perfect right to do.

Abdul Rahman's own title to the tree has been questioned. It is true that the number of the plot on which it stands has been proved to have been incorrectly entered in the sale-deed but the other particulars and the boundaries given in that deed have been shown to be correct and I have no doubt that the error arose from haste in the preparation of the deed. There is a good deal of evidence that the tree belonged to Abdul Rahman. The only witness to the contrary is the *Patwari*. The entry in the papers on which the appellants rely showing that the tree is the property of the Balrampur Estate is of very questionable value. The Estate has not been shown to claim it and though, if the *Patwari* is to be believed practically all the other mango trees in Balrampur should be similarly recorded those belonging to Abdul Rahman are the only ones which the *Patwari* has entered as the Estate's property. I hold with the learned Subordinate Judge that the tree belonged to Abdul Rahman and that it was tranferred by him to Ganga Ram.

The last argument put forward on behalf of the appellants is that a mango tree is "standing timber" and as such is expressly excluded from the definition of immoveable property in the Registration Act. A decision of the Bombay High Court in *Krishnarao* v. *Babaji* (3), to the effect that in some parts of the country where mango trees are used for timber they would come within this exception, has been cited. It is, no doubt, true that in these Provinces mango wood is one of the commonest kinds of timber and is generally used in building and for other purposes. It has, however, been held by a Bench of this Court in *Kamman Lal* v. *Ram Gopal* (4) that in order to determine whether mango trees are or are not immoveable property the intention of the purchaser must be taken into consideration. If the intention is sooner or later to sever the trees from the soil and to use their wood for industrial purposes then they must be regarded as coming within the exception to the definition but not otherwise. In the present case there is some evidence that since its purchase Ram Lal to whom it passed under the deed of gift has been collecting the fruit of it and it has certainly not yet been cut down. It must, therefore, be held that it was not purchased as timber but is immoveable property for the purposes of the Registration Act.

The plaintiffs' appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(3) 24 B. 31; 1 Bom. L. R. 489; 12 Ind. Dec. (N. S.) 557.

(4) 35 Ind. Cas. 713; 3 O. L. J. 367.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1638 OF 1922.

April 24, 1925.

Present :—Mr. Justice Devadoss.

SINGAMANI PANDITHAN—PLAINTIFF—APPELLANT

versus

MUNIBADRA NAINAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55—Limitation Act (IX of 1908), Sch. I, Art. 116—Vendor and purchaser—Implied covenant for title—Decree against vendor by third person—Failure of consideration—Limitation, operation of—Appeal by vendor, effect of.

A suit for compensation for breach of express or implied covenant for title and quiet enjoyment in respect of a sale-deed executed after coming into force of the Transfer of Property Act is governed by Art. 116 of Sch. I to the Limitation Act. [p. 515, col. 2.]

The statutory covenants under s. 55 (2), Transfer of Property Act, are attached to the transaction of the sale and not merely to the contract which precedes the sale. Therefore, contracts which are to be contained in a sale-deed or such terms of contract which the law imports into a sale are contracts within the meaning of Art. 116 of Sch. I to the Limitation Act. [p. 515, cols. 1 & 2.]

Arunachala Aiyar v. *Ramasami Aiyar*, 25 Ind. Cas. 618; 38 M. 1171; 1 L. W. 849; 27 M. L. J. 517; 16 M. L. T. 397, relied on.

Where the title of a vendor is found against him in a suit by a third person, the consideration for the sale fails and limitation runs against the purchaser from the date when the decree of the Court is given in favour of such third person. The date when the decree is confirmed in appeal and second appeal is immaterial. [p. 515, col. 1.]

Hukum Chand Boid v. *Pirthichand Lal Choudhury*, 50 Ind. Cas. 444; 46 C. 670; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C.), followed.

Second appeal against a decree of the Court of the Subordinate Judge, Vellore,

in A. S. No. 31 of 1922, (A. S. No. 67 of 1921 on the file of the District Court, North Arcot), preferred against a decree of the Court of the District Munsif, Arni, in O. S. No. 1043 of 1917.

Mr. *N. S. Rangasawmi Iyengar*, for the Appellant.

Mr. *Patanjali Sastry*, for the Respondent.

JUDGMENT.—The plaintiff purchassed some property from defendants Nos. 1 to 3 under Ex. A. After the sale, a suit was brought by one Ammani Ammal for half the share of the property on the ground that she was entitled to it as the heir of her deceased son. That suit was decreed by the first Court on 20th March 1913. There was an appeal against the decree which was decided on 13th April 1914 and the second appeal was decided on 1st March 1917. The plaintiff who was not given possession under the sale sued for possession of the property and he was given a decree for possession of half the property on 22nd December 1913. The present suit was filed on 10th November 1917.

Mr. Patanjali Sastri, for the respondent, contends that the suit is barred by limitation. His contention is that either Art. 62 applies or Art. 97. Under Art. 97 of the Limitation Act a period of 3 years is given for bringing a suit for money paid upon an existing consideration which afterwards fails. The Subordinate Judge has not definitely held that Art. 116 applies. His view is that the matter was not finally disposed of till 1st March 1917 when the second appeal was decided. This view of the law is wrong. The consideration for the sale failed when the decree of the first Court was given in Ammani Ammal's favour *i. e.*, on 20th March 1913 [*Vide Hukum Chand Boid* v. *Pirthichand Lal Choudhury* (1)].

The next question is whether Art. 116 applies. In this case the document is a registered document and the plaintiff got only half the property and he did not get a title to the other moiety. Mr. Patanjali Sastri's contention is that there was no covenant in writing for good title. He urges that the statutory covenants embodied in s. 55 (2) of the Transfer of Property Act should not be imported into the sale deed as s. 55 speaks only of a contract. I am unable to accept this contention. The statutory covenants are attached to the transaction of the sale and not merely to the contract which precedes the sale. To hold that the statutory covenants under s. 55 apply only to contracts and not to sales would be defeating the object of s. 55. If the statutory covenants do not apply to the actual sale itself, the vendor who executes a sale-deed is relieved of the liability which is cast upon him by the Statute under s. 55. No doubt under the English conveyancing practice all the covenants of title and covenants for quiet enjoyment are set out in the deed itself, but under the Transfer of Property Act the technicalities of the English conveyancing have been done away with and in the case of a sale of property all the covenants which are usually found in an English conveyance deed are to be read into the sale-deed by reason of the provision of the Transfer of Property Act. The contention of Mr. Patanjali Sastri is that Art. 116 speaks only of breach of contract in writing and does not apply to a sale-deed. The sale itself may not be properly called a contract in writing but contracts which are to be contained in a sale-deed or such terms of contract which the law imports into a sale are contracts within the meaning of Art. 116 and a sale-deed comes within Art. 116 of the Limitation Act. It is unnecessary to discuss the matter further as a Bench of this Court, after a careful consideration of the cases, has come to the conclusion that a suit for compensation for breach of express or implied covenant for title and quiet enjoyment in respect of a sale-deed executed after coming into force of the Transfer of Property Act is governed by Art. 116 of the Limitation Act [*Arunachala Aiyar* v. *Ramasami Aiyar* (2)]. With the reasoning of the learned Judges I entirely agree and I hold, therefore, that Art. 116 applies to this case.

It is next contended by Mr. Patanjali Sastri that the document itself has by express terms made the statutory covenants as to title of quiet enjoyment inapplicable. I do not think the document is capable of that interpretation, *Edhil yengalal kalan illai* are only capable of meaning that the transferors had not treated any encumbrance on the property and this does not mean that the vendors had no title to convey. There is nothing, therefore, in this contention.

The Subordinate Judge accepted the contention of the appellant and has in the

(1) 50 Ind. Cas. 444; 46 C. 670; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C.).

(2) 25 Ind. Cas. 618; 38 M. 1171; 1 L. W. 849; 27 M. L. J. 517; 16 M. L. T. 397.

concluding portion of the judgment directed the plaintiff to surrender the moiety of the property in his possession before he could get the amount of consideration for the other moiety which he had lost. I do not see why the plaintiff should surrender the half to which he has got a good title when he sues for damages for breach of the covenants of title in respect of the other half. The lower Court's decree should, therefore, be modified by deleting the portion of the decree as regards the surrender. The words to be omitted are "on plaintiff surrendering possession of the lands which he obtained in pursuance of the decree in O. S. No. 300 of 1912 on the file of the District Munsif's Court, Arni, on or before the 7th day of June 1922".

As regards the amount payable to the plaintiff by the defendants both the Vakils have consented to put in a statement. It is agreed by both parties that the amount payable to plaintiff is Rs. 702-4-7. The plaintiff will have interest at 6 per cent. from date of plaint. Paragraph 2 of the lower Court's decree to be deleted. Parties will pay and receive proportionate costs throughout.

V. N. V.
Z. K. *Decree modified.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 121 OF 1922.
March 23, 1925.

Present:—Mr. Justice Kumaraswami Sastri and Mr. Justice Krishnan.

ANGAMUTHU MUDALIAR—PLAINTIFF—APPELLANT
versus
RATNA MUDALIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Partition Act (IV of 1893), ss. 2, 3, scope of—Order for sale under s. 2—Subsequent application by party for purchase under s. 3, whether maintainable.

The procedure laid down in s. 3 of the Partition Act cannot be applied after the Court has directed a sale of the property under s. 2 of the Act. The proper time for a party to apply under s. 3 to buy the property at a valuation fixed by the Court, is before the Court makes an order under s. 2 for sale, and after a request had been made by one of the parties that the property should be sold. Once a final order is made as between the parties that the property should be sold under s. 2, no order can be made under s. 3. [p. 516, col. 2; p. 517, col. 1.]

The share-holder who offers to buy the property and at whose instance a valuation is made by the Court is the person who is entitled to buy the property. The words "such share-holder" which occur in the latter part of cl. (1) of s. 3 necessarily mean the share-holder who applied for leave to buy. [p. 517, col. 1.]

Appeal from an order of Mr. Justice Coutts Trotter, dated 2nd October 1922, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 750 of 1919.

Mr. *K. Jagannada Iyer*, for the Appellant.

Mr. *V. S. Gorindachariar*, for the Respondent.

JUDGMENT.—This is an appeal against an order passed under the Partition Act IV of 1893. The plaintiff, who is the appellant before us, as one of the co-parceners of a family consisting of 3 co-parceners, brought a partition suit for his share. When the decree was passed in the suit, we find an order passed by the learned Trial Judge by consent of parties that the property in suit, a house, should be sold under the Partition Act unless the Official Referee found it convenient to divide it by metes and bounds. This was a consent order. The Official Referee afterwards found that it was not convenient to divide the house into two halves and give one-half share to the plaintiff and the other half to the defendants. It was, therefore, decided to sell the property under the Partition Act, but in the order made for this purpose, the learned Judge, Coutts-Trotter, J., did not make it clear under what section of the Partition Act the sale was to take place. An application was subsequently made by the plaintiff under s. 3 of the Partition Act claiming to buy the property at a valuation fixed by the Court. This was disallowed by Coutts-Trotter, J., but on appeal to the Appellate Court, the late learned Chief Justice Sir Walter Schwabe and Wallace, J., reversed that order and sent the case back to be disposed of according to law. In remanding the case they did not order that action should be taken under s. 3 of the Partition Act but simply directed that the case must be disposed of according to law.

It is clear to our minds that s. 3 of the Partition Act cannot be applied after the Court had already directed a sale and in this case the sale was with the consent of all parties. The sale which was directed was a sale under s. 2 of the Partition Act. Section 3 begins by saying "If, in any case in which the Court is requested under the last foregoing section to direct a sale

any other share-holder applies for leave to buy at a valuation the share or the shares of the party or parties asking for a sale, the Court shall order for a valuation." It seems to us, therefore, that the proper time to apply under s. 3 is before a Court makes an order under s. 2, and after the request had been made by one of the parties that the property should be sold. Unless we construe the two sections in this manner there will be much difficulty in applying them. Once a final order is made as between the parties that the property should be sold under s. 2, and that means a sale open to the public when anybody might bid for the property unless it is expressly restricted to be between the parties only, no order can be made under s. 3, as it is too late then to apply under that section. Section 3 contemplates that, when the application is made by one of the parties to direct a sale of the property and before the Court makes the order, any other party who is entitled to a share in the property may at once apply for leave to buy at a valuation, and when such an application is made, the Court is bound under the section to direct a valuation of the shares of the party asking for sale to find out what its proper value is, and the party who has offered to buy is entitled to buy that share at that valuation. If he fails to do so, his application would be dismissed and he will be made responsible for costs under cl. (3) of s. 3. Clause (2) provides for more than one party applying at the same time for leave to buy as provided in sub-s. (1) of cl. (3). There is no difficulty in construing the section in this manner. We are not able to agree with the construction put on s. (3) by Coutts Trotter, J., where he says that when an application is made for buying by one of the share-holders, any share-holder can ask that the property should be sold to him at the valuation arrived at; if that view is taken, there will be no end of trouble between competing share-holders. It is clear that the share-holder who offers to buy and at whose instance the valuation is made by the Court is the person who is entitled to buy. The words "such share-holder" occurring in the latter part of cl. (1) of the section must necessarily mean the share-holder who applied for leave to buy. In this case s. 3 does not apply. The parties have already agreed that the properties should be sold under s. 2 and that consent has not been set aside by any order and is still in force.

One further difficulty in applying s. 3 in this case is that it is not shown that the defendant applied for the sale for it is only then that his share can be valued and dealt with under s. 3. The fact seems to be that both parties were present at the time when the decree was passed and agreed to the sale being ordered and neither party actually made the application for sale. In these circumstances we direct that the property be sold by public auction under s. 2 of the Partition Act. Both parties will be at liberty to bid and set off their respective shares if they become purchasers. The public will also have a right to bid at the auction.

It was argued that the plaintiff should be compelled to adhere to the bid that he made once before to the Official Referee of Rs. 10,000 for this property; but we think that that cannot be insisted upon, because the bid was made when it was not clear as to what the rights of the parties were.

The decree will be modified as above stated and the case will go back to the Official Referee for disposal in the light of the above observations. The appellant will pay to the respondent half of the taxed costs.

V. N. V. *Decree modified.*
Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 1051 OF 1923.
June 8, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

PURNA CHANDRA MUKERJI AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
GOPENDRA KRISHNA KUNDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), ss. 15, 27—Agreement for sale of immoveable property—Agreement by adult on behalf of himself and of minor co-owner—Specific performance with regard to share of adult, whether can be enforced—Subsequent transferee from vendor—Notice, proof of.

Where a person agrees to sell his share in certain immoveable property along with the share of a minor co-owner on whose behalf he purports to act as a guardian, there is nothing to prevent the vendee from enforcing specific performance of the contract of sale so far as the interest of the vendor himself, which he was competent to transfer, is concerned. The provisions of s. 15 of the Specific Relief Act are applicable to such a case. [p. 518, col. 2.]

A suit for specific performance of a contract for the sale of immoveable property is liable to be dismissed as against a subsequent transferee from the vendor in the absence of proof that such subsequent transferee had purchased the property with notice of the contract in favour of the plaintiff. [p. 518, col. 2.]

Appeal against a decree of the Subordinate Judge, Nadia, dated the 20th December 1922, reversing that of the Munsif, First Court at Krishnagar, dated the 20th of February 1922.

Mr. *D. N. Bagchi* (with him Babus *Jotis Chandra Guha* and *Mohini Mohan Bhattacharji*), for the Appellants.

Babu *Jahnavi Charan Das Gupta*, for the Respondents.

JUDGMENT.

Ghose, J.—This is an appeal which arises out of a suit for specific performance of a contract for sale of 8-annas share of certain properties entered into by the defendant No. 1 in favour of the plaintiffs. In the agreement for sale the defendant No. 1 purported to have agreed to execute a *kabala* for 8-annas of the property, one-half of which, that is to say, 4-annas share, belonged to the defendant No. 1 and the other half belonged to his infant nephew defendant No. 2. The plaintiffs brought the suit against the defendant No. 1 as well as his nephew. Prior to the suit, the disputed property had been purchased by the Kundus who were added as defendants under an order of the Court but the plaint was not amended and it was not stated on what ground they were sued, or the grounds on which relief was claimed against them.

The Court of first instance dismissed the suit with regard to the share of defendant No. 2 but decreed it with regard to the 4-annas share of defendant No. 1 on payment of the full price agreed to have been paid for the shares of both the defendants. This was evidently done in accordance with s. 15 of the Specific Relief Act. Both the plaintiffs and the defendants appealed from that decree. The plaintiffs claimed specific performance with regard to the share of defendant No. 2 also and the defendants urged that the whole suit ought to have been dismissed. The learned Subordinate Judge dismissed the appeal of the plaintiffs and decreed that of the defendants. His ground was that the express stipulation in the contract was for selling the 8-annas share of both the defendants by a joint deed of sale and as that could not be carried into effect on account of the minority of the defendant No. 2, the whole contract should fail. The contract according to the learned Subordinate Judge was an entire indivisible contract and not capable of performance in part. It seems to me, however, that the defendant No. 1 was perfectly entitled to enter into an agreement with respect to his own share of the property, without reference to the interest of his infant nephew; and that being so, there is nothing in law to prevent the plaintiffs from enforcing the contract as against the defendant No. 1 with regard to his share of the property. The provisions of s. 15 of the Specific Relief Act would, therefore, apply to the present contract. With regard to this point the decision of the learned Munsif is correct as he decreed specific performance on the plaintiff paying the entire purchase-money which he contracted to pay for the shares of both the defendants Nos. 1 and 2. The difficulty, however, arises with reference to the Kundus, the subsequent purchasers. The plaint did not allege that they were purchasers with notice of the agreement entered into by the defendant No. 1 with the plaintiffs. In the absence of such an allegation or proof of the fact that the Kundus had purchased with notice, the suit for specific performance was liable to be dismissed whatever other remedy the plaintiffs might have as against the defendant No. 1. The Trial Court, however, raised an issue on the question of the *bona fides* of the purchase of the Kundu defendants and whether they had purchased with notice. That such an issue was allowed to be raised supplies the deficiency in the plaint. The Trial Court found that the Kundu defendants had purchased with notice. There is no finding, however, of the Subordinate Judge on that point. He simply decided the point on the ground that the plaint was not amended showing the accrual of a cause of action as against the Kundus when they were added as defendants and he considered it unnecessary to discuss the points raised concerning them. As we have held that the decision of the Subordinate Judge with regard to the question of the divisibility of contract is erroneous it must be decided whether the plaintiffs are entitled to a decree as against the Kundu defendants and it is, therefore, necessary to decide the questions which affect them.

The judgment and decree of the Subordinate Judge are, therefore, set aside

except with regard to the dismissal of the suit against defendant No. 2, and the case is sent back to his Court for a hearing of the appeal and deciding the 12th issue raised in the Court of the Munsif. If he finds that the Kundu defendants were *bona fide* purchasers without notice the suit for specific performance must fail. In that case the Court will consider whether the plaintiffs are entitled to damages as against defendant No. 1. If he finds that the Kundus had purchased with notice of the agreement entered into with the plaintiffs, a decree for specific performance as passed by the Munsif on the terms set forth above must be made as against all the defendants except defendant No. 2. The decree in favour of defendant No. 2 will stand.

The costs of the hearing of this appeal and the costs of the Courts below will abide the result.

Greaves, J.—I agree.

Z. K. *Appeal allowed in part.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 805 OF 1922.

October 14, 1924.

Present:—Mr. Justice Devadoss.

VONNAKOTA VIRAJU—PLAINTIFF—APPELLANT

versus

VATSVAYA BANGARAJU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XXXIII, r. 10, O. XLI, r. 33—Pauper suit—Compromise—Withdrawal of suit—Property obtained by pauper under compromise in name of third person—Court, power of, to direct benamidar *to pay Court-fees—Inherent power of Court—Fraud—Party guilty of fraud, whether can recover property conveyed to third person.*

Where a person obtains a conveyance of certain property in the name of another with the object of cheating two people and successfully cheats one of them, this is a sufficient ground for the Court refusing to help him in recovering the property from the person in whose name the conveyance was obtained. [p. 520, col. 1.]

Where a plaintiff in a pauper suit compromises the dispute with the defendant and evades the payment of Court-fees by obtaining a conveyance of the property given to him under the compromise in the name of a third person, the Court has no power in a subsequent suit by a transferee of the pauper plaintiff to recover the property from the *benamidar* to direct the latter to pay Court-fees which should have been paid by the pauper plaintiff in the previous suit. [p. 520, col. 2.]

Section 151 of the C. P. C. does not authorize a Court which tries a subsequent suit to pass an order with reference to a previous suit. [*ibid*]

Where a subordinate Court passes an improper order and the matter is taken up on appeal to a Court which is empowered to hear appeals from the orders of such subordinate Court, the Appellate Court has jurisdiction to set matters right by passing the appropriate order. [p. 520, cols. 1 & 2.]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Rajahmundry, in A. S. No. 76 of 1921, (A. S. No. 100 of 1921, on the file of the District Court, Godavari), preferred against a decree of the Court of the District Munsif, Razole, at Amalapur, in O. S. No. 763 of 1919.

Mr. *T. V. Subba Rao*, for the Appellant.

Mr. *K. Venkatarama Raju*, for the Respondents.

JUDGMENT.—The first point argued in this second appeal is that no fraud was perpetrated by the plaintiff putting the property in the name of the first defendant and that, therefore, he is entitled to get back the property which was conveyed *benami* for him to the first defendant. Both the Courts have found that the plaintiff was able to defraud both the Government of the legitimate Court-fee payable on the plaint in O. S. No. 36 of 1906 and the widow of Veerraju with whom he had contracted to give half the property in case he succeeded in O. S. No. 36 of 1906. The second defendant after filing O. S. No. 36 1906 compromised with the defendants his claim against them and got a sale of some items of property in the name of the first defendant for his benefit and then withdrew the suit, in consequence of which the Government was not able to get the Court-fee payable by the second defendant on his pauper plaint. Both the Courts held that by reason of the property being put in the name of the first defendant, the suit by the widow of Veerraju (O. S. No. 529 of 1909) on the agreement entered into by the second defendant with her husband was not decreed in the terms of her plaint; but she was only given damages. On looking into the judgments of that suit, Exs. III and IV, it appears that the widow of Veerraju was not given a share in the plaint property not on the ground that it was put *benami* in the name of the first defendant but on the ground that the agreement with him by the second defendant was an unconscionable agreement and that, therefore, damages were an adequate remedy. No doubt in the judgment of the Appellate Court Ex. IV, there are observations to the effect that the first defendant had a good title to the property

and the plaintiff in that suit could not ask for a share in the property. Mr. Suba Rao's contention is that the widow of Veeraraju was not defrauded by the property being put in the name of the first defendant and, therefore, no fraud was effectuated. No doubt there is something in this contention. The other fact, namely, that the Government was not able to get the Court fee payable by the second defendant in respect of the property which he got by virtue of the litigation in O. S. No. 36 of 1906 is a circumstance which has to be considered in this case. If the property had not been put in the name of the first defendant, naturally the Court would have given a decree for payment of the Court-fee against the second defendant. This was obviated by the second defendant putting the property which he got by filing O. S. No. 36 of 1906 in the name of the first defendant. I think the object of the second defendant was palpably to cheat both the Government of its Court-fee and Veeraraju of the share to which he was entitled in case of success in that suit. When the second defendant's object was to cheat two people and he has successfully cheated one, that is a quite sufficient ground for the Court to refuse to help the second defendant to get the property from the first defendant.

Mr. Subba Rao contends that the plaintiff is a vendee from the second defendant and that the original agreement with Veeraraju was for his benefit and that he should be given a decree for the plaint property. In this case the plaintiff cannot by said to be a *bona fide* purchaser for value because he must have known that the title of the property stood in the name of the first defendant. There is absolutely no ground for saying that he was not aware of the circumstances under which the property was put in the name of the first defendant. Therefore, he is not a *bona fide* purchaser for value and he cannot claim the help of the Court in getting the property from the first defendant.

It was also urged for the appellant that the Court should take into consideration the subsequent conduct of the parties and give relief to the plaintiff. Exhibits M and N only show that the first defendant dealt with the property as the property of the second defendant. The documents only show that the real owner was the second defendant. These documents do not help the plaintiff to contend that the second defendant was either in possession of the property or dealt with the property as his. If the second defendant was in possession of the property, it is not necessary for him to come to Court and seek its aid to recover possession of the property from the first defendant. The plaintiff has to show that he was not aware of the circumstances under which the property was put in the name of the first defendant before he could ask for relief. He must come into Court with clean hands. I do not think the plaintiff was not aware of the circumstances of the case. That being so, he cannot ask for any relief. Both Courts have found against the plaintiff's contention. I agree with them in holding that the plaintiff is not entitled to any relief.

The second appeal fails and is dismissed with costs.

The memorandum of objections.

The District Munsif has directed the first defendant to pay the Court-fee payable on the plaint in O. S. No. 36 of 1906 and relies upon s. 151 of the C. P. C., as enabling him to pass such an order. It is difficult to see how s. 151 can give power to a Court to pass an order in respect of a suit which is not pending before it. That suit O. S. No. 36 of 1906 was disposed of long before this suit was filed. Whatever may be said of the conduct of the first defendant the Court has no jurisdiction to pass an order of this kind, in a suit brought by the plaintiff for recovery of the property from the first defendant on the ground that the first defendant is a *benamidar*. The person primarily responsible for all the fraud is the second defendant and the Court cannot now saddle the first defendant with the Court-fee payable by the second defendant in an action to which the first defendant was a party to the previous suit. I do not see how a Court which tries a subsequent suit can pass an order with reference to a previous suit. It may be that the motive of the District Munsif was a laudable one, but I cannot but hold that the order was passed entirely without jurisdiction. I think the Subordinate Judge would have done well to have set aside that order instead of suggesting that the first defendant should prefer a civil revision petition to the High Court. When the Subordinate Court passes an improper order and the matter is taken up on appeal to a Court which is empowered to hear appeals from the orders of such Subordinate Court the Appellate Court has

jurisdiction to set matters right. I direct that this order of the District Munsif be vacated.

I allowed the memorandum of objections so far as this point is concerned and dismiss the rest without costs.

V. N. V. *Order set aside.*
Z. K.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 357 OF 1923.
February 10, 1925.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

Sheik MUHAMMAD MARACAYAR—PETITIONER—DEFENDANT No. 1—APPELLANT

versus

MUHAMMAD AMMAL, MINOR, BY GUARDIAN MUHAMMAD MOIDEEN MARACAYAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Partition suit—Minor plaintiff—Compromise between some of the parties to suit, whether for benefit of minor—Sanction of Court—Party other than next friend or guardian, whether can apply for sanction.

In a suit for partition brought by a minor plaintiff, all the parties, except one of the defendants, entered into a compromise. The next friend of the minor was also a party to the compromise but he subsequently changed his mind and refused to apply for the sanction of the Court, under r. 7 of O. XXXII of the C. P. C. One of the defendants thereupon applied to the Court for its sanction:

Held, that one of the defendants having withheld his consent to the compromise it would be open to that defendant to agitate the matter and claim a partition of the properties in dispute afresh and on a different basis and that as this would not be in the interests of the minor, the compromise was not for the benefit of the minor and should not be sanctioned.

Quære.—Whether a Court can sanction a compromise on behalf of a minor on the application of a party other than the next friend or guardian of the minor?

Appeal against an order of the Court of the Subordinate Judge, Negapatam, dated 4th September 1923, in I. A. No. 543 of 1923 in O. S. No. 13 of 1921.

Messrs. *A. Krishnaswami Iyer* and *E. Vinayaka Rao*, for the Appellant.

Messrs. *S Varadachariar* and *K. S. Champakesa Iyengar*, for the Respondents.

JUDGMENT.—A partition suit was pending before the lower Court. All the parties to it excepting the 3rd defendant entered into a compromise. The plaintiff was a minor and he was represented by a next friend. The next friend was also a party to the compromise. He apparently changed his mind and failed to apply to the Court under O. XXXII, r. 7 of the C. P. C., for its sanction of the compromise entered into on behalf of the minor plaintiff. One of the defendants thereupon made the application. It is also necessary to mention that the plaintiff's Vakil did not file in Court a certificate stating that in his opinion the compromise was beneficial to the minor. The next friend himself opposed the application made by the 1st defendant and stated to the Court that it is not in the interests of the minor that the compromise should be sanctioned. The question that arises is: in these circumstances can the Court on the application of the 1st defendant sanction the compromise? There is very little authority on this point. *Wilson* v. *Birchall* (1) cited before us does not deal with the question. The agreement in that case was not entered into by the guardian of the minor and the observations of Jessel, M. R., are, therefore, inapplicable. There is a decision of a Bench of this Court *Ranga Rao* v. *Rajagopala Raju* (2) to the effect that the Court cannot sanction an agreement except on the application of the next friend of the guardian *ad litem* of the minor. In the view we have taken of this case we refrain from expressing any opinion as to the correctness of the decision. We propose to deal with this appeal on the facts that are mentioned in the judgment of the lower Court. The learned Subordinate Judge says that in his opinion the compromise is not beneficial to the minor. He does not, of course, give any reasons in that part of his judgment, but later on shows that the suit before him was a partition suit, that at least one party withheld his consent to the compromise and that it is open to that other party to agitate the matter and claim a partition afresh and on a different basis. This obviously is not in the interests of the minor. For this reason we refuse to interfere with the judgment of the lower Court.

On the whole we are satisfied that the decision is correct. The appeal fails and is dismissed.

Having regard to the conduct of the plaintiff's next friend we are not prepared to grant him any costs of this appeal.

V. N. V.
Z. K. *Appeal dismissed.*

(1) (1881) 16 Ch. D. 41; 44 L. T. 113; 29 W. R. 27.
(2) 22 M. 378; 8 Ind. Dec. (N. S.) 272.

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 11 AND 47 OF 1924.

January 20, 1925.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

A. R. S. M. A. R. L. ARUNACHALAM CHETTIAR BY POWER-OF-ATTORNEY AGENT G. S. RAGHAVACHARIAR—RESPONDENT No. 3—APPELLANT

versus

THE OFFICIAL RECEIVER OF TANJORE AND OTHERS—PETITIONERS NOS. 1 AND 2—RESPONDENTS.

Provincial Insolvency Act V of 1920, s. 54—Fraudulent preference, what amounts to—Intention to prefer—Threat of legal proceedings, whether amounts to pressure.

The word "preference" as used in s. 54 of the Provincial Insolvency Act means the favouring of one creditor to the detriment of others. The question whether there has been a fraudulent preference depends not upon the mere fact that there has been a preference but also on the state of mind of the person who made it, that is to say, whether the debtor was actuated by any feeling of bounty towards the creditor or whether he was doing what he did for his own benefit. In other words, the test is did the debtor execute the deed with a view to protect himself or with a view to benefit the creditor. [p. 523, col. 1.]

What is fraudulent within the policy of the Provincial Insolvency Act is a voluntary act of preferring one creditor to another. Preference imports the act of a person who is free to do either the one thing or the other as he prefers. But if an advantage is given to one creditor under pressure, the act is not done voluntarily and there is no preference. Preference, however, is not voluntary not merely when there is pressure from fear of legal process but that pressure is not the less, because it is pressure upon the debtor's own mind and his own consciousness—from an apprehension of what will happen if bankruptcy takes place; not a pressure by threats of creditors to assert their rights. [p. 523, cols. 1 & 2; p. 524, col. 1.]

Although a threat of legal proceedings against a debtor may be pressure, there are cases where such threats are of no importance and no terror and they may not constitute real pressure so as to validate a transfer by a debtor in insolvent circumstances. [p. 524, col. 1.]

In re Ramsay, (1913) 2 K. B. 80 at p. 85; 82 L. J. K. B. 526; 108 L. T. 495; 20 Manson 15; 29 T. L. R. 225, *New Prance and Garrad's Trustee* v. *Hunting*, (1897) 2 Q. B. 19 at p. 27; 66 L. J. Q. B. 554; 45 W. R. 577; 76 L. T. 742; 13 T. L. R. 269; 4 Manson 103, *Hastings Brothers* v. *Stenotyper, Limited*, (1901) 1 Ch. 250 at p. 255; 70 L. J. Ch. 94; 84 L. T. 149; 17 T. L. R. 151; 8 Manson 203, *Sharp* v. *Jackson*, (1899) A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 15 T. L. R. 418; 6 Manson 264, *Butcher* v. *Stead*, (1875) 7 H. L. 839 at p. 846; 44 L. J. Bk. 129; 33 L. T. 541; 24 W. R. 463 and *Doonadula Sriramulu* v. *Ponakavira Reddi*, 72 Ind. Cas. 805; 18 L. W. 426 at p. 435; (1923) M. W. N 306; 45 M. L. J. 105; (1923) A. I. R. (M.) 641, relied on.

Appeal against the orders of the District Court, West Tanjore, dated the 27th September 1923, in I. A. Nos. 502 and 501 of 1922, in I. P. No. 46 of 1921.

Messrs. *S. Srinivasa Iyenyar*, *K. V. Krishnaswami Iyer* and *K. Narasimha Iyengar*, for the Appellants.

Mr. *K. Bhashyam Iyengar*, for the Respondents.

JUDGMENT.

IN C. M. A. No. 11 OF 1924.

Venkatasubba Rao, J.—Is the transaction impeached by the Official Receiver fraudulent under s. 54 of the Provincial Insolvency Act? The learned District Judge has come to the conclusion that it is and, in my opinion, he is right. On the evidence, the debtors were heavily involved in October 1921. They were threatened with suits and applications for attachment and arrest before judgment. There seemed to be very little hope of averting bankruptcy. In these circumstances, they executed a mortgage in favour of the appellant a Nattukottai Chetty. The debt due to him was about Rs. 10,900 and odd and this mortgage was executed to secure Rs. 10,000 out of that sum. There is little reason to doubt that Raghavachari who was then acting for the Chetty was aware of the condition of the debtors' affairs and of the fact that numerous other creditors were pressing them for re-payment of amounts due. The other facts material for this appeal are the following:—The debtors were said to be possessed of property worth about a lakh and five thousand. Their debts were admitted to amount to about the same figure. The immoveable property over which the appellant was given security was worth Rs. 30,000. The debtors did not own any other immoveable property. They executed over the identical property at the same time two mortgages, one in favour of the appellant and the other in favour of third parties who have also filed an appeal before us and with whose appeal I shall presently deal. So far as the transaction impeached in that other appeal is concerned, I cannot but come to the conclusion that the security was created with the express object of preferring those creditors, namely, the appellants in the other appeal. A man by name Venkatarammayyar plays a very prominent part in bringing about the two transactions. Indeed the facts relating to the two mortgages are so inextricably mixed with each other that it is impossible for the purpose of deciding the question at issue, to deal

with each as absolutely disconnected with the other. A *ratham* (car) which the debtors allege (in an affidavit to which our attention has been directed) was theirs, they appear to have also disposed of, about the 25th of October. They closed their place of business on the 26th and they were declared insolvents on the 1st November. It must be pointed out that the appellants are not related to the insolvents nor has it been shown by direct evidence that the debtors were interested in this particular creditor the appellant.

On these facts, what is to be our finding under s. 54 of the Insolvency Act?

The word "preference" as used in this section does not connote priority, in respect of payment of a debt—that no doubt is one meaning of the word "preference" but it means in the context, the favouring of one creditor to the detriment of others. In the sense of one creditor being given priority, the result of the transaction always is a preference of that creditor. Preference in that sense is the occasion for the moving of the Court under s. 54. As Cozens-Hardy, J., puts in *Hastings Brothers* v. *Stenotyper Limited* (1): "The Court is bound to look at the motive and not at the result." Lord Esher, M. R., in *New Prance and Garrad's Trustee* v. *Hunting* (2) expresses the same idea thus:—"The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it." The learned Master of the Rolls applies the test :— Was the debtor actuated by any feeling of bounty towards the creditor or was he doing what he did for his own benefit? In the words of Lord Macnaughten in *Sharp* v. *Jackson* (3): Was the debtor under an overwhelming sense of imminent peril? Did he have before his mind a sense of his dangerous position? In other words, the test is did the debtor execute the deed with a view to protect himself or with a view to benefit the creditors?

English Judges dealing with this subject express the same idea also in a slightly different way. What is fraudulent within the policy of the Bankruptcy Law is a voluntary act of preferring one creditor to another. Preference imports the act of a person who is free to do either the one thing or the other as he prefers. But if an advantage is given to one creditor under pressure the act is not done voluntarily and there is no preference. Lord Halsbury cites with approval in *Sharp* v. *Jackson* (3) the following observations of Lord Cairns in *Butcher* v. *Stead* (4):

"The Act, however, did not profess to express the existing law without making considerable changes in it. In the case of fraudulent preference, for example, in place of raising an inquiry whether it was done in contemplation of bankruptcy, the Act provided certain definite tests, namely, that the bankrupt should have been at the time unable to pay his debts, as they became due, from his own moneys, and, that he should become bankrupt within three months from the date of payment. The Act appears to have left the question of pressure as it stood under the old Law; and, indeed, the use of the word 'preference' implying an act of free will, would, of itself, make it necessary to consider whether pressure had or had not been used."

To the same effect are observations in my judgment in *Doonadula Sriramulu* v. *Ponakavira Reddi* (5). After pointing out the distinction between the scope of s. 53 of the Transfer of Property Act on the one hand and ss. 36 and 37 of the old Provincial Insolvency Act on the other I observed thus:—

"Wherever a voluntary transfer or a preference of a creditor on the one hand and adjudication of the transferor or the debtor on the other hand are brought into contiguity, the law peremptorily requires a certain inference to be made, enquiry is altogether excluded and the inference will not be allowed to be displaced by any contrary proof, however strong."

In this passage and in the two sentences that followed it, it is in this sense that I used the words "prefer" and "preference." These words used in such contest have acquired a well defined meaning. The judgment of Lord Halsbury in *Sharp* v. *Jackson* (3) shows that by authority dating back

(1) (1901) 1 Ch. 250 at p. 255; 70 L. J. Ch. 94; 84 L. T. 149; 17 T. L. R. 151; 8 Manson 203.

(2) (1897) 2 Q. B 19 at p. 27; 66 L. J. Q. B. 554; 45 W. R. 577; 76 L. T. 742; 13 T. L. R. 269; 4 Manson 103.

(3) (1899) A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 15 T. L. R. 418; 6 Manson 264.

(4) (1875) 7 H. L. 839 at p. 846; 44 L. J. Bk. 129; 33 L. T. 541; 24 W. R. 463.

(5) 72 Ind. Cas. 805; 18 L. W. 426 at p. 435; (1923) M. W. N. 306; 45 M. L. J. 105; (1923) A. I. R. (M.) 641.

more than a century this matter is now well settled.

The learned Lord also observes in the course of his judgment that "preference is not voluntary not merely when there is pressure from fear of legal process but that pressure is not the less, because it is pressure upon the debtor's own mind and his own consciousness—from an apprehension of what will happen if bankruptcy takes place; not a pressure by threats of creditors to assert their rights."

The question of dominant motive does not arise in this case, because the object of the insolvents was either to benefit the creditor or to save themselves. There is no intermediate position. If, for instance, a relation of the debtors is preferred and the question arises, was he preferred because he was a relation or in order to make that creditor disinclined to proceed to extremes against them, in such a case, the question of overriding or dominant motive may arise. The motives then may be various and the Court may then be called on to determine which was the substantial motive. In this case, no such question arises.

It is strongly urged for the appellant that the evidence discloses that he brought pressure to bear on the debtors and it was that pressure that was responsible for the giving of security. But what was the pressure worth? The debtors were on the verge of bankruptcy. If one creditor was paid off, there was another creditor ready to file a suit and get arrests or attachments. The insolvency was in the case of these debtors a certain impending fact. Can it be said that in these circumstances the motive that operated on the mind of the debtors was the safe guarding of their own interests and the averting of unpleasant consequences? I cannot do better than adopt the language of Phillimore, J., in *In re Ramsay* (6). "And although in some cases a writ may be pressure, there are cases where writs are of absolutely no importance to the debtor, no terror; and in such cases I do not think that the threat of a writ, or the issuing of a writ, ought to be called pressure." There is a striking similarity in this respect between the facts of the present case and the facts with which Phillimore, J., had to deal and the test laid down by him seems to be particularly appropriate to the facts before us. I am quite alive to the fact that the onus is upon the Official Receiver. See Williams on Bankruptcy, 12th Edition, page 296, where the learned Author observes thus :— "The balance of authority would seem, therefore, to be in favour of holding that the trustee must give some evidence of a view to prefer on the part of the debtor other than the mere fact that he was insolvent."

It is also true that the Official Receiver has not conducted his case with that care or diligence that is required of him. No reason has been shown why the insolvents have not been examined or why their account books have not been filed. Still, on a consideration of the circumstances, I am inclined to the view that the mortgage amounts to a fraudulent preference. One of the strongest reasons which has weighed with me in coming to this conclusion is that the other mortgage-deed which is the subject of the next appeal is undoubtedly a fraudulent transaction and, as I have observed, it is impossible in deciding the question of motive to treat the two transactions as absolutely distinct and separate from each other. As Phillimore, J., observes in the case I have referred to above "when one has to look into the mind of the bankrupt, any act of his at the time or about the time, any matters in *pari materia*, may be looked into to see what was passing in his mind." We confirm the order of the lower Court and the appeal is accordingly dismissed with costs.

IN C. M. A. No. 47 OF 1924.

It is unnecessary to repeat the facts which led to the filing of this petition by the Official Receiver, as I have just set them forth in the judgment delivered in the connected appeal. The facts that distinguish this from the other appeal are :—

(1) There is no evidence that the bulk of the consideration for the mortgage-deed in favour of the appellant represents any real debt due by the insolvents : Neither Venkataramier nor the brother of the appellant has been examined and there is no evidence that any amount was due to either of them.

(2) It is not alleged that there was any written demand by the appellant for the re-payment of his debt. If the amount that was due to the appellant was Rs. 1,200 and odd and to his daughter Rs. 500 and odd, why was the mortgage deed taken for Rs. 10,000. Why did the appellant undertake to pay a large sum of

(6) (1913) 2 K. B. 80 at p. 85; 82 L. J. K. B. 526; 108 L. T. 495; 20 Manson 15; 29 T. L. R. 225.

money to Venkataramier and why was a provision made for the payment of Rs. 900 and odd to the Chetty whose appeal we have just disposed of? The more natural thing would have been to execute a mortgage-deed in favour of the Chetty for Rs. 10,900. There is no satisfactory explanation for splitting this amount into two sums and execute two separate documents in respect of this debt. It is unnecessary to pursue this matter further, because there can be no doubt that the circumstances of the case lead only to one inference, namely, that the debtors executed the mortgage in question with the express object of giving an advantage to the appellant. The appeal, therefore, fails and is dismissed with costs.

IN C. M. A NOS. 11 AND 47 OF 1924.

Madhavan Nair, J.—I agree, but I would add a few words. The main argument that has been put before us in connection with these two appeals on behalf of the appellants is that the two documents, Exs. A and B, have been executed on account of the "real" pressure that was brought to bear upon the insolvents by the respective appellants and, therefore, it cannot be said that these documents were executed with a view of preferring them to the other creditors under s. 54 of the Provincial Insolvency Act. The facts of the case do not support this view. The two documents were executed on the 25th October 1921. The business was practically closed on the 26th and the brothers were adjudicated insolvents on the 19th December 1921. From their own statement it becomes clear that they were on the verge of bankruptcy at the time when A and B were executed. The statement of assets and liabilities referred to in their petition for *interim* protection shows that they were in very embarrassed circumstances. The oral evidence in the case makes it clear that they were parting with whatever property they had. One car which is referred to as belonging to them in their petition was transferred to a person named Singara Chetty and under these two documents A and B they parted with most of their immoveable properties. The evidence of the adjudicating creditor proves that they were hard pressed with the creditors' demands and that there were various creditors in their house when he went there to make his demand. Under these circumstances we have to consider whether the written notice threatening legal proceedings that was sent by the appellant in C. M. A. No. 11 of 1924 on 10th October 1921 and the oral demand made in the other case really operated on the minds of the insolvents in bringing about the execution of the documents in question. The facts show that at this time the insolvents being in desperate circumstances were trying to part with their immoveable property and the other assets at their disposal recklessly and desperately not caring as to what may be the consequences. The following observations of Phillimore, J., *In re Ramsay* (6) may well be applied to the facts before us. "And although in some cases a writ may be pressure, there are cases where writs are absolutely no importance to the debtor, no terror; and in such cases I do not think that the threat of a writ, or the issuing of a writ, ought to be called pressure." In view of the circumstances, already pointed out, it cannot be said that the two documents in these two cases were executed on account of genuine pressure. I, therefore, think that the conclusion of the learned Judge that these were executed by the insolvents in desperate circumstances and not on account of any real pressure is perfectly justified by the evidence. I agree that the appeals should be dismissed with costs.

V. N. V.
Z. K. *Appeals dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 749 OF 1922.
April 1, 1925.
Present :—Mr. Justice Phillips.

THE MADURA ETC., DEVASTHANAM THROUGH ITS RECEIVER, MUTHU K. R. V. ALAGAPPA CHETTIAR—APPELLANTS

versus

SUNDARAM ANNAVI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99—Master and servant—Temple—Dismissal of temple servants on charges of misconduct—Suit to set aside dismissal—Charges not identical in respect of all plaintiffs—Misjoinder—Decree, whether can be reversed in appeal—Question for consideration—Misconduct, what amounts to—Prior offences by servant, effect of—Finding of fact—Appeal, second—Interference by High Court.

Plaintiffs, four in number, who were the holders of a piper service *inam* in a temple brought a suit to set aside the orders of dismissal passed against them by

the trustee of the temple for misconduct. Each plaintiff had a share in the service *inam*. The charges of misconduct imputed to each plaintiff were different, and in the case of one set of plaintiffs were based on the acts of their father:

Held, that the suit was bad for misjoinder of parties and causes of action; but that the decree of the Court below could not be reversed on the ground of misjoinder. [p. 526, col. 2.]

In such a suit the Court has to determine whether there was justification for the order of dismissal and not whether the Court would itself have dismissed the plaintiffs for the conduct alleged. [p. 527, col. 1.]

It cannot be laid down as a general principle that the punishment to be awarded to a servant for a subsequent offence must be awarded without reference to a prior offence. When an offence has been condoned or dealt with and the offender retained in service, it is not open to the employer to subsequently dismiss him for that same offence but if the servant offends again, it is perfectly justifiable for the employer to consider the prior offences in determining in what manner the servant should be dealt with for the subsequent offence. [*ibid.*]

The question whether there is or is not sufficient ground for the dismissal of a temple servant by the trustee of the temple, is one for determination upon the particular circumstances of each case and where the question is one of degree and not of principle, the finding of the lower Appellate Court must be treated as a finding of fact, conclusive and binding in second appeal. [p. 526, col. 2.]

Krishnasamy Tatacharry v. *Gomatum Rangacharry*, 4 M. H. C. R. 63, relied on.

Where, however, the Appellate Court in considering the question of the legality of the order of dismissal proceeds on wrong principles, the High Court in second appeal is not bound by the finding of fact arrived at by the Appellate Court. [p. 526, col. 2.]

Persistent neglect of service, insubordination and disobedience of orders repeated from time to time in a servant justify his dismissal. [p. 527, col. 2.]

A temple servant cannot be dismissed on account of acts of misconduct committed not by him but by his father. [*ibid.*]

Second appeal against a decree of the Court of the Second Additional Subordinate Judge, Madura, in A. S. No. 6 of 1921, preferred against a decree of the Court of the District Munsif, Melur at Madura, in O. S. No. 117 of 1914.

Messrs. *C. V. Anantakrishna Iyer* and *P. S. Narayanaswami Iyer*, for the Appellant.

Mr. *K. V. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.—The plaintiffs are holders of a piper service in a temple and have brought this suit for setting aside the order of dismissal passed by the 1st defendant. The 1st plaintiff has ¼th share in the *inam*, the 2nd plaintiff has ¼th share, plaintiffs Nos. 3 to 6 have ⅛th share and the 3rd defendant has ⅛th share. Objection was taken to the framing of the suit on the ground of misjoinder of parties and causes of action. This should undoubtedly have been upheld because the charges of misconduct against the several plaintiffs are not identical and each plaintiff's case ought to have been dealt with on its own merits, and it might well have been found that in so far as some of the plaintiffs are concerned the order of dismissal was unwarranted, whereas in respect of others it was fully justified. That alone is sufficient to constitute misjoinder but there is another fact which shows that there is more than one cause of action. In the case of plaintiffs Nos. 3 to 6 the dismissal appears to have been based on acts committed by their father. The father seems to have died while these acts of misconduct were being inquired into and the order of the *devatihanam* manager is to the effect that the father who was at that time dead should be dismissed. Subsequently orders of dismissal were sent to his sons, plaintiffs Nos. 3 to 6, who consequently had quite a different case to that of the other plaintiffs. However, this case has proceeded and in appeal the decree cannot he reversed on the ground of misjoinder. The First Court found that the dismissal of all the plaintiffs was fully justified. The Appellate Court after finding that the acts of misconduct found by the First Court were true has come to the conclusion that the plaintiffs are entitled to a *locus penitentiæ* and that the order of dismissal was, therefore, wrong. It has, no doubt, been held in *Kristnasamy Tatacharry* v. *Gomatum Rangacharry* (1) that the question of whether there is or is not sufficient ground for dismissal is one for determination upon the particular circumstances of the case and that when the question is one of degree and not of principle, the finding of the lower Court must be treated as a finding of fact, conclusive and binding in second appeal. In the present case, however, I do not think that the Subordinate Judge has proceeded on the right principles in coming to his conclusion. He starts by finding that "there has been undesirable neglect of service to an extent which cannot be tolerated in a temple" but nevertheless finds that such conduct does not warrant a dismissal. He has treated the case not with a view to determine whether the fact warranted a dismissal but rather whether

(1) M. H. C. R. 63.

he personally would have dismissed them for that conduct. Different employers may have different feelings on a matter of this sort and where one dismisses a servant, another more kind-hearted will give him one more opportunity to correct himself, and a Court has to determine whether there was justification for the order of dismissal and not whether he personally would have dismissed for such conduct. The Subordinate Judge is also wrong in saying that "condoned faults ought not to have a cumulative effect in finally working out a dismissal". In this case it was found that the plaintiffs had been guilty of misconduct from the year 1904 up till 1912 and these acts of misconduct were repeated on 5 or 6 different occasions, the plaintiffs being punished or merely warned for each of these acts. When then, the Subordinate Judge holds, as a matter of principle, that the punishment to be awarded for a subsequent offence must be awarded without reference to a prior offence he is wrong. No doubt when an offence has been condoned or dealt with and the offender retained in service, it is not open to the employer to subsequently dismiss him for that same offence but if the servant offends again, it is perfectly justifiable for the employer to consider the prior offences in determining in what manner he should be dealt with for the subsequent offences. The Judge is, therefore, clearly wrong in this principle enunciated by him, and that is sufficient ground for my holding that this is not a pure finding of fact which is binding upon me in second appeal. I think it is clear also from a perusal of the learned Judge's judgment that he was really inclined to the view that the dismissal was justifiable but in view of the severity of the punishment which means the loss of a large amount of land he has allowed his kindness to intervene and has declared that the period of 9 years which elapsed between the date of dismissal and the date of judgment should be treated as suspension and that the dismissal should be set aside. Not only has he done this, but he has ordered the plaintiffs to pay the costs of the first defendant who dismissed them, although he has given a decree in plaintiffs' favour. All these facts, together with the recital in the judgment, clearly show that the learned Subordinate Judge did not mean to hold, that the 1st defendant was not justified in dismissing the plaintiffs.

The District Munsif has found that the order of dismissal was justified and on the facts found it cannot be suggested that it was wrong. There was persistent neglect of service, insubordination, and disobedience of orders repeated from time to time. It would be impossible to say that a servant who was guilty of these offences is not worthy of dismissal. The decree of the Subordinate Judge must, therefore, be set aside. I am asked to remand the appeal for a fresh finding but I do not think that it is necessary in the present case as the facts have all been found and I can come to a conclusion myself.

There is one point in respect of which the plaintiffs Nos. 3 to 6 are entitled to consideration. The order of dismissal so far as they are concerned was clearly not justified. In the first place it does not appear that they had actually been appointed and in the second place the order of dismissal was passed for acts committed not by them, but by their father. In this suit it is somewhat difficult to split up the causes of action contained in the plaint, but in the circumstances I think that the decree of the first Court should be confirmed with the modification that there will be a declaration that the dismissal of the plaintiffs Nos. 3 to 6 is invalid.

Plaintiffs Nos. 1 and 2 will pay the costs of the 1st defendant throughout, and plaintiffs Nos. 3 to 6 will bear their own costs throughout as in the case of a suit framed as this is, it would be unfair to ask the 1st defendant to pay costs in respect of a cause of action not specifically pressed, when they have not succeeded in their main contentions.

The memorandum of objections not being pressed is dismissed with costs.

V. N. V.
Z. K.

Appeal partly allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2356 OF 1920.

March 5, 1924.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

GANGA SINGH—PLAINTIFF—APPELLANT

versus

BHAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Punjab Land Revenue Act (XVII of 1887), s. 117—Res judicata—*Partition proceedings—Revenue Officer, decision of title by—Subsequent civil suit, if barred—Suit for declaration that land incapable of partition—Civil Court, jurisdiction of.*

A decision by a Revenue Officer in partition proceedings on a point involving question of title does not operate as *res judicata* in a subsequent civil suit involving the same questions, where the Revenue Officer had neither converted himself into a Civil Court nor had followed the procedure laid down in the C. P. C.

A suit for a declaration that a particular land is incapable of partition, having been privately partitioned by the parties though shown joint in Revenue papers, is a suit of a civil nature and is, therefore, cognizable by a Civil Court.

First appeal from a decree of the Senior Subordinate Judge, Ferozepore, dated the 9th August 1920.

Pandit *Sheo Narain*, R. B., for the Appellant.

Sardar *Kharak Singh* and Mr. *Jawahar Singh*, for the Respondents.

JUDGMENT.—This was a suit for a declaration that the land measuring 3553 *kanals* out of 3560 *kanals* 10 *marlas* situate at *Mouza* Nathuwala, Tehsil Moga, has been partitioned privately by the parties, though in the Revenue papers it is shown as joint property of the parties, and is, therefore, not capable of partition. The suit was resisted mainly on two preliminary pleas:—(1) That it was barred by the principle of *res judicata*, (2) that it was not cognizable by Civil Court.

The facts leading to the litigation are few and simple. Vir Singh applied for partition of the land in dispute under the Land Revenue Act. Ganga Singh filed objections stating that by reason of a private partition the land of which partition was sought had fallen to his share and that it was no more joint land belonging both to Vir Singh and Ganga Singh. The Assistant Collector by his order dated the 3rd March 1917 disallowed the objections summarily without going into the question of title raised. Upon an appeal to the Collector the case was remanded by an order dated the 11th June 1917 for decision after taking evidence.

Clearly on the objections a question of title arose. It was then open to the Revenue Officer to try the question of title himself as a Civil Court or to stay the partition proceedings and direct the parties to have the question of title decided by a competent Civil Court. From the proceedings it appears that the Revenue Officer adopted neither of these courses. He did decide the question adversely to the objector but without following the procedure of a Civil Court or describing himself as the Presiding Officer of such a Court. No decree sheet was prepared. Against this decision the applicant for partition appealed to the Collector. Evidently he took it to be a decision of a Revenue Officer. The Collector decided in favour of the applicant and accepted the appeal. He also refrained from drawing up a decree. The objector then appealed to the Commissioner and the Financial Commissioner without success.

The question now before us is whether the present suit is barred by *res judicata*. The contention of the Counsel for the respondents is that because the question of title has been decided, however, irregularly and under whatever misapprehensions regarding the powers of the Presiding Officer that decision must stand and must be treated by some process of visualisation as a decree of a competent Civil Court and the order on appeal passed by the Collector must in a similar manner be treated as an order and a decree of the District Court. We find that this is wholly impossible. The lower Court accepted the contention of the defendants and held that the suit was barred by the rule of *res judicata* and also that it was not cognizable by a Civil Court. Seeing that a question of title was raised, that the suit was cognizable by a Civil Court, and that the Revenue Officer did not decide the question of title as a Civil Court the suit is neither barred by the rule of *res judicata* nor is it cognizable by a Revenue Court. We overrule the decision of the Court below upon both these preliminary points and setting aside the decree remand the case to that Court under O. XLI r. 23 with the directions that the suit be re-instated on its original number in the register of pending suits and be disposed of according to law. Costs will abide the result.

R. L. *Case remanded.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 614 OF 1924.
(CRIMINAL RIVISION PETITION No. 514 OF 1924.)
March 30, 1924.

Present:—Mr. Justice Devadoss and Mr. Justice Wallace.

RAMACHANDRAN SERVAI—PETITIONER

versus

PRESIDENT, UNION BOARD, KARAIKUDI—RESPONDENT.

Madras Local Boards Act (XIV of 1920), ss. 164, 221 (3)—Encroachment—Penalty—Magistrate moved to recover penalty—Defence of no encroachment, whether competent.

When a Local Board moves a Magistrate under s. 221 of the Madras Local Boards Act of 1920 to recover a penalty imposed for encroachment, the defaulting party cannot ventilate before the Magistrate his claim that there was no encroachment at all.

The question for decision under s. 221 (3) of the Madras Local Boards Act is as to the amount due or its apportionment and not whether the penalty is at all leviable.

Section 221 of the Madras Local Boards Act only applies to the manner of recovery of the penalty and does not re-open the question whether the defaulter is "bound" to pay the penalty imposed.

In re Smith, 81 Ind. Cas. 72; 45 M. L. J. 731; 18 L. W. 879; 33 M. L. T. 185; (1924) A. I. R. (M.) 389; 25 Cr. L. J. 584, *In re Krishnaswami Pillai*, 86 Ind. Cas. 57; 21 L. W. 254; (1925) M. W. N. 47; 48 M. L. J. 132; (1925) A. I. R. (M.) 476; 26 Cr. L. J. 681 and *Chairman, Municipal Council, Chicacole* v. *Gajireddi Seetharamayya Naidu*, 90 Ind. Cas. 152; 21 L. W. 280; (1925) A. I. R. (M.) 584, referred to.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of 30th June 1924, in M. C. No. 13 of 1924, on the file of the Court of the Sub-Divisional First Class Magistrate, Devakottai.

Dr. *Swaminathan* for Mr. *K. K. Ranganatha Iyer*, for the Petitioner.

Mr. *S. Ranganatha Iyer*, for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.—The question for decision in this case is whether, when a Local Board moves a Magistrate under s. 221 of the Madras Local Boards Act XIV of 1920 to recover a penalty imposed for encroachment, the defaulting party can ventilate before the Magistrate his claim that there was no encroachment at all, and plead such a defence to the case.

It is obvious that, if the petitioner's contention be sound that he is allowed to plead such a defence the Magistrate is constituted a sort of appellate authority over the Local Board in the matter of deciding whether or not there has been in fact an encroachment; and a wholesale application of such a principle would mean that in all cases of demand by the Local Board for fees, tolls, costs, compensations, damages, penalties, charges, expenses, or other sums due to it, the Magistrate, a Judge appointed for the trial of criminal matters, is set up as the final Judge over the Local Board, except in so far as either party may take the matter before a Civil Court.

This is to our minds a startling proposition, and, unless the wording of the section clearly imports it, we do not accept it. Clause 1 of the section clearly lays down that what has to be ascertained by the Magistrate is the "amount or apportionment of the sum", if that is disputed and that, we take it, is the "question" that has to be determined under cl. (3). Here the petitioner is not disputing as to the amount due or its apportionment. He contends that the penalty is not leviable at all. We, therefore, see no support for the petitioner in the wording of the section.

Under s. 164 the petitioner is "bound" to pay such sum as may be demanded by the Local Board by way of penalty, which sum "may be recovered in the manner hereinafter provided" *i.e.*, as in s. 221. This makes it quite clear that s. 221 only applies to the manner of recovery and does not re-open the question whether the petitioner is "bound" topay. Petitioner is not able to refer us to any reported case directly in support of his view. The case *In re Smith* (1) was case of prosecution of a person who had erected some machinery without the permission of the Commissioner of Madras City Municipality and thus was said to have contravened s. 288 of the Madras City Municipal Act IV of 1919. There this High Court went into the question of whether such permission was required in the case and decided that it was not. We do not think this can throw any light on the proper interpretation of ss. 164 and 221 of the Local Boards Act. The same learned Judge has held in a case *In re Krishnaswami Pillai* (2) that, in a prosecution for contravention ofs. 166 (1) of the Local Boards Act, it was not open to the accused to plead that the motorbus license ought not to have been refused by the President of

(1) 81 Ind. Cas. 72; 45 M. L. J. 731; 18 L. W. 879; 33 M. L. T. 185; (1924) A. I. R. (M.) 389; 25 Cr. L. J. 584.

(2) 86 Ind. Cas. 57; 21 L. W. 254; (1925) M. W. N. 47; 48 M. L. J. 132; (1925) A. I. R. (M.) 476; 26 Cr. L. J. 681.

the Local Board. Another learned Judge of this Court has taken a similar view in a case, *Chairman, Municipal Council, Chicacole* v. *Gajireddi Seetharamayya Naidu* (3) a case of disobedience to a notice under s. 219 (1) of the Madras District Municipalities Act V of 1920.

We find no support for petitioner's contention in these cases or any others cited before us. We dismiss this petition.

V. N. V. *Petition dismissed.*

(3) 90 Ind. Cas. 152; 21 L. W. 280; (1925) A. I. R. (M.) 584.

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS NO. 83 OF 1924.

December 1, 1924.

Present :—Sir Shadi Lal, KT, Chief Justice.

EMPEROR—ACCUSED—PETITIONER

versus

Pir QADIR BAKHSH SHAH—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 342, 195, 476—Penal Code (Act XLV of 1860), s. 193—Transfer application—Affidavit, false statement in—Prosecution for perjury—Immunity—Procedure.

A false statement of an accused in an affidavit in support of his transfer application is not immune from prosecution and can be the subject-matter of a charge for perjury. [p. 531, col. 2.]

Emperor v. *Bindeshri Singh*, 28 A. 331; 3 A. L. J. 98; A. W. N. (1906) 42; 3 Cr. L. J. 225 and *In the matter of the petition of Barkat*, 19 A. 200; A. W. N. (1897) 23; 9 Ind. Dec. (N. S.) 132, not followed.

Ghulam Muhammad v. *Emperor*, 67 Ind. Cas. 351; 3 L. 86; 23 Cr. L. J. 399; 4 U. P. L. R. (L.) 71; (1922) A. I. R. (L.) 113, followed.

Section 195, Cr. P. C., lays down a rule to be followed by the Court which is to take cognisance of an offence specified therein, while s. 476 of the Code contains directions for the guidance of the Court which desires to initiate a prosecution in respect of an offence alleged to have been committed in, or in relation to, proceedings before it. [p. 532, col. 1.]

Under the Cr. P. C., as amended by Act XVIII of 1923, the Court desiring to initiate proceedings for perjury has no alternative but to prefer a complaint in writing and to forward it to a Magistrate of First Class having jurisdiction to entertain it. [*ibid.*]

Lala *Jai Lal*, R. B., Government Advocate for the Petitioner.

Mr. *Feroze Khan Noon*, for the Respondent.

ORDER.—On the 25th of May 1923, the respondent, Qadir Bakhsh Shah, against whom a ciriminal case under s. 412, Indian Penal Code, was pending in the Court of Magistrate at Dera Ghazi Khan, made an application to the High Court for the transfer of the case to another district. In support of his application he made a long affidavit which contained, *inter alia*, the following allegations against the Superintendent of Police :—

"I state on oath that the Superintendent of Police himself spoke to me and asked me to say that Ghulam Hussain Tumandar had possessed the stolen camel, and he told me that I would be given a 'good service certificate' and when I told him that I could not, he said to me that I would get into trouble."

The application for transfer was, after notice to the District Magistrate, heard on the merits and finally dismissed by a Judge of the High Court. The Government Advocate has now applied on behalf of the Local Government praying that the respondent may be prosecuted for committing perjury in respect of the above statement. The learned Counsel stigmatizes the statement as false and seeks to prove its falsehood by producing an affidavit sworn by Mr. Wace, who is admittedly the Superintendent of Police referred to by the respondent. This affidavit is in the following terms :—

"II. That I never spoke to Qadir Bakhsh Shah—

(*i*) nor asked him to say that Ghulam Hussain Tumandar possessed the stolen camel.

(*ii* That I never told him (Qadir Bakhsh Shah) that he would be given a 'good service certificate.'

(*iii*) That I never told Qadir Bakhsh Shah that he would get into trouble.

III. That in fact I never saw Qadir Bakhsh Shah during the Police investigation of the case, nor made to him any of the statements attributed to me by him in his affidavit of 25th May 1923."

Now, I may say at once that I am not called upon to pronounce any opinion on the question as to which of these two affidavits should be held to be true; the simple issue before me is whether a *prima facie* case for an enquiry has been made out. On that point there can be no two opinions. The allegations contained in one affidavit are flatly contradicted by the other, and it is obvious that both of them cannot be true, I must accordingly hold that it is expedient in the interests of justice that an enquiry should be made into an offence described in s. 193, Indian Penal Code.

The learned Counsel for the respondent, however, contends that as the affidavit was tendered by his client, for the purpose of getting the transfer of a case, in which he was accused of an offence, he cannot be rendered liable to punishment for making a false statement in that affidavit. This contention is based upon a judgment of the Allahabad High Court in *Emperor* v. *Bindeshri Singh* (1) which, no doubt, enunciates the principle that where an accused person applies for the transfer of a case pending against him to some other Court, supporting his application by an affidavit, he cannot, or at least ought not to, be prosecuted under s. 193, Indian Penal Code, in respect of the statements made therein.

Now, I have examined that judgment as well as the earlier judgment in *In the matter of the petition of Barkat* (2) followed therein, and I must say that with all due deference to the learned Judges, I am unable to concur in their exposition of the law. The only provision of the law, which confers immunity upon an accused person from criminal liability for making a false statement, is that contained in sub-s. (2) of s. 342, Cr. P. C. But the protection afforded by that sub-section is expressly confined to the statement made by an accused in answer to questions put to him by the Court for the purposes of enabling him to explain any circumstances appearing in the evidence against him. It is clear that these questions can be put only at some stage of an enquiry or trial in the original Court, and that it is only the answers to such questions for which the privilege can be claimed. The object of the Legislature in granting the immunity can be gathered from the language of the section itself. When the witnesses for the prosecution have been examined, it is unnecessary to call upon the accused for his defence, if he can, by making his own statement, offer a satisfactory explanation of the points made out against him. In tendering his explanation he should have perfect freedom to say what he likes in respect of the evidence produced against him, and he should not be hampered by any fear of prosecution for making a false statement. It will be seen that this examination is entirely in the interest of the accused. While the law makes it obligatory upon the Court to question him in order to give him an opportunity of offering his explanation, it gives him considerable latitude in the matter. He is not required to take an oath before answering the questions put to him by the Court, nor is he bound to answer them. If he chooses to answer them he is not liable to punishment for making a false statement.

Neither in the language of the section nor on principle do I see any valid reason for extending the immunity to a statement made otherwise than in answer to questions put by the Trial Court. If the proposition laid down by the Allahabad High Court be correct, an accused person would be at liberty to make all sorts of unfounded allegations against the Trial Judge; and I do not think that this abuse of the privilege granted for a special purpose was ever contemplated by the framers of the Code. I consider it unnecessary to dwell on the subject any longer, because I find that the view taken by the Allahabad High Court has already been dissented from by this Court in *Ghulam Muhammad* v. *Emperor* (3), and I am clearly of the opinion that there is no law which confers upon an accused person immunity from prosecution in respect of a false statement in an affidavit tendered by him in support of his application for transfer; and that such statement can be the subject-matter of a charge for perjury.

Coming now to the question of procedure to be adopted for bringing the matter before a Criminal Court for enquiry, I observe that the Criminal Procedure Code Amendment Act XVIII of 1923, has abolished the practice of granting sanction to a private individual to launch a prosecution for an offence connected with the administration of justice, and that s. 195, Cr. P. C., as amended by that Act, now lays down the rigid rule that no Court shall take cognizance of any of the offences enumerated therein except on the complaint in writing of the public servant or the Court concerned. The section merely prescribes a condition precedent to the cognisance of certain offences by a Court and is founded upon the same principle as several other sections in the Code, *e. g.*, ss. 196, 196-A, 198 and 199, all of which require the institution of complaints by

(1) 28 A. 331; 3 A. L. J. 98; A. W. N. (1906) 42; 3 Cr. L. J. 225.

(2) 19 A. 200; A. W. N. (1897) 23; 9 Ind. Dec. (N. S) 132.

(3) 67 Ind. Cas. 351; 3 L. 46; 23 Cr. L. J. 399; 4 U. P. L. R. (L.) 71; (1922) A. I. R. (L.) 113.

certain specified persons in respect of offences mentioned therein.

There appears to be some misapprehension as to the relative scope of ss. 195 and 476. Section 195 lays down a rule to be followed by the Court which is to take cognisance of an offence specified therein, but contains no direction for the guidance of the Court which desires to initiate a prosecution in respect of an offence alleged to have been committed in, or in relation to, a proceeding in the latter Court. For that purpose we must turn to s. 476, which requires the Court desiring to put the law in motion to prefer a complaint either *suo motu* or on an application made to it in that behalf, but does not make it incumbent upon the Court to make a preliminary enquiry in every case before starting prosecution. To justify the Court in initiating prosecution, it is necessary, only to hold that it is expedient in the interests of justice that an enquiry should be made into an offence referred to in s. 195.

It will be observed that under the law as it existed prior to its amendment in 1923 it was open to the Court either to grant sanction to a private individual or to send the case for enquiry or trial to the nearest First Class Magistrate, and that it was not necessary to make a formal complaint. Under the new law the Court has no alternative but to prefer a complaint in writing and to forward it to a Magistrate of the First Class having jurisdiction to entertain it. This procedure in its application to the High Court is open to serious objections. It is hardly consistent with the dignity of a Judge of the High Court that he should have to make and sign a complaint which is to be enquired into by one of his subordinates; and that he should be treated as and recorded as complainant throughout the proceedings, the only exception being that his examination in support of the allegations in the complaint has been dispensed with by proviso (*aa*) to s. 200, Cr. P. C.

Nor is it fair to the accused that he should be arraigned in a case which has been instituted on a complaint made by a Judge of the highest Tribunal and is to be tried by a Judicial Officer who is subordinate to the complainant. It is to be hoped that no Magistrate taking cognisance of a case of this description would be influenced by the circumstances that the complaint has been preferred by a Judge of the High Court, but there can be little doubt that the accused person is likely to entertain an apprehension, not altogether without justification, that his conviction is a foregone conclusion.

I am, however, bound to administer the law as I find it, even if I consider it to be objectionable, and I must leave it to the Legislature to make such amendment as may be deemed expedient. I accordingly direct that a complaint under s. 193, Indian Penal Code, in respect of the statement quoted above, be drafted and placed before me for signature. The complaint shall then be forwarded to the District Magistrate of Lahore who shall proceed in accordance with law.

Before concluding I desire to make it absolutely clear that nothing contained in this judgment shall be construed as implying, in the slightest degree, any expression of opinion on the merits, and that the decision of the case shall depend entirely upon the evidence which may be adduced by the parties. As I have already explained, I am constrained to make a complaint in writing because under the present law no other course is open to me.

R. L. *Petitioner accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 882 OF 1924.
(CRIMINAL REVISION PETITION NO. 96 OF 1924.)
April 28, 1925.

Present:—Mr. Justice Krishnan and Mr. Justice Wallace.

In re PERAMASAMI RAGUDU AND OTHERS—ACCUSED NOS. 1 AND 3.

Criminal Procedure Code (Act V of 1898), s. 162—Copy of statement made by prosecution witness to Police at investigation, when to be granted.

The stage in an enquiry or trial at which an accused person is entitled under s. 162 of the Cr. P. C. to ask the Court to furnish him with a copy of a statement made by a prosecution witness to the Police in the course of investigation is when the witness is called for the prosecution; that is, when he is under cross-examination, and has already made the statement which the accused wishes to contradict by proof of his former statements to the Police.

The accused is not entitled to copies of the statements made by prosecution witnesses at the Police investigation before their cross-examination is opened.

Case referred for the orders of the High

Court under s. 438 of the Cr. P. C. by the Sessions Judge, Guntur, in his letter, dated the 24th November 1924.

The Public Prosecutor, for the Crown.

ORDER.—The general point raised in the Letter of Reference is at what stage in an enquiry or trial is an accused person entitled under s. 162 of the Cr. P. C. to ask the Court to furnish him with copies of statements made by prosecution witnesses to the Police in the course of investigation. The wording of the section fixes the stage as "when any witness is called for the prosecution". It will be observed, however, that the purpose of furnishing the copy is to *contradict* the witness. This obviously implies that the witness has already made a statement which is open to contradiction and, therefore, the stage at which the copy is to be furnished is the stage when the witness has made a statement which lays him open to contradiction by his former statement to the Police. We cannot subscribe to the condition that, before cross-examination is opened at all, the accused is entitled to copies of all statements made by prosecution witnesses at the Police investigation, that, in effect, he is entitled to a copy of the prosecution brief. It appears to us, so far as we can gather from the meagre records on the points in this case, that that was the nature of the request put forward by the accused's Pleader, and if that surmise is correct, then the refusal of the Stationary Sub-Magistrate was justified.

In practical working of the section what will usually happen is this. The accused's Pleader will ask the witness what statement, if any, on any particular point he made to the Police during the investigation, and when he replies, then the Pleader may request the Court to refer to the statement before the Police and furnish the Pleader with a copy, having due regard to the second proviso of the section. This second proviso seems to have been overlooked by the learned Sessions Judge when he worte the second para of his Letter of Reference.

As to para. 3 of the Reference we think it quite clear that the stage when the accused is entitled to ask for a copy, is, as indicated above, when the witness is under cross-examination, and has already made the statement which the accused wishes to contradict by proof of his former statements to the Police.

No facts are made out in this case from which we can conclude that the provisions of s. 162, Cr. P. C. as interpreted above, were not complied with in this case.

We, therefore, return the records.

Reference answered.

V. N. V.

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 529 OF 1925.

August 28, 1925.

Present:—Mr. Justice Kanhaiya Lal.

MUNIR—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 494, 497—Criminal Procedure Code (Act V of 1898), ss. 179, 198—Bigamy, abetment of—Complaint by husband, whether necessary—Adultery, prosecution for—Connivance of husband, meaning of—Woman removed to another district—Jurisdiction of Court where husband resides.

If a woman having her husband living marries another person, the person to whom the woman is re-married is not guilty of the substantive offence of bigamy but is liable for abetment. [p. 535, col. 1.]

Connivance is a figurative expression meaning a voluntary blindness to some present act or conduct, to something going on before the eyes or something which is known to be going on without any protest or desire to disturb or interfere with it. [p. 536, col. 2.]

A person charged with the offence of adultery cannot escape liability by merely showing that the complainant connived at the immorality of his wife. He must prove his specific connivance at her adultery with himself. [p. 536, col. 1.]

The provisions of s. 198, Cr. P. C., do not apply to a charge of abetment of an offence therein referred to and, therefore, no complaint by the person aggrieved is necessary where the charge is one of abetment of and not of the substantive offence of bigamy. [p. 535, col. 1.]

Where the husband of a woman who re-marries resides at one place but the offence of bigamy and adultery is committed at another, the Court having jurisdiction over the place where the husband resides has jurisdiction to try the case by virtue of s. 179, Cr. P. C. [p. 536, col. 2.]

Criminal appeal from an order of the Sessions Judge, Shahjahanpur, dated the 8th May 1925.

Syed *Muhammad Hussain*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—The accused Munir has been convicted of offences under ss. 494 and 497 of the Indian Penal Code and sentenced on each charge to rigorous imprisonment for one year. The sentences are concurrent. The case is somewhat unfortunate. *Musammat* Ganga Kaur was the

wife of Hargobind. She was married about five or six years ago, when she was a minor. She was brought by her husband to his house in Ghanshiampur. He did not thereafter allow her to go to the house of her parents, because it is said, her parents had not paid the dowry, which had been settled for the marriage. The accused was in the service of Hargobind and his duty was to act as *chaukidar* and keep watch outside his house. On the night of the 30th of October 1922 Hargobind was away from his house. When he came back he found his wife, *Musammat* Ganga Kaur, not in the house; and his servant Munir was also absent. He made a report at the Powayan Police Station next morning that his wife was missing and that she had been enticed away by Munir. *Musammat* Ganga Kaur states that Munir told her that her brother was at the door and wanted her and that she went out with Munir but did not find her brother. She enquired where her brother was; and her story is that Munir and his brother Shahzada told her to go with them and that they would take her to the house of her mother. She goes on to say that she was taken from there to different places and ultimately to the house of Amir, a brother-in-law of Munir in Bilsanda, where Munir and she stayed for a month. Amir is stated to have afterwards turned out both of them. They then shifted to the garden of Tika Ram where Munir took employment. She was ultimately arrested at Bilsanda on the complaint of her brother Ganga Sahai on the 24th of December 1924. Meanwhile she had two children by Munir, one of whom died and the other a baby seven months old is still alive. After her recovery a complaint was filed by Hargobind on the 3rd of December 1924 stating that she had been kidnapped by Munir with the help of certain other persons and that Munir had done so with the object of having illicit intercourse with her and further stating that Munir had wrongfully kept and confined her and carried on sexual intercourse with her against her will.

Musammat Ganga Kaur was sent for medical examination and the opinion of the Sub-Assistant Surgeon who examined her was that she was about 16 years old. In the complaint filed by Hargobind Munir was charged with offences under ss. 366, 497 and 498 of the Indian Penal Code. During the enquiry before the Committing Magistrate Munir stated that he found the girl roaming about in the Bilsanda Bazar about three years ago and that the girl said that she had been enticed away by some one from the house of her husband. He admitted that he had taken her to his house and celebrated his *nikah* with her and kept her as his wife. The learned Sessions Judge took further evidence about the age of the girl and examined Dr. Shambehari Lal, the Civil Surgeon of Shahjahanpur, who stated that the girl appeared to be about 17 years old and that her development was compatible with the age of 20 years. He accordingly acquitted the accused of an offence under s. 366 of the Indian Penal Code but convicted him under ss. 494 and 497, Indian Penal Code.

The question for consideration here is whether the charge under s. 494 of the Indian Penal Code can be maintained without an express complaint by the husband to that effect and whether in the circumstances established Hargobind had not connived at the adultery of his wife with the accused. It is also urged that there was no proof of any lawful marriage between Munir and the girl inasmuch as the statement of the girl was that she had not consented to the re-marriage, and that the Trial Court had no jurisdiction to entertain the complaint or to enquire into the charges of which the accused has been convicted.

Section 494 of the Indian Penal Code makes the offence of bigamy punishable both as regards a person, having a wife living, marrying another and as regards a wife having her husband living re-marrying, in any case in which such re-marriage would be void by reason of its taking place during the life of such wife or husband. The person to whom the woman is re-married cannot be punished under s. 494. He can only be charged with abetment of that offence. Section 109 of the Indian Penal Code indicates the punishment which is to be awarded for such abetment. Section 198 of the Cr. P. C. prohibits a Court from taking cognizance of an offence under s. 494 of the Indian Penal Code except upon a complaint made by some person aggrieved by such an offence. A complaint was made by the husband in the present case; but it was not a complaint about re-marriage or

bigamy within the meaning of s. 494 of the Indian Penal Code. A complaint is defined in s. 4 of the Cr. P. C. as meaning the allegation made orally or in writing to a Magistrate with a view to his taking action under the Code that some person whether known or unknown has committed an offence. The offence complained of by Hargobind in his application was that his wife had been kidnapped and kept in wrongful confinement by Munir and that he was having illicit connection with her and against her will. There is nothing to show that he was till then aware that she had been re-married in the *nikah* form to Munir and no charge under s. 494 of the Indian Penal Code was, therefore, laid therein. It is noticeable, however, that the provisions of s. 198 of the Cr. P. C. do not apply to a charge of abetment of a marital offence of the kind therein referred to. Section 195 of the Cr. P. C. which deals with cases in which a previous sanction or order for prosecution is required for a prosecution under certain charges, provides in express terms that a similar sanction or order is needed for a prosecution for the abetment of those offences or for an attempt to commit them. No such provision is, however, contained in s. 198 and it cannot, therefore, be said that the charge of abetment of a marital offence of the kind referred to therein is excluded from cognizance without a complaint made by some person aggrieved by such abetment. The section is limited in its operation to the offences mentioned therein. Section 109 of the Indian Penal Code is in a sense a separate provision for offences punishable with the same amount of punishment as is provided for the offences said to have been abetted. To constitute a charge of abetment the commission of the substantive offence has, no doubt, to be established, because there can be no abetment if the substantive offence has not been committed, but the person committing the substantive offence and the person abetting it may not be the same; and it is possible to imagine cases in which the person committing a substantive offence may remain untraced and the person abetting it may be traced and brought to book. In any case the language of s. 198 of the Cr. P. C. does not justify the contention that even where a charge is one of abetment a complaint by the person aggrieved is necessary. In the present case a complaint of an offence under s. 494 of the Indian Penal Code having been committed could not have been made by the complainant because the fact of the re-marriage was not till then known to him. The accused Munir admitted the re-marriage in his statement before the Committing Magistrate and he adhered to that statement in the Court of Session. It has been found and rightly found that he knew that *Musammat* Ganga Kuar was the married wife of Hargobind. The evidence of Hargobind, *Musammat* Ganga Kuar, her brother, Ganga Sahai, and other witnesses proves that there had been a lawful marriage between *Musammat* Ganga Kuar and Hargobind. Munir was employed as a watchman at their house and his own statement shows that he was aware that she was the wife of Hargobind.

It is, however, asserted on his behalf that there was no adequate proof of the performance of the necessary formalities which constituted a marriage under the Muhammedan Law to render the charge of bigamy maintainable, but, as the learned Sessions Judge has rightly pointed out, the statement of *Musammat* Ganga Kuar that she did not know of her *nikah* with Munir till people came and told her about it, is not true. She had evidently consented to be married to Munir, for she says that there was gathering of 10 or 12 persons at the time when *nikah* took place about 10 or 15 days after she was abducted and that she was informed by those persons that the *nikah* with Munir had been celebrated.

The other charge against Munir relates to an offence under s. 497 of the Indian Penal Code. On the statement of the accused himself there can be no question that the appellant was living in adultery with *Musammat* Ganga Kuar knowing that she was the wife of Hargobind. The contention urged on his behalf is that Hargobind had connived at her adultery by taking no steps since October 1922, beyond making a report to the Police, either to get her back or trace her whereabouts. It appears that after Munir and *Musammat* Ganga Kuar settled in Bilsanda the Police got information that Munir who was a previous convict had arrived there and that he was living with a strange Hindu woman. Munir and *Musammat* Ganga Kuar went to the Police Station at Bilsanda to make their statements and an enquiry slip was thereupon sent by the Sub-Inspector in charge of the Bilsanda Police Station, District Pilibhit, to the Sub-Inspector in charge of the Powayan Police

Station, District Shahjanpur, about their antecedents. The result of that enquiry was communicated by the Sub-Inspector of Powayan Police Station on the 3rd of January 1923, but it is not on the record. There is, however, the statement of Sub-Inspector, Zahir Ahmad, attached to the Police lines at Pilibhit to the effect that the woman described herself as *Musammat* Kalawati, wife of Hargobind, and that on the enquiry slip being received back he told Munir to go wherever he liked. There is also the statement of Sub-Inspector Gordhan Das, then second officer at Powayan, that he had sent for Hargobind and informed him that his wife was at Bilsanda and that Hargobind said that he would not have the woman back as she had lost her religion. *Musammat* Ganga Kuar also states that she was told by the Sub-Inspector something to that effect. There can be no doubt, therefore, that Hargobind had then received information that *Musammat* Ganga Kuar was at Bilsanda and that at that time he was not willing to take her back. That does not, however, dispose of the charge, for the information which Hargobind is stated to have received did not indicate that she was living in adultery with Munir. It indicated that she was in Bilsanda and if he had cared to go there and trace her whereabout he might possibly have found her. His omission to do so is not evidence of his having connived at her living a life of adultery with Munir. She may have been living any kind of life; but the charge here relates to her adultery with Munir; and Munir cannot escape liability for it, unless there is proof of his specific connivance of her adultery with him. Hargobind was living in Powayan and *Musammat* Ganga Kuar was living in another district at the time; and in order to establish connivance mere negligence or inactivity will not suffice. To constitute connivance the facts established must lead to a direct and necessary inference that adultery would be committed with the person charged. They must show that the husband acquiesced in by wilfully abstaining from taking any steps to prevent that adulterous intercourse which, from what passes before his eyes or within his knowledge, he cannot but believe or reasonably think is likely to occur. They may not go to prove privity to the actual commission of the adultery. As pointed out by Lord Chelmsford in *Gipps* v. *Gipps* (1). connivance is a figurative expression meaning a voluntary blindness to some present act or conduct, to something going on before the eyes, or something which is known to be going on without any protest or desire to disturb or interfere with it. There is no such evidence of connivance in this case in regard to the specific acts of adultery with which the appellant is charged.

It is also urged that the re-marriage took place in Bilsanda and the adultery also took place there, and that the Sessions Judge of Shahjahanpur had, therefore, no jurisdiction to try the case. But s. 179 of of the Cr. P. C. lays down that where a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued, such offence may be enquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued.

The consequence of the re-marriage and adultery was that the complainant was kept deprived of his wife from the time she went into the keeping of the appellant.

There is no reason, therefore, for interfering with the conviction or sentence.

Musammat Ganga Kuar is living at present with her brother Ganga Sahai. Hargobind states that he is willing to take her back and keep her if she performs certain pilgrimages.

The appeal is dismissed except in so far that the conviction of the appellant under s. 494 of the Indian Penal Code is altered into one of abetment under s. 109 read with s. 494 of the Indian Penal Code. The other conviction and the sentences passed will stand.

N. H. *Appeal dismissed.*

(1) (1864) 11 H. L. C. 1 at p. 27; 33 L. J. Mot. 161; 10 Jur. (N. S.) 641; 10 L. T. 735; 12 W. R. 937; 11 E. R. 123; 145 R. R. 1.

LAHORE HIGH COURT.

MISCELLANEOUS CRIMINAL CASE No. 158 OF 1925.

October 6, 1925.

Present:—Mr. Justice Zafar Ali.

FAZAL AHMED AND ANOTHER—COMPLAINANTS—PETITIONERS

versus

K. S. ABDULLAH KHAN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—

Transfer of case—Hostility of Magistrate towards party, whether ground for transfer.

The complainants in a case applied to the High Court for the transfer of the case from the Court of the Magistrate before whom the case was pending to some other Court. Their application was admitted and further proceedings were stayed. On the date fixed for the hearing of the case before the Magistrate one of the complainants appeared and apprised the Magistrate of the order of the High Court. The Magistrate instead of staying further proceedings issued a warrant for the arrest of the complainant who had not appeared:

Held, that there was no justification for the action of the Magistrate and that the Magistrate's attitude towards the complainants being clearly hostile there was good ground for transferring the case from his Court to the Court of some other Magistrate.

Application for transfer under s. 526, Cr. P. C., from the Court of the Honorary Magistrate, Murree, to the Court of Sardar Bishan Singh or any other Magistrate in Rawalpindi.

Mr. *Shamair Chand*, for the Petitioners.

Dewan *Ram Lal*, Assistant Legal Remembrancer and Mr. *Aziz Ahmad*, for the Respondent.

JUDGMENT.—It appears that the complainants-petitioners have a well-founded apprehension that a fair and impartial trial cannot be had in the Court of the Magistrate where their complaint under s. 420, Indian Penal Code, is now pending. Besides the facts stated in the application there has lately occurred an incident which strengthens their apprehension. Further proceedings having been stayed by order of this Court, one of the two complainants appeared before the Magistrate on the date fixed for hearing and apprised him of that order. The Magistrate instead of staying further proceedings issued a warrant for the arrest of the complainant who had not appeared. There was no justification for this action of the Magistrate and the learned Counsel who appear on behalf of the Crown and the accused to oppose this application admit that it cannot be justified. The Magistrate's attitude was clearly hostile to the complainants and I, therefore, accept the application and direct the District Magistrate to withdraw the case from his Court and to send it to the Court of any other Magistrate subordinate to him who may be competent to try it.

Z. K. *Application accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 727 OF 1924.
(CRIMINAL REVISION PETITION NO. 609 OF 1924.)

April 23, 1925.

Present:—Mr. Justice Krishnan.

A. S. P. L. V. R. RAMASWAMI CHETTIAR AND OTHERS—COUNTER-PETITIONERS NOS. 1 TO 6—PETITIONERS

versus

S. R. M. S. V. R. RAMANATHAN CHETTIAR—PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 133—Water-course leading to public tank—Catchment area, embankment of, cutting of—Diversion of water—Obstruction—Proceedings under s. 133, whether competent.

A water-course carrying water to a public tank is a public water-course and any interference with it justifies proceedings under s. 133 of the Cr. P. C.

In the centre of a catchment area there was a water-course flowing into a public tank. The water flowing through the water-course was attempted to be carried away by the petitioners to their own village tank by building a *bund* and cutting a new channel and by cutting down a portion of the old *bund* of the catchment area which had existed for over thirty years. The effect of the petitioners' act was to make the water falling on the catchment area to flow in a direction different to that of the water-course and to prevent it falling into the public tank:

Held, that the act of the petitioners amounted to an obstruction to the water-course and it was, therefore, competent to a Magistrate acting under s. 133 of the Cr. P. C. to direct the restoration of the embankment of the catchment area to its original condition, closing up of the newly opened channel and the removal of all obstructions to the free flow of water to the tank. [p. 538, cols. 1 & 2.]

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the Sub-District First Class Magistrate, Devakotta Division, dated the 27th September 1924, and made in its proceedings in Mis. Case No. 19 of 1924.

Dr. *S. Swaminathan*, for the Petitioners.

The Advocate-General and Mr. *E. Vinayaka Rao*, for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.—This is an application to revise an order passed under s. 133 of the Cr. P. C. with reference to a water-course running into an *urani* in the village of Puduvayal in Ramnad District. The Magistrate in the first instance had held that this *urani* into which this water-course ran was a private one and, therefore, he could not take action under s. 133, Cr. P. C. On the parties coming up in revision to this Court, this Court revised that finding and held that the *urani* was a public tank and directed fresh orders to be passed. The Magistrate has now taken

evidence and under s. 133 has directed the petitioners before me to restore the embankment of the catchment area to its original condition about a foot high and to close the newly opened channel from the north to the south marked A in Ex.-A and to remove all obstructions caused by them to the free flow of water into the *urani* within 15 days from the date of the orders. Dr. Swaminathan appearing for them has contended that this order was an incompetent order and that s. 133 does not apply to the facts of this case. His contention is based on the allegation that there is no river or channel in the present case which has been obstructed and he contends that under the second paragraph of s. 133 it is only an unlawful obstruction to a way, river or channel which may be lawfully used by the public or an obstruction in a public place that can be ordered to be removed. He contends that the present order of the Magistrate directing the restoration of the embankment of the catchment area is quite beyond the scope of s. 133. I am unable to accept his arguments. It is clear from the complaint that has been filed in the case that there is a water-course taking water to the *urani* in question and the allegation of the respondents before me was that this water-course had been obstructed partly by building up a *bund* in it, partly by cutting open another channel to take away the water from it and partly by cutting away the embankment at a point B round the catchment area. The word "channel'," no doubt, is not defined in the Code but I think the word is quite wide enough to include the state of affairs in this case. We have a catchment area in the centre of which there is a water-course which is obstructed and the water which flows into the water-course is attempted to be carried away by the petitioners before me to their own village tank and the way they do it is by building a *bund* and cutting a new channel and by cutting down a new portion of the old *bund* of the catchment area which the Magistrate has found, has existed for the last 30 years and more. The effect of cutting the *bund* of the catchment area is to make the water falling on the catchment area run away in a direction different to that of the water-course and to prevent it falling into the *urani* ; that, I think, can be held to be an obstruction to the water-course. The point was not properly taken in the lower Court and hence we do not find any discussion of it, in the judgment of the Magistrate for he begins by saying "The only question that remains to be considered is whether the counter-petitioners interfered with the embankment of the catchment area and put up a new channel as alleged in the petition". If the point had been properly put forward, clear evidence would have been available to show what exactly the position of the catchment area is and how the cutting open the *bund* of that catchment area affects the water course or the channel in the centre of the catchment area. I am, therefore, inclined to think that this is an order which the Magistrate could have competently passed under s. 133 and on the merits the petitioners have no case whatever. My attention was called to the case reported as *Jagarnath Sahu* v. *Parmeshwar Narain* (1) where the learned Judge held that a field which was on a lower level than the adjoining fields and over which the surplus water of these fields used to flow into a tank, even if it could be described as a channel, was not such a channel as had been or could be lawfully used by the public and action could not be taken under s. 133 of the Cr. P. C. for the removal of any obstruction from it. This ruling is based on the fact that the field over which the water used to flow was not a public field and hence s. 133 could not be applied to it. Their Lordships are apparently prepared to concede that this field over which water flowed could be described in a wide sense as a channel. That case is not, therefore, in the petitioner's favour. Here, the finding being that the *urani* is a public *urani*, the water-course carrying the water to it must be held to be a public water-course and any interference with that water course will fall under s. 133. The only point taken before me failing, the petition must be dismissed.

V. N. V. *Petition dismissed.*

(1) 23 Ind. Cas. 181; 36 A. 209; 12 A. L. J. 248; 15 Cr. L. J. 229.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 378 OF 1925.

June 30, 1925.

Present:—Mr. Justice Boys.

Musammat BAHRI—ACCUSED

versus

EMPEROR—PROSECUTOR.

Cantonment Act (II of 1924), s. 118 (1) (a) (iii)—Ingredients of offence.

The giving of offence by exposure of one's person is not a necessary ingredient of the offence under s. 118 (1) (*a*) (*iii*) of the Cantonment Act. The offence is complete if the exposure is wilful or indecent and in a public place.

Criminal reference made by the District Magistrate, Jhansi, dated the 28th May 1925.

JUDGMENT.—A woman has been convicted under s. 118 (1) (*a*) (*iii*) of the Cantonment Act (II of 1924) for having "wilfully and indecently exposed her person." The learned District Magistrate has referred the case to this Court, without going into the evidence, on the ground that in his opinion there can be no conviction under that section. He says "that offence is wilful or indecent exposure of the person. If, as alleged, the woman went into the barracks for immoral purposes she can have given no offence by her exposure."

The giving of offence by the exposure is not a necessary ingredient of the offence under s. 118 (1) (*a*) (*iii*). The offence is complete if the exposure is "wilful or indecent" and in a public place.

(Parenthetically I would observe that "or" would seem to be a mistake in the Act for "and." The Legislature could hardly have intended that mere "wilful exposure" not also indecent or mere "indecent exposure" not also wilful should be an offence).

The woman had apparently either deliberately left the barracks improperly clothed or much more probably, because she had no business there, had been compelled to escape in an improperly clothed condition. Even in the latter case, the exposure would be consequence of her own act and would be, therefore, in law "wilful."

But, of course, the facts are to be determined on the evidence.

Let the papers be returned for disposal of the case in accordance with the above observations.

S. D. *Papers returned.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 221 OF 1924.

(CRIMINAL REVISION PETITION No. 190 OF 1924.)

April 2, 1924.

Present:—Mr. Justice Venkatasubba Rao.

DEVASIKAMANI MUDALIAR—COMPLAINANT—PETITIONER

versus

NARAYANA PRASAD—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 202, 203—Complaint against Police Officer—Witnesses of complainant, examination of—Procedure.

Complaints against Police Officers should be handled with the greatest care and the complainant in such cases should be given every facility to prove his allegations. The complaint should not be dismissed without examining the witnesses whom the complainant wishes to produce.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the Chief Presidency Magistrate, Egmore, dated the 12th February 1923, in Application No. 963 of 1924.

Mr. *T. G. Arvamuda Iyengar*, for the Petitioner.

Mr. *K. M. Ganapathi*, for the Accused.

Mr. *K. P. Krishna Menon*, for the Crown.

ORDER.—Serious allegations have been made against the accused who is a Head Constable. If the complaint is true, the accused abused his official position in order to benefit his mother who had dealings with the *soucar* and also to benefit himself.

The complainant should have been given every facility to prove his allegations. He mentioned that he had witnesses but none of them was examined.

It has been held that complaints against Police Officers should be handled with the greatest care. See *Shama* v. *Ejaz Ahmad* (1), *Harihar Prasad* v. *Emperor* (2). Apart from the Magistrate's order being legal or illegal, the question relates to the propriety of the exercise of his discretion under ss. 202 and 203, Cr. P. C.

The Magistrate's order is very laconic.

I direct the Chief Presidency Magistrate by one of the Magistrates subordinate to him to make further enquiry into the complaint.

The order is set aside.

V. N. V. *Order set aside.*

Z. K.

(1) 57 Ind. Cas. 665; 18 A. L. J. 731 at p. 733; 2 U. P. L. R. (A.) 177; 21 Cr. L. J. 649.

(2) 55 Ind. Cas. 679; 21 Cr. L. J. 343.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 435 OF 1924.

December 11, 1924.

Present :—Mr. Justice Srinivasa Iyenger.

RAMASWAMI *alias* DURAIYYA SEMBIMUTHARASU AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 100, 141, 147, 148, 323, 325—Rioting—Unlawful assembly—Common object—Sudden attack by numerous party—Injuries inflicted on former—Offence—Private defence, right of—Appeals arising out of cross-cases, disposal of.

For the purpose of establishing the offence of unlawful assembly which is a necessary element in the offence of rioting, it must be established that the unlawful assembly had a common object by means of criminal force or show of criminal force of doing any of the various things mentioned in s. 141 of the Penal Code, and the common intention of the unlawful assembly to use criminal force must be established as a fact by legal evidence. [p. 540, col. 2.]

There was a dispute between the Pallars and Kallars of a village in respect of the right to catch fish in an *oorani*. The Kallars armed and in large numbers went to the *oorani* to exercise their right and suddenly ran towards and attacked the Pallars, 20 or 30 in number, who were gathered 200 yards off and the latter in the course of the attack inflicted injuries on their assailants. They were convicted of offences under ss. 147, 148, 323 and 325 of the Penal Code:

Held, (1) that no common criminal intention having been established with regard to this assembly of Pallars, they were not members of any unlawful assembly and were not guilty of the offence of rioting; [p. 541, col. 1.]

(2) that in the course of their defending themselves against a sudden and virulent attack by a much larger body of Kallars, the Pallars were entitled to inflict such injuries as they had inflicted, and that consequently, they were not guilty of any offence. [*ibid.*]

Queen-Empress v. *Peelimuthu Thevan* 24, M. 124; 1 Weir. 54, relied on.

It is always desirable that when there are cases and cross-cases the appeals arising from such cases should be posted before and tried by the same Bench. [p. 540, col. 1.]

Appeal against an order of the Court of Session of the West Tanjore Division at Tanjore, in Case No. 19 of the Calendar for 1924.

Mr. *K. S. Jayarama Iyer*, for the Appellants.

Mr. *J. C. Aadm*, Public Prosecutor, for the Crown.

JUDGMENT.—It is always desirable that when there are cases and cross-cases the appeals arising from such cases should be posted before and tried by the same Bench. However, this appeal having come up before me, I am bound to deal with it on the evidence on the record, and on that evidence I have no hesitation in holding that the appellants have not been proved to be guilty of the offences for the commission of which they have been convicted and sentenced. The offences charged were rioting, rioting with deadly weapons and causing hurt and grievous hurt. The dispute was between the Kallars and Pallars of Shori-Kudipatti. The Kallars who were larger in number and considerably more influential than the Pallars had been making arrangement for the purpose of catching fish in the *oorani* with the help of certain Muhammadans from Trichinopoly. The Pallars were objecting to it. The evidence that is accepted by the learned Sessions Judge really is the evidence of the disinterested witnesses, amely, P. Ws. Nos. 3, 4, 5 and 6. Taking their evidence and the finding of the Sessions Judge thereon, there can be no doubt as to what took place. There was an attempt at mediation by the mediators with the Kallars in the village. The Kallars would not have it and they then proceeded in large numbers armed to the *oorani*. The mediators followed them. While passing to the *oorani* they had necessarily to pass through the place where the Pallars were residing. After arriving at the *oorani*, the attempt at mediation was again renewed. It was again rejected by the Kallars. At that time there were about 20 or 30 Pallars seated about 200 or 300 yards away; and the story that the learned Sessions Judge accepts is that the Kallars after the mediation fell through ran towards the Pallars, surrounded them and attacked them. The Pallars naturally in self-defence inflicted injuries on several Kallars. On those facts the question is whether the conviction of these appellants for the offences of rioting, and causing hurt of various kinds can be sustained. For the purpose of establishing the offence of unlawful assembly which is a necessary element in the offence of rioting, it must be established that the unlawful assembly had a common object by means of criminal force or show of criminal force of doing any of the various things mentioned in s. 141, Indian Penal Code. All that could reasonably be inferred from the mere fact of the 20 or 30 Pallars having assembled at that distance from the *oorani* and possibly also from the fact some of them having sticks in their possession i that their intention was to prevent, if possible, the fishing by the Kallars. But

that alone would not be sufficient to establish that their intention was to accomplish it by the use of criminal force. It has been held in *Queen-Empress* v. *Peelimuthu Theven* (1), that the mere fact that a crowd of 100 persons including the accused had assembled together armed with bill-hooks and sticks would not be sufficient to support the inference that their common intention was to use criminal force or to commit any other offence. In the circumstance of this case it is just possible that seeing that the Kallars were proceeding towards the *oorani* armed with weapons, some of the Pallars took sticks with them for purposes of self-defence in case of any unpremeditated attack by the Kallars in the course of any mediation or parley. The common intention of the unlawful assembly to use criminal force must be established as a fact by legal evidence. There is in this case, apart from the fact of this group of 20 or 30 Pallars assembling, some of them with sticks, no evidence which goes to show that their common object was to use criminal force. It is also very significant that there is no evidence whatever that, after the mediation fell through, there was any communication from the leaders of the Pallars' party near the *oorani* to the Kallars seated at a distance. All that happens is a sudden attack by the Kallars. In that attack the Pallars were undoubtedly entitled to defend themselves in the manner and to the extent they did. No common criminal intention having been established with regard to this assembly of Pallars I cannot hold that they were members of any unlawful assembly or that they were guilty of the offence of rioting, much less, of rioting, armed with deadly weapons.

So far as hurt and grievous hurt caused by them are concerned, it is clear that they were caused in the course of their defending themselves against the sudden and virulent attack by a much larger body of Kallars from the *oorani* and I cannot possibly hold that the Pallars were not entitled to defend themselves or, in the course of defending themselves, to inflict such injuries as they did inflict on the attacking Kallars, I must also add that the evidence with regard to the Pallars having possessed themselves of sticks is very meagre and unreliable; and, as the learned Vakil for the appellants suggested, it is quite possible that, in the course of the attack, some of the Pallars wrested the sticks which some of the Kallars had in their possession and inflicted injuries with them. In the result I think the conviction of the accused appellants by the lower Court was wrong. I set it aside and direct that they be acquitted. The bail-bonds executed by them will be dicharged.

V. N. V. *Appeal allowed;*
Z. K. *Accused acquitted.*

(1) 24 M. 124; 1 Weir, 54.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 894 OF 1924.
December 8, 1924.

Present:—Justice Sir Henry Scott-Smith, KT., and Mr. Justice Martineau.

AHMAD—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 201, application of.

Section 201, Penal Code, applies merely to the person who screens the principal or actual offender and not to the principal or actual offender himself. [p. 542, col. 2.]

Torap Ali v. *Queen-Empress*, 22 C. 638; 11 Ind. Dec. (N. S.) 425, followed.

Criminal appeal from an order of the Sessions Judge, Rawalpindi, dated the 10th September 1924.

Mr. *D. R. Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—Ahmad appellant, Dadu his 16 years' old son, *Musammat* Gabo his wife, and *Musammat* Nazar Jan his daughter have been convicted by the Sessions Judge of Rawalpindi of the murder of Bahadur and have been sentenced for transportation for life. They have also been convicted of an offence under s. 201, Indian Penal Code, and for that offence they have been sentenced separately to seven years' rigorous imprisonment; the sentences to run concurrently. They have filed separate appeals through the Superintendent of Jail. The facts, which are given fully in the judgment of the learned Sessions Judge, are very clear and in brief they are that *Musammat* Nazar Jan was the wife of Bahadur, but did not as a rule live with him. Her father wanted Bahadur to divorce her and to marry her to Muhammad Shah, who is said to have joined the other offenders in committing the murder and to have been absconding at the time of the trial. On the 5th April last Dadu went to Rawalpindi and told Bahadur that Nazar

Jan was dying of plague at Saidpur, a village some five miles distant, and if he wished to see her alive he should come at once.

Bahadur and Jamal Din witness went forth to Saidpur, and Bahadur there found that his wife was not ill at all. He demanded the return of the ornaments which he had given to his wife and also told Ahmad that his wife was to be sent back with him, but Ahmad refused to give up either the ornaments or the woman. Bahadur was never seen alive after the night of 5th April and on the 11th April his dead body was found buried in the house of Ahmad upon a clue being given by Dadu. Subsequently Ahmad pointed out a cave on a hill-side from which certain clothes indentified as those of Bahadur were found.

We agree fully with the learned Sessions Judge that Bahadur was murdered in the house of Ahmad, in which all the four appellants were living at the time. From these facts the learned Sessions Judge has concluded that all the four appellants must have joined in the murder and must also have cut up and buried the body after the murder. It must be remembered that Muhammad Shah absconder is also alleged to have taken part in the murder. Under the circumstances we do not think that it can be held with any certainty that the two women and the boy Dadu must necessarily have joined in the conspiracy to commit the murder. It is quite possible that Dadu was ignorant of the object with which Bahadur was summoned to Saidpur. It is also possible that when he was summoned Ahmad may not have formed the intention of murdering him, and that he may have been murdered on the spur of the moment during the night between the 5th and 6th April. If Muhammad Shah joined in the murder it is quite possible that he and Ahmad committed the offence without the other appellants having taken any part in it or even without their having abetted it.

With reference to offence under s. 201, Indian Penal Code, the same difficulty arises. The body may very well have been dismembered and buried by Ahmad and some other person without any assistance from Dadu and the two women. We, therefore, do not think it safe to convict these persons of any offence.

The words of s. 201, Indian Penal Code, lead us to the conclusion that it was meant for persons other than the principal offenders, and this was the view taken in the case reported as *Torap Ali* v. *Queen Emperor* (1) where it was held that this section applies merely to the person who screens the principal or actual offender and not to the principal or actual offender himself. We, therefore, accept the appeals of Dadu, *Musammat* Gabo, and *Musammat* Nazar Jan and setting aside their convictions and sentences acquit them and direct that they be released from custody. We also accept the appeal of Ahmad so far as to set aside the conviction and sentence under s. 201, Indian Penal Code. So far as his conviction under s. 302, Indian Penal Code, is concerned we dismiss his appeal.

R. L. *Appeal partly accepted.*

(1) 22 C. 638; 11 Ind. Dec. (N S.) 425.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 264 OF 1925.

June 9, 1925.

Present :—Mr. Justice Suhrawardy and Mr. Justice Panton.

ISMAIL SHA—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 342, 370—Presidency Magistrate—Judgment, contents of—Examination of accused, particulars of, record of—Reasons for conviction, whether must be recorded.

Where in a trial before a Presidency Magistrate the accused is examined under s. 342 of the Cr. P. C., it is the duty of the Magistrate to record the substance of the examination of the accused and his plea in the judgment. In a case in which such Magistrate inflicts imprisonment or fine exceeding Rs. 200 or both, a brief statement of the reasons for the conviction must also be recorded. Where these particulars are omitted the judgment is not in conformity with the requirements of s. 370 of the Cr. P. C. and is liable to be set aside. [p. 543, col. 1.]

Rule.

Babu *Mahim Chandra Roy*, for the Petitioner.

Mr. *Khondkar*, for the Opposite Party.

JUDGMENT.—This Rule is issued on the ground that the Trial Magistrate erred in not recording the statement of the accused under ss. 342 and 370, Cr. P. C. The Magistrate in his explanation submits that he examined the accused under s. 342. There is no record of the result of the examination but it is noted below the record of the evidence of the witnesses for the prosecution "examined under s. 342." There were three accused persons placed on trial of whom accused No. 3 was acquitted and Nos. 1 and 2 were sentenced to on

month's regorous imprisonment each. The order of the Magistrate is recorded in a form which is used in the Calcutta Police Court which bears numbered heads. Column No. 7 mentions "the plea of the accused and his examination (if any)". There is no entry against this column and in the whole of the record we have not been able to trace what the plea of the accused really was. The judgment of the Magistrate is exceedingly short. He says: "Heard parties: Accused No. 3 acquitted. Numbers 1 and 2 sentenced to a month's rigorous imprisonment each". The record of the case as made by the learned Trying Magistrate is not in accordance with the requirements of s. 370, Cr. P. C. In the first place the plea of the accused and his examination are not recorded as required by cl. (*f*) of that section. In the second place, according to cl. (*i*) of the section, in all cases in which the Magistrate inflicts imprisonment or fine exceeding two hundred rupees or both, a brief statement of the reasons for the conviction should also be recorded. This also is wanting. The Trial Magistrate admits in his explanation that the accused was examined under s. 342. It was, therefore, his duty to record the substance of his examination and his plea. We accordingly think that proper procedure has not been followed in this case and the case should be re-tried.

The result is that this Rule is made absolute, and the conviction and sentence of the petitioner set aside and we direct that he be re-tried according to law.

The petitioner will remain on the same bail until further order of the Magistrate.

M. B. *Rule made absolute;*
Z. K. *Re-trial ordered.*

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 38 OF 1925.

August 7, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

EMPEROR—PROSECUTOR

versus

SUBRAO SESHARAO—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 35—Penal Code (Act XLV of 1860), ss. 64, 69—Conviction for separate offences—Imprisonment in default of payment of fine—Sentences, whether can run concurrently.

Where an accused person is convicted in respect of separate offences and is sentenced to pay a fine, or in default, to suffer imprisonment for a certain period for each of the offences of which he has been convicted, the sentences in default of payment of fine cannot be directed to run concurrently. [p. 543, col. 2.]

It is not incumbent upon a Magistrate to impose a term of imprisonment in default of payment of fine. Section 64 of the Penal Code merely says that it is competent to the Court to pass such a direction, and if the Magistrate wants to avoid giving a second term of imprisonment in default of payment of fine, he can refrain from making a direction under that section. [p. 544, col. 1.]

Criminal reference made by the District Magistrate, Poona.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—In this case the accused was convicted under s. 380, Indian Penal Code, in respect of two separate acts of theft, and he was sentenced to suffer rigorous imprisonment for one day and to pay a fine of Rs. 50, or in default to suffer rigorous imprisonment for three months, for each of the two offences. The Magistrate further directed that the two sentences should run concurrently.

The question is raised by the Superintendent of the Jail, in which the accused was confined whether the sentences of imprisonment in default of payment of the fine could run concurrently. The Jail Superintendent on the authority of s. 64, Indian Penal Code, and a Government Resolution, No. 5851, dated October 26, 1888, Judicial Department, was of opinion that they could not run concurrently. The District Magistrate has referred the question to us. The only judicial authority on the point that has been brought to our notice is the case of *Imperator* v. *Akidullah* (1), where it was held that s. 35, Cr. P. C., did not permit the passing of concurrent sentences of imprisonment in default of fines imposed for two or more offences. It was remarked in the course of the judgment (page 264*):—"In case of part-payment of the fine it would be difficult to estimate what portion of which term of imprisonment should terminate under s. 69, Indian Penal Code." We agree with this ruling. Section 35, sub-s. (1), only authorises concurrent punishments in the case of imprisonment or transportation. It does not for instance authorise concurrent fines. And a Magistrate, if he wants to make the fine for a second or further effence extremely light, in consideration of the fine already imposed for another offence, can easily make it nominal. Then if a Magistrate imposes a

(1) 15 Ind. Cas. 808; 5 S. L. R. 263; 13 Cr. L. J. 536.

*Page of 5 S. L. R.—[*Ed.*]

sentence of imprisonment in default of payment of fine under s 64, Indian Penal Code, the provisions of that section require that that term of imprisonment "shall be in excess of any other imprisonment to which he may have been sentenced."

This implies that it cannot be made to run concurrently with another term of imprisonment. Then, as pointed out in the Sind ruling, a difficulty will arise in regard to the apportionment of a part-payment of fine against the term of imprisonment in default under s. 69, Indian Penal Code. Moreover, it is not incumbent upon a Magistrate to impose a term of imprisonment in default. Section 64 merely says that: "it shall be competent to the Court" to pass such a direction, and if the Magistrate wants to avoid giving a second term of imprisonment in default, he can refrain from making a direction under that section. Therefore, we agree with the view put forward by the District Magistrate and supported by the learned Government Pleader.

We accordingly quash the direction of the Magistrate under s 35, Cr. P. C., that the sentences should run concurrently, except so far as it covers the one day's rigorous imprisonment imposed for each of the two offences.

Z. K. *Direction quashed.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 643 OF 1924.

July 5, 1924.

Present:—Mr. Justice Campbell.

ALIA—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 114, illus. (1)—Penal Code (Act XLV of 1860), s. 412—Possession of stolen property—Presumption—Defence, falsity of.

Possession of stolen goods several months after the theft and at a place several miles away from the scene of theft, does not raise any presumption that the person in possession is either the thief or a receiver of stolen property.

In such a case there is no onus on the accused to explain how he got the property and the prosecution cannot succeed by proving the defence to be false.

Revision of an order of the Additional Sessions Judge, Lahore, dated the 12th January 1924.

Pir *Taj-ud-Din*, for the Petitioner.

Mr. *Ahmad Hasan*, for Government Advocate, for the Respondent.

JUDGMENT.—This judgment will dispose of Criminal Revisions Nos. 643 and 644 of 1924. The petitioner has been convicted of two offences under s. 412, Indian Penal Code, and the findings of the learned Sessions Judge are as follows:—

On the night of the 26th April 1922 a number of currency notes were stolen from the house of Nawab Sadullah Khan at Lahore. One of these notes was sold in the Karnal District by Alia petitioner to one Sardha Ram in the following August and three in the ensuing month of September. The learned Sessions Judge has held that possession by Alia of the notes having been proved it was for him to explain where he got them and that since Alia was in possession of the notes a few months after the theft the legal presumption is that he is either the thief or a receiver of stolen property.

I cannot agree with this proposition. All that the learned Counsel, who represents the Crown, can say in support of the conviction is to refer to the first Illustration under s. 114, Indian Evidence Act. This Illustration deals with the case of a man in possession of stolen goods soon after the theft. The petitioner is not proved to have been in possession of these notes soon after they were stolen. He was also in possession of them many miles from Lahore where they were stolen and no connection between the petitioner and Lahore or any person likely to have stolen the notes at Lahore has been proved. I suspect that the learned Sessions Judge has been influenced by the fact that the petitioner is a member of a criminal tribe which fact in this particular connection is irrelevant.

According to the prosecution evidence the transfer of the notes by the petitioner to Sardha Ram was done perfectly openly and the learned Sessions Judge appears to have accepted statements that the petitioner is a well-to-do man. It is true that his defence has been throughout that he was never in possession of the notes but the prosecution was not entitled to succeed merely by proving this defence to be false. In short no presumption was justified from the fact of possession that the petitioner knew or had reason to believe the notes to be stolen and admittedly there is no evidence direct or indirect of any such guilty knowledge.

The convictions must, therefore, be set aside. I accept both petitions and acquit the petitioner who will be released from Jail.

R. L. *Petitions accepted.*

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS Nos. 961 AND 962 OF 1923.

February 27, 1925.

Present:—Mr. Justice Wallace.

GOKARAKONDA VENKATASUBBIAH—DEFENDANT No. 1—PETITIONER

versus

DELIPARTHI LAKSHMINARASIMHAM AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, rr. 6, 7—Order declaring defendant ex parte, *whether bar to appearance in subsequent proceedings.*

An *ex parte* order under r. 6 of O. IX of the C. P. C only covers the period during which the party is actually absent and does not act as a bar to his subsequent appearance. He is not, therefore, prevented from appearing later and proceeding with the case at the stage at which it then is. [p. 545, col. 2; p. 546, col. 1.]

Rule 7 of O. IX of the C. P. C. applies to a party who wishes to be relegated back to the position which he would have been in, if he had appeared at a previous hearing at which he was absent, and who wishes the proceedings, taken in his absence, to be taken over again in his presence, so that he may regain the opportunities of cross-examination, etc., which he has lost by his absence. The words "*ex parte*" in the rule apply only to the hearing on the particular day when that hearing and adjournment *ex parte* is made. There is no ground for extending its operation to all subsequent hearings of the suit [p. 546, col. 1.]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Additional Subordinate Judge, Kistna at Masulipatam, dated the 13th October 1923, in I. A. No. 136 of 1923, in O. S. No. 11 of 1923 and I. A. No. 135 of 1923, in O. S. No. 32 of 1923 respectively.

Mr. *M. Patanjali Sastri*, for the Petitioner.

Messrs. *V. Krishna Mohan*, *Ch. Raghava Rao* and *P. Bapiraju*, for the Respondents.

JUDGMENT.—These two civil revision petitions are presented against the orders of the lower Court declining to set aside the *ex parte* order passed against the petitioner. The petitioner was the 1st defendant in two suits, O. S. No. 11 of 1923 and O. S. No. 32 of 1923. He had appeared in the suits and put in written statements. On one of the hearing days, namely, 27th September 1923, he was absent and the Court "declared him *ex parte*." The evidence for the plaintiff was adduced on that date and the hearing was adjourned to 13th October 1923. On that day the 1st defendant appeared and put in a petition under O. IX, r. 7, praying that the *ex parte* order against him may be set aside. The lower Court dismissed that petition, and the present civil revision petitions are filed against that order. The decree in the case has not yet been passed as further trial has been stayed by this Court; so that no question of setting aside an *ex parte* decree has yet arisen.

The plea put forward by the 1st defendant for his absence was sickness and want of money. His allegations were challenged by the plaintiffs in the suits and the lower Court refused to believe these allegations and found that the 1st defendant had not shown sufficient cause for his absence to justify its setting aside the order under O. IX, r. 7. The lower Court was entitled to come to that conclusion; and there is no lack of jurisdiction or irregular exercise of jurisdiction in its order. On the face of the record, I find there is no reason for interference in revision.

The petitioner, however, has stated that the Subordinate Judge's view is that he, having been once declared *ex parte* in the suits, is debarred from subsequently appearing, even if he was prepared to resume the case from the stage it had reached and not ask that the proceedings which went on in his absence be cancelled, *i.e.*, it is suggested that the Subordinate Judge's view is that the *ex parte* order passed by him on 27th September 1923 prevents the 1st defendant from appearing at all again in the suits until and unless that order is set aside and that *ex parte* decrees must follow if the plaintiffs have made out any case at all. The respondents to these petitions do not challenge, but uphold this view. The petitioner before me states that all he now wants is to be allowed to put forward his evidence, the suits having merely reached the point at which the plaintiffs' evidence has been closed. Is he debarred from doing that or is he not? I have had this point argued before me in order to decide for the guidance of the lower Court whether the *ex parte* order does or does not now bar the petitioner from resuming appearance in the suits at the stage at which they now are. The point is a novel one and there is an absence of authority on it. But my view is that the petitioner is not so debarred, in other words, that the *ex parte* order only covers the period during which the party was actually absent and does not act as a bar to his subsequent appearance. Respondents contend that this view is opposed to O. IX, r. 7; but I do not think so.

One cardinal principle to be observed in trials by a Court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing. It follows that a party should not be deprived of that right, and in fact the Court has no option to refuse that right, unless the C. P. C., deprives him of it. Is there any rule of procedure then which gives power to a Court to say to a party when he appears to plead his case that it cannot hear him because at the previous hearing he was absent? I do not so read O. IX, r. 7. That applies to a party who wishes to be relegated back to the position which he would have been in, if he had appeared at a previous hearing at which he was absent, and who wishes the proceedings, taken in his absence to be taken over again in his presence, so that he may regain the opportunities of cross-examination, etc., which he has lost by his absence After all *ex parte* only means that the party has not been heard because he was absent and the adjournment of the hearing. *Ex parte* in the words of r. 7 applies only to the hearing on the particular day when that hearing and adjournment *ex parte* was made. I do not see any ground for extending its operation to all subsequent hearings of the suit.

The mere physical appearance of a party or his Pleader has no special effect on the procedure in the suit. For example, a party who has no special interest in a particular part of the case being heard and does not intend to take any part in that part of the trial may surely absent himself on the days when that part of the trial is being heard without incurring as a penalty his total exclusion from the case. He no doubt forfeits any opportunities he would otherwise have had of taking part in those days proceedings, but I cannot see how he would forfeit anything more, or that he could by any rule of procedure be prevented from appearing in future when the part of the suit in which he is interested comes on for hearing. Mere absence on certain days does not make him *ex parte* for the rest of the trial but only *ex parte* for those hearings at which he was absent. He is not prevented from appearing later and proceeding with the case at the stage at which it then is. His right to come on at that stage would, of course, depend on the stage at which the trial then stood.

In the present case if the plaintiff had closed his case and the petitioner had been called upon to produce his case and he was absent and, therefore, made *ex parte* as regards the presentation of his case, I take it that he would not be allowed to come on later unless he got the *ex parte* order set aside under O. IX, r. 87. But if the plaintiff had closed his case and the petitioner had not been called upon to produce his case, there could be no *ex parte* order against him with reference to his presentation of his case, which had to be set aside. Therefore, he could appear and go on with his case on the adjourned date from the stage at which it stood.

There is a paucity of authority on the point. The learned Vakil for the petitioner has drawn my attention to two rulings of the Allahbad High Court: *Mannu* v. *Tulshi* (1) and *Bhagwat Prasad Tewari* v. *Muhammad Shibli* (2). They support the view I have taken. A case reported as *Satyendra Nath* v. *Narendra Nath* (3), though slightly different on the facts, was decided on the same principle. With these remarks, I dismiss these petitions with costs, one set to each plaintiff.

V. N. V. *Petitions dismissed.*

(1) 64 Ind. Cas. 958; 20 A. L. J. 39; (1922) A. I. R. (A.) 33.

(2) 66 Ind. Cas. 892; 20 A. L. J. 270; (1922) A. I. R. (A.) 110.

(3) 81 Ind. Cas. 867; 39 C. L. J. 279; (1924) A. I. R. (C.) 806.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1450 OF 1922.

February 2, 1925.

Present:—Mr. Justice Venkatasubba Rao.

PALANI GOUNDAN AND OTHERS—APPELLANTS

versus

SUPPIA GOUNDAN AND OTHERS—DEFENDANTS NOS. 1 AND 2 AND PLAINTIFFS NOS. 1 TO 4 AND 6 TO 8—RESPONDENTS.

Res judicata—*Hindu Law—Widow—Reversioner, declaratory suit by, to set aside alienation by widow—Dismissal on finding against plaintiff's reversionary title—Suit for possession on widow's death, whether barred—Mutuality.*

Where a suit brought by a person alleging himself to be the nearest reversioner to the estate of a deceased Hindu for a declaration that an alienation by the widow of the deceased is not valid beyond her lifetime is dismissed on the ground that the plaintiff is not a reversioner at all, the decision operates as *res judicata* in a subsequent

suit brought after the death of the widow for possession of the properties by a successor-in-interest of the alleged presumptive reversioner. [p. 548, col. 1.]

The fact that in dismissing an application in the first suit by the plaintiff to withdraw it with liberty to file a fresh suit, the Court made an observation that the order refusing permission would not affect plaintiff's right to bring a suit for possession after the widow's death, is immaterial where the Court actually proceeded to hear the case and dismissed the suit on its merits. [p. 550, col. 1.]

[Case-law considered.]

One test of *res judicata* is mutuality. A party will not be concluded against his contention by a former judgment unless he could have used it as a protection, had the judgment been the other way. [p. 548, col. 2; p. 549, col. 1.]

Second appeal against a decree of the Court of the Subordinate Judge, Coimbatore, in A. S. No. 1 of 1921, preferred against that of the Court of the District Munsif, Tiruppur, in O. S. No. 267 of 1918.

Mr. *T. V. Ramanatha Iyer*, for the Appellants.

Messrs. *A. Venkataraliah* and *L. Venkata Narasiah*, for the Respondents.

JUDGMENT.—The question to be decided in this appeal is, has the subject-matter of the action become *res judicata?* The plaintiffs derive their title from one Muthu Goundan, and the defendants from Palani Ammal, the widow of the last male-holder. Muthu filed as the presumptive reversioner of the estate of one Raya Goundan, O. S. No. 83 of 1908 for a declaration that a mortgage executed by Palani in favour of the 2nd defendant in that suit was not binding upon the reversicnary heirs. Palani, who was the 1st defendant as also the mortgagee-defendant, denied the relationship set up by the plaintiff. The first issue framed in the case raised the question whether Muthu was related in the manner alleged in the plaint and was the reversioner as claimed. After a witness was examined, Muthu, discovering that the pedigree on which he relied was wrong, applied to be allowed to withdraw the suit with permission to file a fresh suit. The Court refused the permission and the plaintiff having declined to withdraw the suit without such permission, the Court disposed of the case on the merits. The issue relating to Muthu being the reversionary heir was found against him and the suit was dismissed. Muthu then filed an appeal which was also dismissed. In the present suit Muthu alleges that he has become the actual reversioner in whom the estate has vested and possession is claimed on that footing. The matter really decided becomes apparent from the following passage of the judgment of the District Munsif in O. S. No. 83 of 1908:—

"In the affidavit now filed by the plaintiffs in support of their petition for withdrawal of the suit with permission to sue again, they admit that the pedigree given by them along with the plaint is not correct. Exhibit I, the registration copy of sale-deed executed by first plaintiff's father, shows that the 1st plaintiff's grandfather was not Perumal Goundan as given in the plaintiffs' pedigree but his name was Chinna Thirumalai Goundan. From Ex. II the division release deed between plaintiffs Nos. 2 to 4 attested by the 1st plaintiff, it is also clear that 1st plaintiff is not related to the other plaintiffs as he claims to be in the pedigree. The burden of proving the relationship to 1st defendant's husband and thus their reversionary right to his estate lies heavily on the plaintiffs and, they have failed to discharge it. I find the first issue against the plaintiffs and, on that finding alone, dismiss the suit".

The Subordinate Judge, in appeal from the decision of the District Munsif, thus deals with the question:—

"Upon the evidence on the record the lower Court has found that plaintiffs have failed to prove their reversionary right and I concur in its finding. The appeal is dismissed with costs".

The point, therefore, to be decided is, whether the question of the reversionary right of Muthu has become *res judicata.* This issue has been decided in favour of the plaintiff by the lower Courts and the third defendant appeals.

It is now settled law that a suit by a reversioner during the lifetime of the widow is a representative one and enures for the benefit of all the reversioners and is equally operative to the detriment of all. See *Venkatanarayana Pillay* v. *Subbammal* (1) and *Challagundla Varamma* v. *Madala Gopaladasayya* (2). The last case cited illustrates very forcibly this rule and gives full effect to the principle. The presumptive reversioner at the date of the alienation by failing to bring a suit within the 12 years allowed became barred under Art. 125

(1) 29 Ind. Cas. 298; 38 M. 406; 17 M. L. T. 435; 28 M. L. J. 535; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 21 C. L. J. 515; 42 I. A. 125 (P. C.)

(2) 46 Ind. Cas. 202; 41 M. 659; 35 M. L. J. 57; 24 M. L. T. 115; 8 L. W. 62; (1918) M. W. N. 461 (F. B.).

and his omission was held to preclude all reversioners including even subsequently born reversioners from questioning the alienation during the widow's lifetime, although, be it noted, that subsequently born reversioners became on their birth nearer presumptive reversioners than the person whose omission led to this result.

There can thus be no doubt that a judgment obtained by the presumptive reversioner that an alienation is good is binding during the lifetime of the widow on the whole body of reversioners; and conversely a decision obtained by the presumptive reversioner against the widow that an alienation is not binding, is *res judicata* and cannot be questioned by the widow during her lifetime in any subsequent suit brought by any other reversioner.

The question then arises, does the death of the widow make any difference? In *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (3) the facts are, that the then presumptive reversioner filed a suit during the widow's lifetime and obtained a declaration that an alienation was not binding on the widow's death. She then died and succession opened to the plaintiff who was the actual reversionary heir and in his suit he was held entitled to take advantage of the previous decision and to rely upon it as *res judicata*.

Pogula Hussain Reddy v. *Yasaggari Venkata Reddy* (4) decided by Wallace and Jackson, JJ., is the converse of *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (3). The previous suit in the lifetime of the widow by the presumptive reversioner was dismissed on the ground that the alienation was for a justifiable purpose. The second suit by the actual reversioner after the widow's death was held barred on the ground of *res judicata*. To the same effect is my own judgment in S. A. No. 923 of 1921. In the suit against the widow by the presumptive reversioners, their right was found against on the ground that the last male-holder had left a Will. This judgment, I held, operated as *res judicata* precluding the actual reversioner from re-agitating the question after the death of the widow.

Lakshmi Kantaiyammi v. *Inuganti Rajagopal Rau* (5) has also a very direct bearing on the issue to be decided. *S* filed a suit claiming as reversionary heir entitled to inherit after the death of the defendant, the mother of the last male owner. She defended that suit on the ground that the properties were her *stridhanam* and that her daughter and daughter's son were entitled to succeed to them after her. *S* died during the pendency of the suit and *R* who alleged to be his adopted son, was substituted for him. The said daughter and the daughter's son were also made parties to the suit. A decree was passed declaring that certain alienations made by the mother were invalid against the reversionary heir. The mother having died after decree, *R* brought as the nearest reversioner, a second suit against the daughter and the mother for possession of the property. The point to be decided was, whether the matter of the reversionary right became *res judicata*. Collins, C. J., and Parker, J., held that the contention of *res judicata* was well-founded. They observed:—

"As the issue was tried by a Court of competent jurisdiction between the same parties litigating under the same title, we can see no reason why the question between them should not be *res judicata* under s. 13? See bottom of page 346*".

The Privy Council observing at page 350*, that the question whether *R* was the nearest reversioner was distinctly raised in the earlier suit, confirmed the decree of the High Court and held that the previous decision was conclusive between the parties in the second suit. This ruling would be a direct authority but for the fact that in the present case reversioner did not succeed in the first suit but lost it. But does this fact make any difference? Hukum Chand points out that the test of *res judicata* is mutuality. He cites the observations of Petheram, C. J., in *Surendernath Pal Chowdhry* v. *Broja Nath Pal Chowdhry* (6) and Muthusamy Iyer, J., in *Gnanambal* v. *Parvathi* (7) to the effect that estoppel is mutual, that a particular judgment if obligatory upon either is binding upon both. He says that a party will not be concluded against his contention by a former judgment unless he could have used it as a protection, had

(3) 82 Ind. Cas. 962; 51 I. A. 381; (1924) A. I. R. (P. C.) 247; 10 O. & A. L. R. 1105; 40 C. L. J. 461; 47 M. L. J. 824; 46 A. 831; 23 A. L. J. 168; 27 Bom. L. R. 130, 21 L. W. 295; 1 O. W. N. 640; L. R. 6 A. (P. C.) 1; 29 C. W. N. 606 (P. C.).

(4) 83 Ind. Cas. 140; 47 M. L. J. 545; 20 L. W. 552; (1924) M. W. N. 730; (1925) A. I. R. (M.) 86.

(5) 21 M. 244; 25 I. A. 102; 2 C. W. N. 337; 7 Sar. P. C. J. 325; 7 Ind. Dec. (N. S.) 599 (P. C.).

(6) 13 C. 352; 6 Ind. Dec. (N. S.) 735.

(7) 15 M. 477; 5 Ind. Dec. (N. S.) 681

*Pages of 21 M.—[*Ed.*]

the judgment been the other way; The result therefore is that the Privy Council having held in *Sriraja Rao Lakshmikanthiammi* v. *Srirajah Inuganti Rajagopala Rao* (5) that a decision favourable to the reversioner could be used against the widow, the converse of the proposition is eqully true that the widow who obtained a judgment in her favour could use it as a protection against the reversioner. As Mr. Justice Mahmood in *Jamaitunnissa* v. *Lutfunnissa* (8) says :--

"A finding which conclusively binds one party must necessarily bind the opposite party also, and that but for this reciprocity, the rule of *res judicata*, far from attaining its object of putting an end to litigation, would only achieve the contrary result of increasing litigation". (See Hukum Chand's Res Judicata, 1894 Edition p. 24. See also *Liliabati Misrain* v. *Bishen Chobey* (9).

In *Nawab* v. *Punjaba* (10) it was held, that in similar circumstances a second suit by a reversioner after the death of the widow was barred as *res judicata*.

Fateh Singh v. *Jagannath Baksh Singh* (11) a decision of the Judicial Committee, is almost conclusive against the respondent. Certain reversioners instituted a suit for cancellation as void of a deed of gift executed by the widow of the last male-holder. Besides the widow and the alienee there were others who were impleaded as defendants, one of whom was Ganga Baksh. The plaintiffs admitted that they were remoter in relationship to the common ansestor than Ganga Baksh who being the nearest reversioner would ordinarily be the person entitled to question the alienation. The plaintiffs, however, based their right to sue upon Ganga Baksh's indifference to his rights and collusion with the widow and the alienee. During the pendency of the suit the widow died and the plaintiffs applied for permission to amend the plaint by adding a prayer for possession and by adding a new ground of claim, namely, that according to a custom alleged, the nearer as well as the remoter heirs both inherit the property according to the shares of their fathers *per stirpes*. The application for amendment was disallowed on the ground that it was material to allege the family custom in the suit even as originally laid and that the plaintiffs not having then alleged it ought not to be permitted to introduce this ground at a later stage. Thereupon the suit itself was disposed of and the material portion of the judgment is as follows:—

"I, therefore, order that the plaintiffs being one degree remoter to the last male-holder than defendant No. 3, they have no cause of action. The suit must be, therefore, dismissed."

Some of the reversioners who instituted this suit instituted a second suit (the widow having as stated above died) against the alienee and the representatives of Ganga Baksh for possession of the property. One of the defences raised was that the subject-matter of the action was *res judicata*. The Courts in India held that the question became *res judicata* and the Judicial Committee upheld this view.

As an authority on the question involved in the present case, this decision is extremely valuable for the following reasons :—

(1) The plaintiffs who brought the second action were identical with some of the plaintiffs who instituted the first suit. In this respect there is substantial agreement between the facts of this case and the one decided by the Judicial Committee.

(2) The first suit was instituted during the lifetime of the widow, the second after her death. In the present case also, these facts exist.

(3) If the plaintiffs, at the time of the first suit, had been the presumptive reversioners, they would have become, on the facts, upon the death of the widow, actual reversioners. In this respect also, there is no difference between the two cases.

Let us now see what their Lordships did. They construed the judgment in the earlier suit as amounting to a negation of the plaintiffs' reversionary rights. In the second suit, they held that the questions could not be again raised. I may reproduce their own words:—

"They (the plaintiffs) claimed as next heirs and their claim was dismissed. They cannot fight it over again".

Their Lordships felt no difficulty by reason of the fact that the first suit was for declaration and the second suit was for possession. Nor did they refuse to apply the prin-

(8) 7 A. 606 at p. 619; A. W. N. (1885) 89; 4 Ind. Dec. (N. S.) 657.

(9) 6 C. L. J. 621 at p. 627

(10) 59 Ind. Cas. 946; 4 L. L. J. 442.

(11) 91 Ind. Cas. 280; 48 M. L. J. 64; (1925) A. I. R. (P. C. 55; 2 O. W. N. 25; 12 O. L. J. 117; L. R. 6 A. (P. C.) 50; 27 O. C. 334; 27 Bom. L. R. 725; 29 C. W. N. 749; 47 A. 158; 23 A. L. J. 739; 22 L. W. 58 (P. C.).

ciple of *res judicata* on the ground that whereas the earlier suit was directed against the widow, the later one was filed after her death. What is even more significant is, that notwithstanding these facts, they gave full effect to the doctrine of *res judicata* holding, as they did, that the case fell within Explanation IV of s. 11, C. P. C., which runs thus:—

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

The plaintiffs in the previous suit ought to have alleged the family custom and not having alleged it, they were precluded from relying on that ground in the second action.

The respondent supports his contention that the matter has not become *res judicata*, by relying upon the following passage in the order of the District Munsif in the previous suit, the order referred to by me, by which permission to withdraw from the suit with liberty to file a fresh suit, was refused :

"After all this suit is only for a declaration and there is no hardship for the plaintiffs, if no permission to bring a fresh suit for declaration is granted, for they could after the widow's death bring a suit for possession, contesting also the present alienations".

I fail to see how these observations of the Munsif can prevent the rule of *res judicata* from applying In *Fateh Singh* v. *Jagannath Baksh Singh* (11), already referred to, a similar contention was put forward by reason of the words "I leave them to the liberty of filing a fresh suit for possession" occurring in the previous judgment. But that contention was overruled by the Judicial Committee. The respondent also relies upon *Pandillapalai Singha Reddi* v. *Yeddula Subba Reddi* (12). The second suit for possession was held not barred under O. XXIII, r. 1, by reason of the first suit for declaration being withdrawn without liberty. This is clearly not an authority in favour of the respondent. Order XXIII, r. 1, cl. 3, says:—

"Where the plaintiff withdraws from a suit ...without the permission referred to in sub-r. (2) he shall be...precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim".

The case referred to decided that the suit for possession cannot be considered as having been brought in respect of the same subject-matter as the earlier suit for declaration. In the present case this section is utterly inapplicable for the very simple reason that the plaintiff has not withdrawn from the suit without permission. It was open to the plaintiff to have adopted this course. But the case was allowed to be tried and judgment was delivered in due course.

I am clearly of the opinion that the subject-matter of the action has become *res judicata* and that the plaintiff's suit, therefore, fails. The second appeal is accordingly allowed and the suit is dismissed with costs throughout.

I must add that the appellant's Vakil intimated to me that he is in a position to show that the judgment of the lower Appellate Court cannot be sustained even in second appeal on the merits. As I have come to the conclusion that the plaintiff must fail on the ground of *res judicata*, I have not heard arguments on the other questions.

V. N. V.
Z. K. *Appeal allowed.*

(12) 35 Ind. Cas. 185; 39 M. 987; 31 M. L. J. 48; 20 M. L. T. 62; (1916) 2 M. W N. 1; 4 L. W. 1.

RANGOON HIGH COURT.
FULL BENCH.

CIVIL REFERENCE NO. 12 OF 1925.
September 29, 1925.

Present:—Sir John Guy Rutledge, KT., Chief Justice, Mr. Justice Heald and Mr. Justice Chari.

THE MUNICIPAL CORPORATION OF RANGOON—APPELLANT
versus
M. A. SHAKUR—RESPONDENT.

Rangoon Municipal Act (VI of 1922), ss. 14, 199—Civil Procedure Code (Act V of 1908), s. 115—Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Chief Judge, Rangoon Small Cause Court—Jurisdiction under s. 14—Court or persona designata*—Revision—High Court, power of.*

When by an Act of the Legislature, a new authority is constituted for the purpose of determining questions concerning rights which are themselves the creations of the Act, and a Judge or Presiding Officer of a Court, as distinct from the Court itself is directed to perform the functions of the newly created

authority, then it must be presumed, unless the contrary is expressly enacted or necessarily implied, that the intention of the Legislature was that the Judge or Presiding Officer should perform these functions as a *persona designata* and not as a Court. Such a presumption is stronger in the case of a Court like the Rangoon Small Cause Court which consists of a plurality of Judges when only one particular Judge is invested with the new powers. [p. 556, cols. 1 & 2.]

[Case-law discussed.]

The Chief Judge of the Rangoon Small Cause Court in performing the functions assigned to him by s. 14 of the Rangoon Municipal Act acts as a *persona designata* and not as a Court, and the High Court of Judicature at Rangoon has no power of interference in revision with his decisions either under s. 115 of the C. P. C. or under s. 107 of the Government of India Act. [p. 556, col. 2.]

JUDGMENT.

Doyle, J.—(*August 17, 1925*).—In Civil Revision No. 88 of 1925, I held, following the ruling in *Mahommed Ebrahim Moolla* v. *Jandass* (1) that, although s. 14 of the Rangoon Municipal Act declared that the decision of the Chief Judge of the Rangoon Small Cause Court on matters referred to in that section was final, the section did not oust the jurisdiction in revision of the High Court. My grounds for following that ruling were that the wording of s. 14 of the Rangoon Municipal Act was similar to that of s 18 of the Rangoon Rent Act. My attention was not drawn during the hearing of that revision case to s. 199 of the City of Rangoon Municipal Act which provides that, the decision of the Chief Judge of the Rangoon Small Cause Court, unless it is otherwise expressly provided by the said Act on any matters in respect of which he exercises his powers of jurisdiction, shall be final. An application has now been filed for a review of my order on the ground that the omission to consider s. 199 constituted, if not an error of law, apparent on the face of the record, at any rate, a sufficient reason by analogy for a review of the order passed by me.

I have no hesitation in saying that, had my attention been drawn to s. 199 of the Rangoon Municipal Act instead of deciding the case on my own initiative, I should have submitted the question, as to the finality of the order of the Chief Judge of the Rangoon Small Cause Court, to a Bench of the High Court.

In view of the fact that the party who applied for review has no further recourse and of the circumstance that my decision, although not necessarily erroneous, was come to without considering a very material section of the Rangoon Municipal Act, I am of opinion that sufficient ground exists for a review.

Section 199 of the Rangoon Municipal Act sets forth that notwithstanding anything contained to the contrary in the Rangoon Small Cause Court Act, 1920, or any other enactment, the Chief Judge of the Rangoon Small Cause Court shall exercise all powers and jurisdiction conferred on and vested in the said Judge under the provisions of this Act, and, unless it is otherwise expressly provided by this Act, his decision, on any matters in respect of which he exercises such powers or jurisdiction, shall be final.

It is argued on behalf of the applicant that this section gives a definition of finality which expressly excludes recourse to any legal remedy unprovided for by the Rangoon Municipal Act. This contention would, at first sight, appear to be unimpeachable. Unfortunately, however, whereas, in the Rangoon Rent Act, there is no provision for an appeal from the decision of the Chief Judge of the Court of Small Cause Rangoon there is provision (under s. 91 of the Rangoon Municipal Act, for instance) for an appeal in certain circumstances from the decision of the Chief Judge of the Rangoon Small Cause Court. It was, therefore, essential that there should be some clause to qualify the last phrase of s. 199 of the Rangoon Municipal Act providing that the jurisdiction of the Chief Judge of the Rangoon Small Cause Court should be final. It is, therefore, a matter of considerable doubt as to whether the definition of s. 199 of the Rangoon Municipal Act extends the finality of the decisions of the Chief Judge of the Rangoon Small Cause Court beyond the finality of his decisions under the Rangoon Rent Act. In s. 200 of the Rangoon Municipal Act it is held that, for the purposes of any appeal, inquiry or proceeding, under this Act, the Chief Court or the Chief Judge of the Rangoon Small Cause Court may exercise all the powers conferred on the said Court by the C. P. C., 1908, or the Rangoon Small Cause Court Act, 1920, as the case may be, and the said Chief Judge shall observe the procedure prescribed in the said Code, and act, so far as the same is consistent, with the provisions of this Act. It has been argued that this section limits the power of the High Court. To my mind it leaves the power of the High Court untrammelled and, so far as it is a limiting section,

(1) 70 Ind. Cas. 135; 11 L. B. R. 387.

it merely deals with the procedure to be followed by the Chief Judge of the Rangoon Small Cause Court.

Had I been free to discuss this case without considering the Full Bench ruling in *Mahommed Ebrahim Moolla* v *Jandass* (1), I should have been prepared to hold that s. 199, read with s. 14 of the Rangoon Municipal Act, precluded the High Court from interfering in revision in the case under consideration. In the Full Bench decision first cited, the late Chief Justice held that the ordinary legal meaning of the word "final" was that the order was not appealable.

He did not discuss this point at length but referred to the case of *Balkaram Rai* v. *Gobind Nath Tiwari* (2), in which case he held that the matter had been fully considered. With all due respect to the late learned Chief Justice, I am unable to find in the decision quoted by him any countenance for the theory that the word "final," as applied to a decision means that, although not appealable, it is open to revision. Far from that being the case, Edge, C. J., who discussed the point at length, appears to have held the exact opposite. On page 152* of the judgment in question he says: "another contention was that the word term 'final' in s. 5 of the Court Fees Act does not mean final as that term is understood in law, and that the decision of the Taxing Officer, the Chief Justice or the Judge appointed under s. 5 is open to appeal or revision." The only interpretation, which can be placed on the remarks of Edge, C. J., is that he holds that the term "final," as understood in law signifies that the decision is not open to appeal or revision. Again at page 158*, he says: "I have consequently come to the conclusion that not only did the Legislature intend that the decision, under s. 5 of the Court Fees Act of the Taxing Officer of the High Court, or of the Chief Justice, or the Judge appointed under s. 5 should for all purposes be final, but that the Legislature has been careful to avoid providing or suggesting any means by which such decisions might be questioned. Whether or not such decisions ought to be open to appeal, review or revision is another question as to which I do not feel bound to express an opinion." That Edge C. J., did not use the word "revision" in the sentence quoted by the late learned Chief Justice of the High Court in *Mahommed Ebrahim Moolla* v. *Jandass* (1), was due to the fact that the question under review was a question as to whether an appeal lay. It is significant that the head-note to *Balkaram Rai* v. *Gobind Nath Tewari* (2) states that, "a decision under s. 5 of the Indian Court Fees Act is not open to appeal, revision or review and is final for all purposes, and no means have been provided or suggested by the Legislature for questioning it."

Finally, on page 152*, Edge, C. J., remarks: "I have no doubt that the term 'final' in s. 5 of the Court Fees Act has precisely the same meaning as the term 'final' in s. 12 of that Act". In so far as s. 5 of the Court Fees Act contains a qualifying clause it is analogous to s. 14, Rangoon Municipal Act, while, in s. 12, Court Fees Act, like s. 18, Rangoon Rent Act, the phrase shall be final is unqualified.

It would appear to me, therefore, that, while the decision in *Mahommed Ebrahim Moolla* v. *Jandass* (1), may be sound yet it finds no support in *Balkaram Rai* v. *Gobind Nath Tewari* (2).

Section 115 of the C. P. C. invests the High Court with a power to interfere where a subordinate Judge has not followed the ordinary principles which should guide him in coming to a decision. It would appear to me to be advisable that there should always be inherent in the High Court such power of interference. On the other hand, it is pointed out, with a good deal of free, that such a power of interference, if contemplated in a case like the particular one now under review, would lead, as in the present case, to grave inconvenience since a constituency might remain practically disfranchised for some considerable time pending a final decision by the High Court. It is argued, therefore, that it was with a view to preventing the High Court from exercising this power of revision that s. 199 of the Rangoon Municipal Act was specially enacted.

In view of the great public importance of the question now under issue, I submit, for the decision of a Bench, the following question :—

Under s. 199 of the Rangoon Municipal Act is the High Court of Judicature at Rangoon precluded from exercising its power of revision under s. 115 of the C.P.C.

Mr. *N. M. Cowasjee*, for the Applicant.
Mr. *M. Auzam*, for the Respondent.

(2) 12 A. 129; A. W. N. (1890) 39; 6 Ind. Dec. (N. S.) 831.

*Pages of 12 M. I. A.—[*Ed.*]

JUDGMENT OF THE FULL BENCH.

This is a reference made by Mr. Justice Doyle, a Judge of this Court. The matter arises in the following way. Mr. M. A. Shakur was a Councillor in the Rangoon Municipal Corporation. He became a sub-contractor under a contractor employed by the Corporation and the question arose whether he became disqualified for office by reason of s. 12 of the Rangoon Municipal Act (Bur. Act VI of 1922). On application to the Chief Judge of the Rangoon Court of Small Causes under s. 14 of that Act the learned Judge held that he had become disqualified. Mr. Shakur being disqualified with the order took it up in revision to the High Court and Mr. Justice Doyle sitting as Revision Judge came to the contrary conclusion and was of opinion that he had not become disqualified. An application for review was then filed on behalf of the Municipal Corporation and it was urged before Mr. Justice Doyle that the High Court had no jurisdiction to interfere in revision with the decision of the Chief Judge of the Court of Small Causes. The learned Judge after hearing arguments made a Reference in the following terms. "Under s. 199 of the Rangoon Municipal Act is the High Court of Judicature at Rangoon precluded from exercising the powers of revision under s. 115 of the C. P. C." The terms of the Reference are not satisfactory. As we understand that the parties desired to argue the matter on all points and not merely with reference to the provisions contained in s. 199 of the Rangoon Municipal Act, we allowed Counsel on both sides to argue the matter in all its bearings and we have decided to deal with the Reference after amending the order to read as follows:— "When the Chief Judge of the Court of Small Causes, Rangoon, exercises any of the powers conferred on him by s. 14 of the Rangoon Municipal Act is his decision open to revision by the High Court of Judicature at Rangoon?" We have confined the Reference to the powers which the Chief Judge of the Court of Small Causes, Rangoon, exercises in respect of qualifications of Councillors.

It is desirable first to refer to the relevant sections. Section 13 of the Rangoon Municipal Act enacts that a Councillor shall cease to hold office as such, *ipso facto* on his becoming disqualified by reason of the provisions of s. 12. Section 14 runs as follows:—

"Whenever it is alleged that any Councillor has become disqualified for office for any reason aforesaid, and such Councillor does not admit the allegation, or whenever any Councillor is himself in doubt whether or not he has become disqualified for office, such Councillor or any other Councillor or the Corporation may apply to the Chief Judge of the Rangoon Small Cause Court; and the said Judge, after making such enquiry as he deems necessary, shall determine whether or not such Councillor has become disqualified for being a Councillor, and his decision shall be final."

Sections 199 and 200 of the Act are to the following effect:

Section 199 "Notwithstanding anything contained to the contrary in the Rangoon Small Cause Court Act, 1920, or any other enactment, the Chief Judge of the Rangoon Small Cause Court shall exercise all powers and jurisdiction conferred on, or vested in, the said Judge under the provisions of this Act, and, unless it is otherwise expressly provided by this Act, his decision on any matter in respect of which he exercises such powers or jurisdiction shall be final."

Section 200 (1) 'For the purposes of any appeal, inquiry or proceeding under this Act, the Chief Court or the Chief Judge of the Rangoon Small Cause Court may exercise all the powers conferred on the said Court by the C. P. C., 1908, or the Rangoon Small Cause Court Act, 1920 as the case may be, and the said Chief Judge shall observe the procedure prescribed in the said Code and Act so far as the same is consistent with the provision of this Act."

(2) "The costs of every such appeal, inquiry or proceeding as determined by the said Court shall be payable by such parties and in such proportions as the Court shall direct and the amount thereof, shall, if necessary, be recoverable as if the same were due under a decree of the Court."

The first point for consideration is whether, when dealing with election disputes and disqualifications of Councillors, the Chief Judge of the Small Causes Court is to be deemed "a Court" or a *persona designata*. We shall refer only to those authorities in which persons discharging similar functions to those of the Chief Judge of the Rangoon Small Causes Court in the case before us, have been held to be a Court or otherwise. The case of *Balaji Sakharam Gurav* v. *Merwanji Nowroji Antia* (3) was

(3) 21 B. 279; 11 Ind. Dec. (N. S.) 189.

a case concerning a Municipal Election in the Bombay Presidency which was sought to be set aside under s. 23 of the Bombay District Municipal Act (Amendment Act) (II of 1884), the wording of which is similar to the wording of s. 15 of the Rangoon Municipal Act. The District Judge of the District in which the election had been held, was the person to whom application had to be made and he after enquiry was authorised to pass orders confirming, amending or setting aside the election. There was a provision in the section that for the purposes of the enquiry he might exercise any of the powers of the Civil Court and that his decision should be conclusive. Chief Justice Farran and Mr. Justice Parsons held, following an earlier ruling of their own Court, that the High Court had no jurisdiction to revise an order setting aside an election. They held that a District Judge was not a Court within the meaning of s. 622 of the C. P. C., but was merely a *persona designata*. It is true that in that case Mr. Chandravarkar (afterwards Mr. Justice Chandravarkar) who appeared for the appellant conceded in argument, on account of the earlier ruling of the High Court that the High Court had no jurisdiction to entertain a revision application with respect to the order of the District Judge relating to the election, but contended that the High Court could entertain an application in respect of that part of the order relating to costs. The learned Judges of the Bombay High Court held however that as he was not a "Court" at all they had no jurisdiction to interfere with any part of his order. The above case was referred to in a later case in the same High Court [*Municipality of Belgaum* v. *Rudrappa* (4).] That case was under s. 160 of the Bombay District Municipal Act (Bom. Act III of 1901) and related to compensation about which there was a dispute between the Municipality and the owner of land which the Municipality was acquiring. Sub-s. (3) of s. 160 provides that the matter may be determined by the District Court which is directed to follow in the case of land the procedure provided by the Land Acquisition Act. The learned Judges of the Bombay High Court had already held in an earlier case that no appeal lay from an order under this section to the High Court and they, therefore, held that a revision was also incompetent as being the only consistent course. They said at the end of the judgment that although the words occurring in s. 23 of the Bombay District Municipal Act are "District Judge" and the words occurring in s. 160 of the later Act are "District Court" the distinction was not sufficient to support the argument that an application for revision is competent although admittedly no appeal would lie. The matter was again before the High Court of Bombay in a very recent case [*Navalkar* v. *Sarojni Naidu* (5).] Under the provisions of the Bombay Municipal Act in respect of Elections of Municipal Commissioners in Bombay City the Chief Judge of the Small Causes Court is by s. 33 of that Act appointed to decide on the validity of the elections. The wording of that section is similar to the wording of ss 14 and 15 of the Rangoon Municipal Act, sub-s. (1) of s. 33 enables an elector to apply to the Chief Judge of the Small Causes Court in cases where the qualification of an elected person is disputed or where the validity of the election is questioned. Sub-s. (2) directs the Chief Judge to make such enquiries as he deems fit and decide the matter, and sub-s. (3) provides that his orders shall be conclusive. On an application for revision of an order made by the Chief Judge of the Small Causes Court Sir Norman Macleod, C. J., and Mr. Justice Crump held that the Chief Judge of the Small Causes Court was a *persona designata* and that the High Court had no power to interfere in revision with his decision. We notice that the Privy Council case of *Balakrishna Udayar* v. *Vasudeva Aiyar* (6) was brought to the notice of the learned Judges by the petitioners, though no reference was made to that case in the judgment itself. The case of *Vijiaraghavalu Pillai* v. *Emperor* (7) dealt with a petition under s. 15, Charter Act, corresponding to s. 107 of the Government of India Act, praying the High Court to revise an order of a Presidency Magistrate who, by the rules framed by the Government under the Madras City Municipal Act, was authorised to decide on the

(4) 34 Ind. Cas. 21; 40 B. 509; 18 Bom. L. R. 340.

(5) 73 Ind. Cas. 133; 25 Bom. L. R. 463; (1923) A. I. R. (B.) 421.

(6) 40 Ind. Cas. 650; 40 M. 793; 19 Bom. L. R. 715; 44 I. A. 261; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 59; 11 Bur. L. T. 48 (P. C.).

(7) 25 Ind. Cas. 345; 38 M. 581; 16 M. L. T. 128; 2 M. L. J. 227; 15 Cr. L. J. 593.

ompetency or otherwise of a candidate for Municipal Election. The learned Judges f the Madras High Court held that the agistrate was not "a Court" or subject to ie appellate jurisdiction of the High Court ithin the meaning of s. 15 of the Charter ct. The attention of the learned Judges as drawn to the case which later formed he subject of the Privy Council decision entioned above in regard to which they aid that that decision had no direct bearng on the matter they had to decide. After eferring to the observations of Fry, L. J. a *Royal Aquarium* v. *Parkinson* (8) they ited from Halsbury's Laws of England (p.) of Vol. IX the following passage: "Many odies are not Courts, although they may ave to decide questions, and in so doing ave to act judicially, in the sense that the roceedings must be conducted with fairess and impartiality." They then referred o the case of *Manavala Goundan* v. *Kumaappa Reddy* (9) and the case of *Balaji akaram* v. *Merwanji Nowroji* (3) and oncluded as follows:—"These authorities how that when *quasi*-judicial functions re delegated to an officer whose decions are ordinarily subject to the revional powers of the High Court he is not vith reference to the delagated power ecessarily subject to its appellate or revional authority." We have been referred o certain later decisions of the same High Court where in respect of a different Act he High Court of Madras has taken a lifferent view. Thus in *Ramaswami Gounder* v. *Muthu Velappa Gounder* (10) that Court eld that a District Judge acting under s. 57 f the Madras Local Boards Act (XLV of 920) was subject to the revisional jurisdicion of the High Court.

Our attention has also been drawn to the more recent case of *Kokku Parthasarathy Naidu* v. *Chinstlacheru Koteswara Rao* (11) in which a Bench of three Judges have in reference to the same act, arrived at the same conclusion as that of the learned Judges in *Ramaswami Goundan's case* (10). These decisions are distinguishable from the case before us, as they proceeded upon a consideration of the rules framed under the Act in question. It is unnecessary to cite the other Madras cases. We would however refer to a passage in the judgment of Sir Arnold White, C. J., in the case of *Vasudeva Aiyar* v. *Negapatam Devasthanam Committee* (12) which went on appeal to the Privy Council. Referring to the case of *Balaji Sakaram* v. *Merwanji Nowroji* (3), Sir Arnold White says: "The Chief Justice and Parsons, J., were of opinion that 'a District Judge acting under s. 23 of the Bombay District Municipal Act Amendment Act, 1884, is not a Court within the meaning of the word in s. 622 of the old C. P. C.' They suggest that he was a *persona designata* apparently for a specific purpose. That seems to be so. It seems to me that under the Act in question the District Judge is a *persona designata* for a specific purpose and not an officer exercising judicial functions under the Act. As regards the Religious Endowments Act, it is clear that for the purpose of several sections of the Act ,the District Court is not a *persona designata* but a Civil Court exercising jurisdiction under the Act."

In the case of the *National Telephone Co*, *Ltd.* v. *Postmaster General* (13), the question for decision was whether the Railway and Canal Commission which was constituted a Court of Record acted as such Court or as arbitrators in a certain matter. Lord Parker of Waddington said: "Where by Statute matters are referred to the determination of a Court of Record with no further provision, the necessary implication is, I think, that the Court will determine the matters ,as a Court. Its jurisdiction is enlarged, but all incidents of such jurisdiction, including the right of appeal from its decision remain the same." This is the dictum of a very high authority and if, in the case before us, the "Court" as a "Court" had been directed to determine matters, his remarks would be apposite, but these remarks may be taken as suggesting that when the Legislature enacts that certain matters. Unconnected with the ordinary jurisdiction of a particular Court, shall be determined, not by the Court, but by the Judge, the intention must have been that those matters should be determined by him not as a Court but as a *persona designata*. The Privy Council case of *Balakrishna* v.

(8) (1892) 1 Q. B. 431; 61 L. J. Q. B. 409; 66 L. T. 513; 40 W. R. 450; 59 J. P. 404.
(9) 30 M. 326; 17 M. L. J. 313; 2 M. L. T. 267.
(10) 71 Ind. Cas. 1039; 46 M. 536; 16 L. W. 848; 44 M. L. J. 1; (1923) M. W. N. 133: (1923) A. I. R. (M.) 192.
(11) 78 Ind. Cas. 98; 47 M. 369; 46 M. L. J. 201; 19 L. W. 402; (1924) M. W. N. 272; (1924) A. I. R. (M.) 561.
(12) 21 Ind. Cas. 451; 38 M. 594; 14 M. L. T. 354; (1913) M. W. N. 842; 25 M. L. J; 536.
(13) (1913) A. C. 546; 82 L. J. K. B. 1197; 109 L. T. 562; 57 S. J. 661; 29 T. L R. 637.

Vasudeva (6) deals with a different matter. The order challenged was passed under s. 10 of the Religious Endowments Act which authorised the Civil Court to fill up a vacancy in the Temple Committee. "Civil Court" and "Court" are defined in the Act itself as being the principal Court of original civil jurisdiction in which the mosque, temple, or religious establishment is situate. Their Lordships say: "Moreover, it is to the Civil Court, and not to an individual Judge who may preside in or constitute the Civil Court, that jurisdiction is given." In all probability this remark of their Lordships was made with reference to the Bombay case of *Balaji Sakaram* v. *Merwanji Nowroji* (3), which was cited with approval by Sir Arnold White in the judgment under appeal, as the words used in the Bombay Act were "District Judge" Their Lordships later dealt with the argument that was raised that the order in question in the case was not a judicial but merely an administrative or ministerial act.. They then considered the preceding sections and came to the conclusion that in a question such as the emotion of an officer from his office for misconduct or unfitness the Court which makes the order removing him is exercising judicial function. They referred to some of the succeeding sections and concluded this part of their judgment as follows:—"It appears to their Lordships to be clear that in all these matters the Civil Court exercises its powers as a Court of Law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal Tribunal." These remarks of their Lordships seem to indicate that a Civil Court exercising special jurisdiction may be *persona designata* and that whether it is so or not will have to be inferred from a consideration of the special powers exercised and the special functions performed by the Civil Court. This decision is no authority for the proposition that when the Judge of a Court is directed to determine certain matters, it must be presumed that the Judge is intended to determine those matters as a Court.

The effect of the Bombay decisions, with which we are in respectful agreement, is that when by an act of the Legislature, a new authority is constituted for the purpose of determining questions concerning rights which are themselves the creations of the Act, and a Judge or Presiding Officer of a Court, as distinct from the Court itself, is directed to be performed the functions of the newly created authority, then it must be presumed, unless the contrary is expressly enacted or necessarily implied, that intention of the Legislature was that the Judge or Presiding Officer should perform those functions as a *persona designata* and not as a Court. Such a presumption is stronger in the case of a Court like the Rangoon Small Cause Court which consists of a plurality of Judges when only one particular Judge is invested with the new powers. It would have been easy for the Legislature to indicate the Court by name if it was the intention of the enactment that the jurisdiction should be exercised by the Court as such.

In our opinion, therefore, the Chief Judge of the Rangoon Small Cause Court in performing the functions assigned to him by s. 14 of the Rangoon Municipal Act acts as a *persona designata* and not as a Court. This being so the High Court of Judicature at Rangoon has no power of interference in revision with his decisions either under s. 115 of the C. P. C., or under s. 107 of the Government of India Act. We, therefore, answer the reference as follows:—The High Court of Judicature at Rangoon has no jurisdiction to interfere in revision with the orders passed by the Chief Judge of the Small Cause Court, Rangoon, in the exercise of the powers conferred on him by s. 14 of the Rangoon Municipal Act.

A. B.
N. H. *Answered accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 73 OF 1924.
April 22, 1925.
Present:—Mr. Justice Venkatasubba Rao.
NOMULA NARASIMHA—DEFENDANT—APPELLANT
versus
VASAM MANGAMMA—PLAINTIFF—RESPONDENT.

Adverse possession—Permissive entry—Subsequent possession, whether can be adverse—Succession of trespassers—Periods of possession, tacking of, whether permissible.

To constitute adverse possession, it is not indispensable that the entry should be adverse in its inception. Unless adverse in its inception, possession will be presumed to continue as it began; but this

does not preclude the occupant from setting up an adverse claim at any time he chooses by any act which changes the character of his occupancy from amicable to adverse. [p. 557, col. 2.]

A succession of trespassers claiming through one another (*e. g.*, as heir, legatee, assignee, or otherwise) can, though the possession of each of them has extended to less than 12 years, add and tack the periods of their possession so as to defeat the right of the true owner. [p. 558, col. 1.]

Second appeal against a decree of the Court of the Subordinate Judge, Nellore, in A. S. No. 24 of 1923, (A. S. No. 263 of 1922 on the file of the District Court, Nellore), preferred against a decree of the Court of the Additional District Munsif, Nellore, in O. S. No. 133 of 1921, (O. S. No. 259 of 1920).

Mr. *B. Somayya*, for the Appellant.

Mr. *L. A. Govindaraghava Iyer*, for the Respondent.

JUDGMENT.—I regret to have to reverse the judgment of the Subordinate Judge and dismiss the suit of this unfortunate plaintiff, but I am afraid on the materials no other course is possible. Venkatesam was the foster son of Venkatamma and they settled by Ex. C on Mangamma the plaintiff, the house in question. This was on the 12th of July 1890. The deed was executed just on the eve of the marriage of Venkatesam with the plaintiff and there is no dispute that the plaintiff practically never resided with her husband in the plaint house. It is clear beyond any possibility of doubt that at any rate since 1895 the plaintiff has not been living in this house. The present suit was instituted in 1920. It is necessary to set forth in some detail the history of the relations between Venkatamma and Venkatesam on the one hand and the plaintiff on the other. Owing to misunderstandings, the plaintiff did not go to live with her husband and on the 24th of July 1901 the mother and the son executed what is described as a cancellation deed revoking the settlement in the plaintiff's favour. This was followed a few months later by what is termed a relinquishment deed by which Venkatesam gave up his rights in the property to Venkatamma. The next step was that Venkatamma filed Suit No. 522 of 1901 for a declaration that the plaintiff had forfeited her rights to the suit property. At this time Venkatamma was in possession and the only relief she sought to obtain was a declaration as to her rights to the property. That suit was for some reason dismissed in 1903. Venkatamma in 1905 executed Ex. 4 a deed of sale in favour of Tiruvenkatacharlu and the latter sold the property to the defendant by Ex. 1 on the 13th April 1909. Venkatamma died in 1910.

The Subordinate Judge makes two mistakes of law. He says that Venkatamma's possession was originally permissive. I shall assume that this is a correct statement of fact. Then he says that possession originally permissive could never become adverse. In this, of course, he is entirely wrong. I shall take the following statement of the law from Rustomji's well-known Book on Limitation, page 610 (3rd Edition):—

"It is not indispensable that the entry should be adverse in its inception.

"Unless adverse in its inception, possession will be presumed to continue as it began, yet this does not preclude the occupant from setting up an adverse claim at any time he chooses by any act which changes the character of his occupancy from amicable to adverse."

Again the learned Author says:—

"Where a party is in possession of lands in privity with the original owner, nothing short of an open and explicit disavowal and disclaimer of a holding under that title, and assertion of title in himself brought home to the owner, will satisfy the law".

These propositions are so well settled that I do not think I need trouble to refer to decided cases.

This being the law, let me now examine the facts. In 1901 Venkatamma and Venkatesam joined in revoking the settlement. This is an unequivocal denial of the plaintiff's right. The question then is: was this brought to the knowledge of the plaintiff? In the suit that followed the revocation, Venkatamma relied on her own title and repudiated the right of the plaintiff. Venkatamma and the plaintiff joined issue and went to trial. Venkatamma denied the plaintiff's title and openly asserted her own, and this was clearly brought to the plaintiff's knowledge. In 1903 the suit was dismissed and notwithstanding this, Venkatamma continued to be in undisturbed possession. Adverse possession on the part of Venkatamma clearly began in 1903 if not at an earlier date. It is unnecessary to enquire whether the plaintiff became aware of the sale deeds of 1905 and 1909.

The second mistake of law which the Subordinate Judge makes is, that the possession of the defendant cannot be added to the possession of Venkatamma. I shall once

again quote from Rustomji, page 634, 3rd Edition:—

"It is now, it seems, well established that a succession of trespassers claiming through one another (*e.g.*, as heir, legatee, assignee, or otherwise) can, though the possession of each of them has extended to less than 12 years, add and tack the periods of their possession so as to defeat the right of the owner. Thus if the original dispossessor dies after remaining in possession for six years, and his heir or legatee thereupon enters into and remains in possession for seven years, these two periods can be added to complete the 12 years, and the owner would be effectually barred".

This statement is borne out by a large body of authority, but I do not propose to refer to decided cases.

On behalf of the respondent it was finally urged that it has not been found that Tiruvenkatacharlu took possession. But what difference does it make? If Venkatamma was in possession till 1910 and subsequent to her death the defendant was in possession, the plaintiff's title would become barred.

The decree of the lower Appellate Court is reversed and the appeal is allowed. The suit is dismissed with costs throughout.

V. N. V.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 952 OF 1921.

June 5, 1924.

Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

RIKHI RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DURGA DASS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 8, O. XXII, r. 2—Suit for declaration against village proprietors—Second appeal—Omission to bring on record legal representatives of deceased proprietors—Abatement—Permission to implead some only of proprietors, effect of.

A second appeal in a suit by the non-proprietors of a village for a declaration to the effect that a particular piece of *shamilat* land is a grazing ground for the cattle of all the inhabitants and is not liable to partition among the proprietors, abates if the appellants fail to make an application within time to bring on the record the legal representatives of some of the defendants-respondents who have died, notwithstanding that the plaintiffs-appellants have obtained permission under O. I, r. 8, C. P. C, from the second Appellate Court to sue only a few out of the defendants-respondents on behalf of all the proprietors. [p. 558, col. 2.]

Ram Dayal v. *Mohammad Raju Shah*, 51 Ind. Cas. 437; 46 P. R. 1919, distinguished.

Wali Muhammad v. *Mahlu*, 86 Ind. Cas. 592; 6 L. L. J. 360; 5 L. 429; 1 L. C. 482; (1925) A. I. R. (L.) 124, followed.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 17th January 1921.

Mr. *Jai Gopal Sethi*, for the Appellants.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—Counsel for the respondents raises a preliminary objection that the appeal has abated in consequence of appellants' failure to make an application to bring on the record the legal representatives of some of the defendants-respondents who have died, though the statutory period for doing the same has expired. The suit was by the non-proprietors of a village in the Hoshiarpur District for a declaration to the effect that the *shamilat* land specified in the plaint measuring 5244 *kanals*, 8 *marlas* was a grazing ground for the cattle of all the inhabitants of the village and was not liable to partition among the proprietors. The Trial Court allotted an area of 1344 *kanals* to be reserved as a grazing ground; but the plaintiffs were not satisfied with that and appealed to the District Judge. That officer confirmed the decree of the First Court with a slight modification. The plaintiffs lodged a second appeal in this Court which was admitted, and then they applied under O. I, r. 8 of the C. P. C., for permission "to sue only 4 out of the 147 defendants-respondents on behalf of and for the benefit of all." This application was granted. The reply of the learned Counsel for the appellants to the objection, therefore, is that the appeal has not abated in view of the permission granted to sue four of the respondents only and he cites *Ram Dayal* v. *Mohammad Raju Shah* (1) and O. XXII, r. 2 of the C. P. C., and contends that the right of appeal survives against the surviving respondents alone. This very contention was raised in *Wali Muhammad* v. *Mahlu* (2) but was overruled by a Division Bench of this Court in its judgment dated

(1) 51 Ind. Cas. 437; 46 P. R. 1919.

(2) 86 Ind. Cas. 592; 6 L. L. J. 360; 5 L. 429; 1 L. C. 482; (1925) A. I. R. (L.) 124.

the 8th of May 1924. *Ram Dayal* v. *Muhammad Raju Shah* (1) is not in point because in that case only one man had with the permission of the Court instituted the suit on behalf of himself and 29 others, and it was from among the latter that two died during the pendency of appeal. As these two men had never applied to the Court under sub-cl. (2) of r. 8, O. I of the C. P. C., to be made parties, it was held that "It was not necessary to make them respondents in the defendants' appeal and the fact that they died during the pendency of the appeal, and their legal representatives had not been brought on the record did not, therefore, cause the appeal to abate." In the present case all the defendants were parties to the suit in the First Court as well as in the lower Appellate Court, and it cannot be said that all of them with the exception of the four mentioned in the application under O. I, r. 8, C. P. C., ceased to be necessary parties to this second appeal by virtue of the order granting that application. All the proprietors were necessary parties because they were all joint owners of the *shamilat* and were equally interested therein and the suit involved a question affecting the rights of all of them as a body. It could not, therefore, be said that the right of appeal survived against the surviving respondents alone. As the question affected the rights of all the proprietors in a body it could not be decided without having all of them before us. The appeal, therefore, abates and will be struck off the list of pending cases. The appellants will pay the respondents costs in this Court.

Appeal dismissed.

R. L.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 4052 OF 1924.

January 19, 1925.

Present:—Mr. Justice Srinivasa Iyengar.

MULA NARAMMA—PETITIONER

versus

MULA RENGAMMA—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 24—Transfer of case—Prejudice against Pleader, whether ground for transfer—Scope of enquiry.

When the transfer of a case is applied for on the ground that an impartial hearing of the case and proper adjudication cannot be obtained because the Judge hearing the case has shown himself as prejudiced against or in favour of one side or the other, all that has to be ascertained is whether the allegation of the absence of an unprejudiced judicial mind is true in fact there and then and any enquiry into the causes that brought about such a state of things would not only be irrelevant but be calculated to misdirect. [p. 560, col. 1.]

It would be incumbent on a higher Court to transfer a case from the file of a particular Tribunal to another Tribunal the moment it is clear that some prejudice has been created and that a fair hearing and an impartial adjudication cannot reasonably be expected even though such a state of things has been brought about by the conduct of the very party applying for the transfer. [*ibid.*]

It would, however, be a dangerous principle to establish that the moment a Judge falls out with a Pleader or *vice versa* the case should be transferred from that Judge to some other. If, on the other hand, there is any reasonable ground for supposing that the prejudice against the Pleader has in any manner or measure affected the judicial attitude towards the party or his case, a transfer should be ordered. [p. 560, cols. 1 & 2.]

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to transfer O. P. No. 30 of 1922 from the file of the District Court, Anantapur, to that of any other District Court.

Mr. *B. S. Narain Rao*, for the Appellant.

Messrs. *S. T. Srinivasa Gopalachariar* and *R. Gopalasmai Iyengar*, for the Respondent.

ORDER.—After taking time to consider my order and giving the matter my very careful consideration, I have come to the conclusion that this petition for transfer should be dismissed.

The transfer that has been applied for is of Original Petition No. 30 of 1922 on the file of the District Court of Anantapur to another District Court. That original petition was filed under the Guardians and Wards Act more than two years ago and has been pending all this time and is now part-heard. The most curious feature about the application for transfer is that the affidavit in support thereof has been filed not by the petitioner who is also the petitioner in the lower Court or any agent or relation of hers but by her Vakil who has been appearing for her in that original petition. In the view that I have taken of this case it is unnecessary for me to deal in detail with the various allegations made and denied on one side or the other. It is sufficient to state that the application for transfer and the grounds alleged, therefore, are due entirely to several regrettable passages and incidents in the course of the hearing of the petition between the learned

Vakil for the petitioner and the present learned District Judge of Anantapur.

Having regard to all the circumstances, there is reason to believe that the present petition for transfer was itself not the act and motion of the party but was largely prompted by that very Vakil. In spite of it, I should have been disposed to order a transfer if I were satisfied that on the merits and in the interests of justice it was a proper case for transfer. But I am not so satisfied. When a transfer is applied for on the ground that an impartial hearing of the case and proper adjudication could not be obtained because the Judge hearing the case has shown himself as prejudiced against or in favour of one side or the other, all that has to be ascertained is whether the allegation of the absence of an unprejudiced judicial mind is true in fact there and then and any enquiry into the causes that brought about such a state of things would, in my view, be not only irrelevant but be calculated to misdirect. The hearing of the application is not an occasion for the apportionment of any blame on any enquiry about the origin and causes, and it may possibly be that it would be incumbent on a higher Court to transfer a case from the file of a particular Tribunal to another Tribunal the moment it is clear that some prejudice has been created and that a fair hearing and an impartial adjudication could not reasonably be expected even though such a state of things has been brought about by the conduct of the very party applying for the transfer. In the present case there is, no doubt, abundant evidence of a great deal of prejudice in the mind of the District Judge not against the petitioner or her case but against her Pleader due altogether, as I cannot help thinking, to proceedings and incidents in this very case. I cannot, however, assume that prejudice against a particular Pleader is or will operate as prejudice against the party or her case. It may no doubt, and perhaps often does, and one can only do his best to form his own judgment taking that and all other circumstances into consideration. It would be a dangerous principle to establish that the moment a Judge falls out with a Pleader or *vice versa* the case should be transferred from that Judge to some other. If, on the other hand, in this case there was any reasonable ground for my supposing that the prejudice against the Pleader has in any manner or measure affected the judicial attitude towards the petitioner or her case, I should certainly have given effect to it by ordering a transfer even at the risk of such an order being supposed to establish a wrong precedent. But no such reasonable ground or apprehension has been made out to my satisfaction and what is more, I should not let myself under the guise of doing justice to the petitioner perpetrate an injustice against the respondent. Further the petitioner would appear to have on the record another Pleader also appearing for her. If, therefore, even after the lapse of all this time the temporary heat and irritation of the moment should not have subsided so as to allow of the learned Judge and the learned Pleader resuming their normal functions and proceed with the hearing of the case, even then, any difficulties that the petitioner may in consequence be put to, would not be of such a nature as to warrant my ordering a transfer of the case on that ground.

I have, therefore, come to the conclusion that the transfer applied for should not be ordered and the petition is, therefore, dismissed with costs.

Z. K. *Petition dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 34 OF 1925.

October 7, 1925.

Present:—Mr. Neave, A. J. C.

Saiyid MUHAMMAD MOHSIN—PLAINTIFF—APPELLANT

versus

Saiyid MUHAMMAD ABID AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9—Abatement of suit—Death of defendant—Ignorance of death—Sufficient cause—Abatement, setting aside of.

In an application to set aside an abatement of a suit, the question of sufficient cause is to be determined with reference to the facts of the particular case. [p. 561, col. 1.]

A plaintiff who did not substitute on the record the legal representatives of the defendant, who died, within time, applied to set aside the abatement on the ground of his ignorance of the death of the defendant. It appeared, that the plaintiff was in service at a place about a hundred miles away from the place of the defendant and, also that owing to temporary arrangements at the Court where the suit was pending there

was no Judge for many months by whom the plaintiffs' case could be taken up:

Held, that, on the facts of the case, some latitude may be allowed, and the abatement set aside. [p. 561, col. 2.]

Appeal against an order of the Subordinate Judge, Hardoi, dated the 6th December 1924.

Mr. *Mohammad Ayub*, for the Appellant.

ORDER.—This is an appeal against an order of the Subordinate Judge of Hardoi refusing to set aside an order for the abatement of the plaintiff's suit.

The suit was instituted on the 13th of December 1916 for redemption of a mortgage. The Munsif by whom it was tried held that the suit was barred by limitation under Art. 134, but in second appeal this Court held that Art. 148 governed the case and suit was not barred by limitation. The case is reported as *Muhammad Mohsin* v. *Mohammad Abid* (1). The suit was remanded for trial of the remaining issues and came before another Munsif. Once more, however, it was found to be time-barred. The new Court applied Art. 144. From this order the plaintiff appealed to the District Judge of Hardoi on the 3rd of October 1922. For one reason or another no further action was taken in this case until December 1923 when a date for hearing was fixed and a notice issued to the parties. According to the affidavit filed by him the plaintiff now learnt for the first time that one of the respondents, named Din Dayal, was dead. He applied to the Court to substitute the names of the respondent's heirs but the Court found that Din Dayal had died more than three months before and passed an order for the abatement of the suit. The plaintiff objected but his objections have been overruled and it is against this order that the present appeal is preferred.

The learned Subordinate Judge has relied on *Mohamad Askari* v. *Lalu* (2), where it was held that it is the duty of the person who is prosecuting an appeal to keep himself informed of the existence of his adversary. A mere plea of ignorance of the death of the opposite party is not a sufficient ground for setting aside an order that the appeal should abate.

In this case, however, it is pointed out on behalf of the applicant that in the course of the judgment the remark occurs: "In a case like this the question of sufficient cause is to be determined with reference to the facts of the case." In the affidavit filed by the appellant it is said that he is in service at Lucknow about a hundred miles away from the residence of the deceased Din Dayal. He had, therefore, little opportunity of learning of the death of his adversary. Further it is said that owing to the temporary arrangements at Hardoi there was no Judge by whom the appellant's case could be taken up for many months. Accordingly he had no occasion to take any steps to ascertain the continued existence of the other parties to the suit. In none of the cases referred to by the learned Subordinate Judge was the distance between the respective residences of the plaintiff and his adversary more than 20 miles. In the circumstances of the present case I think that some latitude may be allowed and that the plaintiff's appeal should be granted. Accordingly I allow his appeal The opposite party is not represented. There is, therefore, no order as to costs.

Appeal allowed.

N. H.
G. H.

(1) 52 Ind. Cas. 159; 22 O. C. 72.
(2) 45 Ind. Cas. 594; 21 O. C. 68.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1730 OF 1922.

July 13, 1925.

Present:—Mr. Justice Ramesam.

S. SAMU ASARI—DEFENDANT No. 1—APPELLANT

versus

KULLAPPAN ASARI'S WIFE ANANCHI AMMAL—PLAINTIFF—RESPONDENT.

Hindu Law—Marriage—Asura form—Payment to bride's parents for expenses of marriage, effect of—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 28—Suit by father to recover moveables belonging to deceased daughter, nature of—Jurisdiction of Small Cause Court.

The question whether a suit is or is not cognizable by a Small Cause Court depends upon a construction of the plaint only. What the defence of the defendant in his written statement will be or what attitude the defendant assumed with reference to a demand made by the plaintiff prior to suit are irrelevant considerations for the determination of this question. [p. 562, cols. 1 & 2.]

Chhedi v. *Gulabo*, 27 A. 622; 2 A. L. J. 388; A. W. N. (1905) 134 and *Kapalee Bewah* v. *Keshram Kooch*, 11 W. R. 93; 2 B. L. R. App. 23; 1 Ind. Dec. (N. S.) 1043, not followed.

A suit by a father as heir of his deceased daughter for recovery of moveables belonging to her on the ground that her marriage was in the *asura* form falls within the purview of Art. 28 of Sch. II to the

Provincial Small Cause Courts Act and is excluded from the cognizance of a Small Cause Court. [p. 562, col. 2.]

Chhedi v. *Gulabo*, 27 A. 622; 2 A. L. J. 388; A. W. N. (1905) 134 and *Kapalee Bewah* v. *Keshram Kooch*, 11 W. R. 93; 2 B. L. R. App. 23; 1 Ind. Dec. (N. S.) 1043, dissented from.

Where among a particular class of people it is customary for the bridegroom's party to make a payment to the parents of the bride to enable them to meet a substantial part of the expenses of the marriage, the marriage must be held to be in the *asura* form though the bride's father spends the whole amount thus received on the expenses of the marriage. [p. 563 cols. 1 & 2.]

Reverend Gabrie Inathaswami v. *Valliammal Ammal*, 53 Ind. Cas. 423; (1920) M. W. N. 158; 10 L. W. 491; 26 M. L. T. 318, *Muthu Aiyar* v. *Chidambaran Aiyar*, 3 M. L. J. 261 and *Rathnathanni* v. *Somasundara Mudaliar*, 62 Ind. Cas. 931; 41 M. L. J. 76; 13 L. W. 582; (1921) M. W. N. 635, relied on.

Second appeal against a decree of the Court of the Subordinate Judge, South Malabar at Palghat, in A. S. No. 95 of 1921, preferred against that of the Court of the Additional District Munsif, Palghat, in O. S. No. 401 of 1920 (O. S. No. 482 of 1920, on the file of the Court of the Principal District Munsif, Palghat).

Mr. *C. S. Swaminathan*, for the Appellant.

Mr. *C. Unnikanda Menon*, for the Respondent.

JUDGMENT. — When the second appeal was taken up I at first felt a doubt whether a second appeal lay, because the suit is to recover Rs. 270 being the price of jewels belonging to plaintiff's deceased daughter which the plaintiff claims as her heir on the ground that the marriage of the deceased was in the *asura* form.

The learned Vakil for the respondent took up my suggestion and argued the preliminary objection. He relied on *Chhedi* v. *Gulabo* (1) in support of the objection. This decision no doubt seems to support him. It relies on two earlier decisions in *Kapalee Bewah* v. *Keshram Kooch* (2) and in *Moheshur Mondul* v. *Koilash Nath Mundul* (3). I may at once observe that the decision in *Moheshur Mondul* v. *Koilash Nath Mundul* (3) is really irrelevant. For, in that case, the title was established by a prior judgment and the suit was merely for possession of specific moveable property. It is now well-established that the question whether a suit lies in the Small Cause Side of the Original Jurisdiction depends upon a construction of the plaint only. What the defence of the defendant in his written statement will be or what attitude the defendant assumed with reference to a demand made by the plaintiff prior to suit is really an irrelevant consideration in the determination of this question. Article 28 of the Second Schedule of the Provincial Small Cause Courts Act runs as follows :—

"(28) a suit for a legacy or for the whole or a share of a residue bequeathed by a testator or for the whole or a share of the property of an intestate."

In the present case it is conceded by the Vakils on both sides that the deceased Ankammal had no other property except these jewels. If there had been any other property in the possession of the defendant, the plaintiff would have sued for it. It is obvious that the plaintiff is suing for the whole of the property of her deceased daughter who died intestate. I fail to see why a suit of that kind does not fall under Art. 28 simply because the defendant does not set up the plea of a rival claimant. I find some difficulty in accepting the test laid down in *Chhedi* v. *Gulabo* (1) and in the case of *Kapalee Bewah* v. *Keshram Kooch* (2) relied on in it. But, in the present case, even according to the test laid down in *Chhedi* v. *Gulabo* (1), it seems to me that the suit lies on the Original Side because the defendant in his written statement contends that Krishnamasari, the husband of the deceased, succeeded to her property and that the second defendant succeeded Krishnamasari as his mother. This contention amounts to setting up the plea of a rival claimant. It is true there are other defences also in the written statement, but I do not see how the addition of other defences makes it the less the plea of a rival claimant. For these reasons I think the second appeal lies though I must again add that the second reason (according to which I have to refer to the written statement) is unsatisfactory and I would rather rest my conclusion on a construction of the language of the Article, differing from *Chhedi* v. *Gulabo* (1) and from *Kapalee Bewah* v *Keshram Kooch* (2). The preliminary objection, is, therefore, overruled.

Coming to the merits of the case, the evidence in the case and the findings of the Courts below show that, in the community to which the parties belong, namely, the community of goldsmiths or *Asaris*, it is

(1) 27 A. 622; 2 A. L. J 388; A. W. N. (1905) 134.
(2) 11 W. R. 93; 2 B. L. R. App. 23; 1 Ind. Dec. (N. S.) 1043.
(3) 7 C. L. R. 71.

customary for the bridegroom's party to make a payment to the parents of the bride to enable them to meet a substantial part of the expenses of the marriage. It seems to me immaterial whether it is the whole of the expenses of the marriage or a substantial portion of it. To the extent the bride's father gets a contribution of that kind from the bridegroom's father he benefits by it ; though he does not pocket it, he spends it for the marriage. It is true that presents made to the bride's parents which are either small or relatively small having regard to the scale on which the rest of the expenses of the marriage are incurred do not necessarily make a marriage an *asura* marriage. One must really look into the substance of the transaction. In the case of *Reverend Gabrie Inathaswami* v. *Valliammal Ammal* (4) there was some obscurity as to the meaning of the word *parisupanam*. The learned Judge who originally heard the second appeal had a suspicion that it might be merely a courtesy present given to the bride's parents and so they called for a finding whether it was regarded as a bride price. Having regard to the ruling in *Muthu Aiyar* v. *Chidambaram Aiyar* (5), and to the statement in Manu, Ch. 3, verses 25 and 51 Ch. 9, verses 98 and 100 quoted in Mayne's Hindu Law, 9th Edition, Art. 81 :—"Let no father, who knows the law, receive a gratuity, however small, for giving his daughter in marriage, since the man who, through avarice, takes a gratuity for that purpose is a seller of his offspring." I think that a substantial contribution towards the expenses of the marriage must be regarded as equivalent to taking a bride price. The learned Vakil for the respondent relied on a remark in my judgment in *Rathnathanni* v. *Somasundara Mudaliar* (6). I there said: "No special custom among Mudaliars to the effect that the bridegroom should incur the expenses of the marriage has been pleaded". That remark was made to avoid discussion of that question. It is true in this case a custom has been pleaded and proved and I have to decide whether the existence of such a custom makes any difference in the result. I am of opinion it does not. If there is a general custom of taking contribution from the bride-groom's party among *Asaris*, it only comes to this that every *Asari* marriage is an *asura* form of marriageand it is not that on the ground of the general prevalence of such a custom, the marriage should be regarded as one in the *brahma* form. The decision in *Jaisondas Gopaldas* v. *Harkisondas Hullochandas* (7) has nothing to do with the point before me. There a present called *palu* was made to the bride and not to the bride's relations. I am of opinion that the form of marriage in the case is not *brahma* form, but *asura* form, and agreeing with the Courts below, I dismiss the second appeal with costs.

V. N. V.
Z. K. *Appeal dismissed.*

(4) 53 Ind. Cas. 423; (1920) M. W. N. 158; 10 L. W. 491; 26 M. L. T. 348.
(5) 3 M. L. J. 261.
(6) 62 Ind. Cas. 931; 41 M. L. J. 76; 13 L. W. 582; (1921) M. W. N. 635.
(7) 2 B. 9; 2 Ind. Jur. 19; 1 Ind. Dec. (N. S.) 434.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 327 OF 1923.
July 10, 1925.

Present:—Mr. Justice Halifax, A. J. C.

MADHO RAO GHATATE—PLAINTIFF —APPELLANT
versus
BALAJI NARAYAN—DEFENDANT —RESPONDENT.

Limitation Act (IX of 1908), ss. 6, 29—C. P. Land Revenue Act (II of 1917), s. 160—Suit for village profits—Minority of plaintiff—Extension of time.

Section 6 of the Limitation Act applies to a suit for share of village profits by a minor plaintiff as provided by s. 160 of the C. P. Land Revenue Act. [p. 564, col. 1.]

The amendment of s. 29 of the Limitation Act in 1922 did not restrict its scope but extended it. Under the old s. 29 none of the provisions of the Limitation Act were applicable unless they were expressly included by the special or local Act. Under the new s. 29 some of them are applicable without being expressly included unless they are expressly excluded; the rest remain, as before, applicable only when they are expressly included. [p. 564, col. 2.]

Appeal against the decree of the District Judge, Wardha, dated the 21st April 1923, in Civil Apeal No. 18 of 1923.

Mr. *M. R. Bobde*, for the Appellant.
Mr. *W. R. Puranik*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for a share of village profits filed on the 28th of April 1922 by the appellant, who was then a minor, against the *lambardar* of a village in which he owns a share. He claimed his share of the profits

for the five *fasli* years from 1326 to 1330. The village is in the Nagpur Division, and, therefore, his cause of action arose on the 1st of May of each of the five years from 1917 to 1921 A. D. Under s. 160 of the Land Revenue Act, 1917 the period of limitation for such a suit is three years and the claim for the profits of the first two of the five years is barred by time unless the plaintiff is entitled to the concession granted to minors by s. 6 of the Limitation Act. It has been held in the Courts below that he is debarred from this privilege by s. 160 (3) of the Land Revenue Act, 1917 read with cl. (*b*) of sub-s. (2) of s. 29 of the Limitation Act, 1908 as amended by Act X of 1922, which came into force a little less than two months before the suit was filed.

The petition of appeal mentions a matter connected with the *lambardari haq*. This ground was expressly abandoned in argument. Another contention faintly urged and obviously untenable, is based on a letter written by the defendant *lambardar* on the 28th of April 1918 in which he admitted that the profits for 1323 *Fasli* and the subsequent years were unpaid and promised to pay at least those for 1323 and 1324 *Fasli* in a few days. It is urged that this letter ought to be treated as creating a fresh contract in respect of the profits for the years 1326 and 1327 *Fasli*, so that the suit to that extent is a suit on a bond, not a suit for village profits, and, therefore, s. 160 of the Land Revenue Act could not apply to it whatever the meaning and effect of that section may be. The many reasons for refusing to accept this position are too obvious to require statement.

The real question in the case is one of the interpretation of s. 160 (3) of the Land Revenue Act, 1917, read with s. 29 of the Limitation Act, 1908, as it stood originally and as it stands after amendment by Act X of 1922. Section 160 of the Land Revenue Act, 1917, lays down that, with certain exceptions which do not include the rule relating to minors in s 6 of the Limitation Act, 1908, that Act shall govern the limitation of a suit for recovery of a share of proprietary profits between a *lambardar* and a co-sharer. Section 6 was, therefore, applicable to such suits.

Section 29 of the Limitation Act, 1908, as far as it affected such a suit, merely laid down that its provisions did not affect or alter any rule of limitation prescribed in any special or local Act. Sub-section (2) of s. 29 as amended in 1922 says that periods of limitation prescribed by special or local laws shall be regarded as prescribed by that Act for the purposes of s. 3 and that certain other sections, among which s. 6 does not appear, shall apply unless they are expressly excluded by the special or local Act, and that "the remaining provisions of this Act shall not apply."

The last phrase can only mean that the remaining provisions of the Act shall not apply unless they are expressly made applicable by the special or local Act. To hold otherwise, as apparently both the lower Courts have done, is to hold that it is a prohibition of the future as well as the past application of those provisions by a special or local Act, which is obviously impossible. The amendment of s. 29 of the Limitation Act in 1922 did not restrict its scope but extended it. Under the old s. 29 none of the provisions of the Limitation Act were applicable unless they were expressly included by the special or local Act. Under the new s. 29 some of them are applicable without being expressly included unless they are expressly excluded; the rest remain, as before, applicable only when they are expressly included.

It is to be regretted that there is no finding in the judgments of the Courts below as to the amount of the profits realised in 1326 and 1327 *Fasli*, the claim for which is now found to be made in time. The case must go back to the first Court for a decision of this matter and the addition to the amount decreed by the lower Appellate Court of such a sum as is found to be due to the plaintiff for the profits of the two years 1326 and 1327 *Fasli*. The costs heretofore incurred by the appellant in this Court and the lower Appellate Court will be paid by the defendant-respondent. All past and future costs in the first Court will be paid as may be ordered by that Court.

N. H. *Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1695 OF 1923.

March 27, 1925.

Present:—Mr. Justice Ramesam.

MARINGANTI RAMANUJCHARYULU—DEFENDANT—APPELLANT

versus

PUDIPROLU BUCHI MANGARAO, MANAGER OF KORUKONDA DEVASTHANAM—PLAINTIFF No. 11—RESPONDENT.

Temple governed by scheme—Supplemental scheme appointing manager for purpose of suing, validity of—Trustee, powers of—License to erect pandal, *permanent, whether can be granted—Adverse possession.*

Where a temple is governed by a scheme, an order of the District Court modifying and supplementing the scheme and appointing a manager for the purpose of suing is not *ultra vires.*

Patinharipat Krishnan Unni Nambiar v. *Chakur Manakkal Nilakandan Bhattathiripad*, 4 M. 141; 1 Ind. Dec. (N. S.) 933, distinguished.

The trustee of a temple has no power to issue a permanent license to put up a *pandal* on lands belonging to the temple. No question of adverse possession arises in a case where a person erects a *pandal* over temple property after applying for and obtaining permission from the trustees to do so.

Nainapillai Marakayar v. *Ramanathan Chettiar*, 82 Ind. Cas. 226; 47 M. 337; (1924) A. I. R. (P. C.) 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 28 C. W. N. 809; 52 I. A. 83; L. R. 5 A. (P. C.) 33 (P. C.), relied on.

Second appeal against a decree of the Court of the Subordinate Judge, Rajahmundry, in A. S. No. 150 of 1922 (A. S. No. 123 of 1922, District Court, Godavari) preferred against that of the Court of the Additional District Munsif, Rajahmundry, in O. S. No. 156 of 1919.

Mr. *G. Lakshmanna*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—The first point argued is that the 11th plaintiff was incompetent to file the appeal in the lower Appellate Court. Mr. Lakshmanna relied on *Patinharipat Krishnan Unni Nambiar* v. *Chekur Manakkal Nilakandan Bhatathiripad* (1). That case related to the position of a Karayamma Samudayam under Malabar Customary Law. Here the temple is governed by a scheme and the order of the District Court, Godavari, dated 7th November 1919, modifies and supplements the original scheme, and I do not see that the appointment of a manager for the purpose of suing is *ultra vires.*

The next point argued is that Ex. I is binding on the plaintiffs as it was in compromise of a *bona fide* dispute. The Subordinate Judge thinks that the dispute was "merely a pretention" and he is entitled to find so on the evidence. Mr. Laksmanna contends that the whole of the Subordinate Judge's reasoning in paras. 2 and 3 is vitiated by a mistake as to the *pandal* to which the litigation of 1905 related. It is true that the *pandal* referred to in the third issue of that suit was the *pandal* opposite to the trustee's house: *Vide Ramanathan Chettiar* v. *Saminatha Aiyar* (2). It is also true that the defendant's father was *muktyar* only for two or three years, and the defendant's father died in 1913. There is nothing to show that the *pandal* was erected with any previous express permission prior to 1905 and it is possible to argue that its existence was adverse if it existed for 40 years. But it seems to me that Ex. I is conclusive and puts an end to any adverse possession. Exhibit I was accepted by the defendant, and he is bound by its recitals. It proceeds on the footing that the defendant applied for permission and the permission was given. The possession must be taken to be permissive on the footing of that of a licensee.

It is true that the license intended to be given by Ex. I was a permanent license but this the *dharmakartha* has no right to issue [see *Nainapillai Marakayar* v. *Ramanathan Chettiar* (3).] Though I do not agree with the Subordinate Judge in supposing that Ex. I should be registered, and though a fresh finding might have to be called for on the question of adverse possession, if there had been no Ex. I, I think Ex. I puts an end to these questions.

The second appeal fails and is dismissed with costs.

Appeal dismissed.

V. N. V.

Z. K.

(1) 4 M. 141; 1 Ind. Dec. (N. S.) 933.

(2) 14 Ind. Cas. 520; 12 M. L. T. 155 at p. 158; 23 M. L. J. 278.

(3) 82 Ind. Cas. 226; 47 M. 337; (1924) A. I. R. (P. C.) 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 28 C. W. N. 809; 51 I. A. 83; L. R. 5 A. (P. C.) 33 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 256 OF 1923.
January 15, 1924.
Present :—Mr. Justice Campbell.
SALIG RAM—VENDEE—DEFENDANT—APPELLANT
versus
BAKHTAWAR SINGH—PLAINTIFF—AND ANOTHER—VENDOR—PETITIONER—RESPONDENTS.

Soldiers Litigation Act (IX of 1918), s. 11, application of.

Section 11 of the Soldiers (Litigation) Act is applicable only to a plaintiff who is an Indian soldier at the time when he brings his suit.

Piara Singh v. *Mula Mal*, 75 Ind. Cas. 915; 4 L. 323; (1923) A. I. R. (L.) 655; 5 L. L. J. 551, followed.

Second appeal from a decree of the District Judge, Ludhiana, dated the 20th November 1922.

Lala *Badri Das*, R. B., for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT. — Bakhtawar Singh, plaintiff, sued to pre-empt a sale of land which took place on the 6th March 1917. He instituted his suit on the 11th August 1920 and stated in his plaint that he had been on war service with the Patiala Lancers and that for that reason his suit was within time. The defendant vendee pleaded that he knew nothing of the plaintiff being in the Patiala Lancers, that he was in the village at the time of the sale and that his suit was time-barred.

The plaintiff offered evidence of the dates on which the Patiala Lancers had been mobilised, and both the Trial Court and the lower Appellate Court held that his suit was within time. The Trial Court found that the Patiala Lancers returned from overseas on the 16th of February 1919 and were demobilised, and that they were again mobilised on the 14th April 1919 and demobilised on the 8th November 1919. The plaintiff was then granted long leave from the 19th December 1919 to the 20th of August 1920.

The vendee Salig Ram has preferred a second appeal and has contended that some of the evidence on which the above dates were fixed is inadmissible. He must, however, succeed on the ground that the plaintiff has never proved or attempted to prove that he is an Indian Soldier within the meaning of Act IX of 1918. The term "Indian Soldier" means any person subject to the Indian Army Act, 1911. The persons subjected to the Indian Army Act of 1911 are (*a*) Indian Officers and Warrant Officers, to which category the plaintiff certainly does not belong; (*b*) persons enrolled under the Act; and (*c*) persons not otherwise subject to Military Law, who, on active service, etc., are employed by, or are in the service of, or are followers of, or accompany portion of, His Majesty's Forces.

There is no proof that plaintiff is or ever was a person enrolled under the Indian Army Act. If as a member of an Imperial Service Corps he could be brought within (*c*) above during the period that he was on actual active service, he certainly ceased to be an Indian Soldier when the Regiment returned to Patiala and was demobilised in November 1919. As ruled in *Piara Singh* v. *Mula Mal* (1), s. 11 of the Indian Soldiers (Litigation) Act is applicable only to a plaintiff who is an Indian Soldier at the time when he brings his suit.

The plaintiff thus has failed to prove that his suit is within limitation. I accept the appeal, set aside the decree of the Courts below, and order that the plaintiff's suit be dismissed with costs throughout.

N. H. *Appeal accepted.*

(1) 75 Ind. Cas. 915; 4 L. 323; (1923) A. I. R. (L.) 655; 5 L. L. J. 551.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 27 OF 1925.
July 17, 1925.
Present:—Sir Charles Gordon Spencer, KT., Officiating Chief Justice, and Mr. Justice Viswanatha Sastri.
SAVAN DURGA BAI AMMAL—PLAINTIFF—APPELLANT
versus
S. RAMANATHA RAO *alias* RAMA RAO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Letters Patent (Mad), cl. 15 - Order refusing to strike out allegations in written statement, whether judgment—Appeal, whether lies.

An order by a Judge sitting on the Original Side of the High Court refusing to direct certain allegations in defendants' written statement to be struck out at the instance of the plaintiff, as being unnecessary and scandalous, is not a 'judgment' within the meaning of cl. 15 of the Letters Patent of the Madras High Court and consequently is not appealable.

Tuljaram Row v. *Alagappa Chettiar*, 8 Ind. Cas. 340: 35 M. 1 at p. 7; 8 M. L. T. 453; (1910) M. W. N.

697; 21 M. L. J. 1 and *Mahalingam* v. *Natesa Aiyar*, 32 Ind. Cas. 423; 3 L. W. 107; (1916) 1 M. W. N. 146, relied on.

Appeal from an order of Mr. Justice Waller, dated the 17th January 1925, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 742 of 1924.

Mr. *T. V. Muthukrishnier*, for the Appellant.

Mr. *V. S. Govindacharier*, for the Respondents.

JUDGMENT.—The order appealed against was an order by a Judge sitting on the Original Side of this Court refusing to direct certain allegations in defendants' written statement to be struck out at the instance of the plaintiff, as being unnecessary and scandalous.

In our opinion the Judge's order in this case was not a 'judgment' within the meaning of cl. 15 of the Letters Patent and consequently is not appealable. The application was not one which started independent proceedings ancillary to the suit [see the observations of White, C. J., in *Tuljaram Row* v. *Alagappa Chettiar* (1)] nor could its effect in any event be to put an end to the suit. The order, of course, concluded the proceedings in which the application was made, if that could be regarded as a separate and independent proceeding, but the same might be said of every order made by a Court in the course of the trial of a suit. The proceeding in which Waller, J.'s order was passed was part of the proceedings in the suit itself. Therefore, I think that when the learned Chief Justice spoke of putting an end to the suit or proceeding, he was thinking of some kind of independent proceeding which could not be called a suit.

It was held in *Mahalingam* v. *Natesa Aiyar* (2) that an order refusing leave to amend pleadings was not a judgment within the meaning of cl. 15 of the Letters Patent. The present order is of a cognate nature, the difference being only that, there the plaintiff sought to amend his own plaint and here the plaintiff wishes to have the defendants' written statement amended.

The fact that no appeal is provided by the C. P. C. against an order under O. VI, r. 16 is an indication that the Legislature intended that there should be no appeal in such cases.

The observation of Waller, J., in *Sonachalam Pillai* v. *Kumaravelu Chettiar* (3) that all orders passed after contest *inter partes* should be regarded as judgments was not necessary for the disposal of that case, which followed the decision in *Tuljaram Rao* v. *Alagappa Chettiar* (1) and appear to us to be too wide. The learned Judge adopted the view of Bittleston, J., in *De Souza* v. *Coles* (4) from which White, C. J., had expressed his dissent in *Tuljaram Rao* v. *Alagappa Chettiar* (1). The appeal is rejected on the preliminary point of admissibility with costs.

Appeal dismissed.

V. N. V.

Z. K.

(1) 8 Ind. Cas. 319; 35 M. 1 at p. 7; 8 M. L. T. 453; (1910) M. W. N. 697; 21 M. L. J. 1.

(2) 32 Ind. Cas. 423; 3 L. W. 107; (1916) 1 M. W. N. 146.

(3) 79 Ind. Cas. 109; 47 M. 316 at p. 324; 46 M. L. J. 138; (1924) M. W. N. 167; 19 L. W. 427; (1924) A. I. R. (M.) 597.

(4) 3 M. H. C. R. 384.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1210 OF 1923.

June 9, 1925.

Present :—Justice Sir Ewart Greaves, Kt., and Mr. Justice B. B. Ghose.

MAHAMMAD ABJAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HAFIZANNESSA KHATUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Partition suit—Appeal—Parties, necessary, failure to implead, effect of.

In a partition suit it is necessary for all persons interested in the property to be before the Court and this is equally necessary in the case of an appeal from the decision of the Trial Court in a partition suit. The mere fact that certain persons who were parties to the partition suit before the Trial Court would not, if made parties to the appeal, contest the appeal, is no ground for not impleading them as appellants or respondents to the appeal. Where any of the necessary parties to the suit are not made parties to the appeal, the appeal cannot proceed.

Appeal against a decree of the District Judge, Backergunge, dated the 12th March, 1923, modifying that of the Subordinate Judge, First Court, Barisal, dated the 22nd March 1922.

Babu *Suresh Chandra Talukdar*, for the Appellants.

Mr *Gunoda Charan Sen* (with him Babu *Prasanta Bhusan Gupta*), for the Respondents.

JUDGMENT.—This is an appeal by defendants Nos. 6 and 7 against a decision of the District Judge of Backergunge, modifying a decision of the Subordinate Judge of the First Court at Backergunge. The suit out of which this appeal arises was brought by the plaintiffs for partition, The share of the plaintiffs was not challenged in the suit by any of the defendants but the real dispute was between the defendants Nos. 6 and 7 on the one hand and defendants Nos. 5, 8 and 38 on the other. The dispute being that the defendants Nos. 6 and 7 contended that one Mahammed Waris had two brothers whereas defendants Nos. 5, 8 and 38 said that he had only one brother. The learned Judge in the Court below decided against the contention of the defendants Nos. 6 and 7 and he has held that Mahammed Waris had only one brother.

This appeal is preferred, as I have already stated, by defendants Nos. 6 and 7, but they have omitted to make parties the plaintiffs in the suit. Their reason being that there was no dispute with regard to the plaintiffs' share and that accordingly it was not necessary to make the plaintiffs parties to the appeal. This is clearly wrong. In a partition suit it is necessary for all persons interested in the property to be before the Court and this is equally so if there is an appeal from the decision of the first or second Court with regard to the decision on the claim. It may be, of course, that if the plaintiffs had been made parties to the appeal they would not have contested the appeal as their share was not challenged. This makes no difference, in my opinion, and the appeal is incompetent unless all persons interested are made parties to the appeal, either as appellants or respondents. It was urged before us that the matter may stand over for sometime in order that the plaintiffs may now be added as respondents to the appeal. But we see no reason why we should now allow them to be brought on the record after the time allowed by law for the appeal has lapsed.

The result, therefore, is that the appeal comes before us as incompetent and we see no reason why we should follow the course suggested by the learned Vakil for the appellants and allow the plaintiffs now to be brought on the record.

The appeal accordingly fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 1 OF 1923.

January 21, 1925.

Present:—Sir Victor Murray Coutts Trotter, Kt., Chief Justice, and Mr. Justice Krishnan.

B. PARTHASARATHY CHETTY AND Co. —DEFENDANTS—APPELLANTS

versus

T. M. GAJAPATHI NAIDU AND Co. —PLAINTIFFS—RESPONDENTS.

Sale of goods—C. I. F. contract—Buyer's refusal to accept bills—Re-sale by vendor after delay and drop in prices—Goods tendered not in accordance with contract—Seller, right of, to claim loss incurred on re-sale.

Plaintiffs undertook to supply the defendant with fireworks imported from Europe, the bills therefor to be accepted on presentation and paid for at maturity; in default, the plaintiffs were authorised to dispose of the goods by public sale or auction. It was agreed that the goods should be supplied in 3 lots of 10 cases each, each lot containing a different design. The invoices forwarded did not show this and the defendant refused to accept the drafts. Plaintiffs thereupon, long after the season for fireworks was over and when prices had greatly dropped, sold the goods and sued for the loss incurred by them on such re-sale. It was proved that the goods consigned were all of one design and not of different designs as provided for in the agreement:

Held, that the plaintiffs' suit must fail inasmuch as, (*a*) they were not justified in re-selling the goods after an unreasonable delay, and (*b*) they had not shown that the goods which they purported to re-sell and had re-sold were goods which the defendants would have been obliged to take under the terms of the contract. [p. 570, col. 2.]

Braithwaite v. *The Foreign Hardwood Co.*, (1905) 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 21 T. L. R. 413; 10 Com. Cas. 189; 10 Asp. M. C. 52, explained.

Appeal from the judgment of Sir Walter Salis Schwabe, Kt., Chief Justice, dated the 11th October 1922, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 163 of 1921.

Messrs. *Nugent Grant*, *K. Rajah Iyer* and *P. Krishnamachari*, for the Appellant.

Mr. *V. C. Gopalaratnam*, for the Respondents.

JUDGMENT.

Coutts Trotter, C. J.—If I had not the misfortune to differ from my learned predecessor who tried this case, I should myself have thought this matter to be a reasonably clear one. The plaintiffs are persons who were buying goods from foreign merchants in Europe on the demands of persons in the position of the defendants and in this case the defendants commissioned the plaintiffs to get them some fireworks from Europe on certain conditions. The contract is a confused document but the clauses that we

are primarily concerned with apparently are reasonably clear. The contract provided for the drawing of bills against invoices and I will take it for purposes of argument that this was in effect a C. I. F. contract. The invoices came to hand with the documents and drafts attached. The terms of payment are these : "We authorise you to draw upon us for the total amount of invoice at the sight mentioned below at current rate of exchange and such bill or bills we hereby bind ourselves to accept on presentation and pay at maturity." That is the material clause. Then lower down comes this, "should we fail to accept or to pay at maturity such bill or bills or to pay cash as before agreed, we hereby authorise you to dispose of the documents or goods either by private sale or by public auction on our account." The contract was on the 6th May, 1920 and the goods came through in about the following October and the specification of the goods provided for by the contract was "30 cases of wonder candles, offer No. 383, each label 10 cases, in all three designs." Then there was a further order for five lots of two cases of different classes of goods and we are only concerned with one of these because the others were not shipped. The contract provides that the plaintiffs are to be at liberty to execute the order in something less than its entirety. The invoices specify the two cases of goods as "wonder candles coloured as per my offer No. 383, 9cm. burning" and the 30 cases as "wonder candles (electric sparkles) white as per my offer No. 383, 9cm. burning." The defendants were obviously bound on receipt of the shipping documents, if they were in order, to accept the drafts that were forwarded through the Mercantile Bank. They refused to do so and they justified their refusal on the ground that the invoice was silent as to the provision that the 30 cases should have been divided into three lots of ten cases, each containing a different design and that that ought to have appeared on the face of the invoice. This case has been discussed on the footing that that was not a reasonable rejection and that there was nothing in the invoice to warrant them in refusing to accept the drafts. Therefore the position was that on the date when they refused to accept these drafts in Octocer, they were in breach and the defendants have been sued for the consequences of that breach. The goods were taken over by the plaintiffs and in August, 1921, they were sold, and sold at a very great drop in value. In the first place, it is very evident that the plaintiffs could not possibly go on indefinitely holding goods of this kind, goods of a perishable nature and goods which are only in vogue at certain seasons in the year, and apparently the season in India is not very different from the season in England, the months of November and December. But there was a much more fundamental flaw in the plaintiffs' goods than that. It proved on the evidence that satisfied the learned Chief Justice to be a fact that, when the goods were examined, instead of being divided into three lots each with a different label specified in the contract, all the 30 cases were the same. The finding of fact is challenged by the plaintiffs-respondents. But we have gone through the evidence very carefully. Mr. Gopalaratnam has taken us through it, and our opinion is that the only witness who is clear or specific about the matter and who seemed to know what he was talking about is D. W. No. 6, Govindaswami Chetti, who is quite explicit and the more he was cross-examined about it the more clearly did he adhere to the story that he gave that he had seen all these goods and that they were all marked with the same labels. It is suggested that the state of the law about the sale of goods is this, that, if there is a breach of contract which is unwarranted and cannot be supported, the buyer who rejects the goods cannot be heard to say thereafter that in truth and in fact the goods were in such a state as would have justified him in rejecting them on the actual ground of their quality even though he took and falsely took some other ground of rejection. That may or may not be the scope of *Braithwaite* v. *The Foreign Hardwood Co.* (1), and I note Lord Sumner in the House of Lords while confining *Braithwaite's case* (1) strictly to that case seemed very doubtful as to whether even that was not too wide a proposition to put forward. But I notice that in *Braithwaite's case* (1) when it came to the measurement of damages it is clear that the inferior quality of the timber in that case, though it was not allowed for the defence to say that it entitled them to reject and that, therefore, there could be no damages, was clearly taken into account, and

(1) (1905) 2 K. B. 543; 47 L. J. K. B. 688; 92 L. T. 637; 21 T. L. R. 413; 10 Com. Cas. 189; 10 Asp M. C. 52.

having ascertained the difference between the market and contract price, allowance was made for the deficiency of the quality of the timber tendered. What is the position in this case? In this case, the plaintiffs claim not damages based on the market price in which case the principle of *Braithwaite's case* (1) might intervene to prevent Mr. Grant saying: 'Oh, You cannot get any damages here because your goods were not only not as warranted but there was a complete breach of the condition of description and you were in fact selling other goods". Let it be assumed that *Braithwaite's case* (1) would carry Mr. Gopalaratnam so far and Mr. Grant could not set up that defence. But here there is no claim for the difference between the market price and the contract price. The claim here is in the terms of the contract. We sold the goods and we could debit you with the loss that we suffered, the difference between the actual sale price, and the contract price. What is the clause? The clause is this, and I am quoting only the material words: "Should we fail to accept the bills we hereby authorise you to dispose of the goods on our account and risk without notice and we bind ourselves to make good any loss or deficiency that may arise from such sale". What does that means? It means that if the defendants default in accepting the bills, the plaintiffs have the power to re-sell all the *goods*. What is meant by the goods? Obviously the goods that corresponded to the description in the contract. Supposing that instead of being filled with fireworks the cases were filled with shavings, is it possible for a moment to say that the plaintiffs can go into the market and sell the shavings and then come down on the defendants for the price of the fireworks? We should clearly be exceeding the scope of the doctrine in *Braithwaite's case* (1) if we should give effect to so absurd a contention. The plaintiffs have elected to open their mouth for a wider remedy and they have got to prove that the goods that they sold were goods which they delivered or were prepared to deliver in conformity with the contract. Had they sued for the difference between the market and contract price, I think it would be quite possible to state, "Yes. You must get that and you need not prove that the goods really corresponded to what was contracted for. But, of course, you will have to make allowance for any loss of value caused by the breach of condition, although it is not available as a weapon for the rejection of the goods *in toto*". It is only fair to observe that the learned Chief Justice did apparently find as a fact that the goods tendered were just as good as the goods contracted for. In that case it might be that if they had sued for the difference between the market price and the contract price and proved it, they would have got some damages. However I do not think they would have got very much because the only evidence that was called in went all to show that if the goods had been re-sold on the date of breach or shortly afterwards, far from having depreciated in value, they had appreciated. However, that was done and we cannot allow the plaintiffs to start a wholly new case on a different basis at this stage. We must, therefore, hold that the plaintiffs have failed to prove their case, that they were not justified in unreasonably delaying before they re-sold the goods in any event and that further in law before they could substantiate a claim of this nature and on this ground they must show that the goods which they purported to re-sell and had re-sold were goods which the defendants would have been obliged to take under the terms of the contract but failed to do so. The appeal must be allowed with costs here and below.

With regard to the two cases, they stand on exactly the same footing as the others because there never was any opportunity given to see whether the goods on the market would have involved any loss at all and the evidence is just the same as with regard to the other cases. The plaintiffs cannot leave this case in a state of nebulous conjecture. On this part of the case also the plaintiffs fail.

Mr. Grant does not press the counter-claim. The counter-claim will stand dismissed with costs in the appeal.

Krishnan, J.—I agree and have nothing to add.

V. N. V. *Appeal allowed.*

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2536 OF 1921.

April 29, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Zafar Ali.

TIRKHA MAL—DEFENDANT—APPELLANT

versus

GURJI MAL—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Partition—Separation of one member—Presumption as to others.

When one member of a joint Hindu family separates, there is no presumption that the remaining members remain joint and an agreement to remain united or to re-unite must be proved.

Jatti v. *Banwari Lal*, 74 Ind. Cas. 462; 4 L. 350; 21 A. L. J. 582; (1923) A. I. R. (P. C.) 136; 18 L. W. 273; 45 M. L. J. 355; (1923) M. W. N. 687; 25 Bom. L. R. 1256; 28 C. W. N. 785; 33 M. L. T. 283; 50 I. A. 192 (P. C.), followed.

Where on the separation of one member, the shares of other members also are defined in the partition deed, the legal inference is that the latter are to hold the property allotted to them in those shares as separate owners.

Second appeal from a decree of the District Judge, Hissar, dated the 13th June 1921.

Lala *Jagan Nath*, for the Appellant.

Mr. *G. S. Salarya*, for the Respondent.

JUDGMENT.—This was a suit between two Hindu brothers who, together with a third named Madan Lal, once constituted a joint Hindu family. In June 1903 the plaintiff separated from the other two and a deed of partition was duly executed defining the shares of all three. After the separation of the plaintiff, Madan Lal and the defendant, who was then a minor, continued to live together and the two transacted business jointly. Madan Lal died later on leaving a son Sohan Lal. The latter has not been heard of for over seven years and the plaintiff, therefore, maintained that he was dead and sued to recover half of his share in the property of which he and the defendant were co owners. The Trial Court dismissed the suit holding that the defendant and Madan Lal had remained united and that, therefore, the defendant was entitled to succeed to the whole of the property of Madan Lal's son by right of survivorship. On appeal the learned District Judge reversed the judgment and decree of the first Court on the ground that it was not proved that the defendant Madan Lal remained united or re-united after the partition.

The only point urged before us on behalf of the defendant-appellant in this second appeal is that the deed of partition referred to above fully indicated that the two brothers remained joint and that the finding of the lower Appellate Court to the contrary was erroneous and insupportable. But in the said deed the shares of the defendant and his brother Madan Lal were defined and the legal inference, therefore, is that they were to hold the property allotted to them in those shares as separate owner. In the recent Privy Council case, *Jatti* v. *Banwari Lal* (1), their Lordships of the Privy Council decided that when one member of a joint Hindu family separated there was no presumption that the remaining members remained united, and that an agreement to remain united or to re-unite must be proved like any other fact. In the present case there was no evidence to establish that the defendant and Madan Lal remained united or agreed to re-unite. We are, therefore, of opinion that the conclusion arrived at by the learned District Judge is correct and dismiss the appeal with costs.

R. L.

N. H. *Appeal dismissed.*

(1) 74 Ind. Cas. 462; 4 L. 350; 21 A. L. J. 582; (1923) A. I. R. (P. C.) 136; 18 L. W. 273; 45 M. L. J. 355; (1923) M. W. N. 687; 25 Bom. L. R. 1256; 28 C. W. N. 785; 33 M. L. T. 283; 50 I. A. 192 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 901 OF 1923.

February 11, 1925.

Present:—Mr. Justice Ramesam.

NARAYANA DOSS—PLAINTIFF—PETITIONER

versus

SANKARASUBBIER AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (2) (d)—Inam excluded from Permanent Settlement, whether estate—Jurisdiction of Civil Courts—Burden of proof.

An *inam*, which is not a *Darmila inam*, and which is excluded from the scope of the Permanent Settlement, whether enfranchised by the *Inam* Commissioner or not, can be governed by the Madras Estates Land Act only if it is a whole village and even then only if the conditions of s. 3 (2) (*d*) of the Act are satisfied, as to which the onus is on the person who seeks to oust the jurisdiction of the Civil Courts.

Petition, under s 25 of Act IX of 1887, praying the High Court to revise an order, dated the 30th July 1923, of the Court of the Subordinate Judge, Tinnavelly, in S. C. No. 1877 of 1922.

Mr. *K. V. Sesha Iyengar*, for the Petitioner.

JUDGMENT.—The plaintiff is the holder of an *inam* of 65 cents in a *ryotwari* (or *Ayan*) village Seevarampari belonging to Government. The defendant is his tenant and the suit is for rent. An *inamdar* by which I mean the owner of an *inam* excluded from the scope of the Permanent Settlement and either enfranchised by the *Inam* Commissioner or not, but not the so-called "*Darmila inam*", can be governed by the Estates Land Act only if it is a whole village and even then only if the conditions of s. 3 (2) (*d*) are satisfied as to which the onus is on the person, who seeks to oust the jurisdiction of the Civil Courts. In the present case we have not a case of a whole village. The case in *Appalanarasimhulu* v. *Sanyasi* (1) related to a subsequent *inam*, *i. e.*, land granted by a *zemindar* after the settlement (a grant before the settlement provided it was included in the assets of the *zemindari* stands on the same footing). It did not relate to a case of enfranchised or enfranchiseable *inam*. The case in *Gadadhara Doss* v. *Suryanarayana Patnaik* (2) was also a similar case so also *Jurugumilli Brahmayya* v. *Chellaghali Achiraju* (3). These cases have no bearing on the matter before me. The order of the Subordinate Judge (who thought these cases applied and directed the plaintiff to go to Revenue Court) is set aside and the suit remanded to him for disposal according to law. The respondents will pay the costs of the petition in this Court. The costs in the lower Court will abide the result.

V. N. V. *Petition allowed.*

Z. K.

(1) 17 Ind. Cas. 120; 38 M. 33.

(2) 64 Ind. Cas. 317; 44 M. 677; 41 M. L. J. 97; (1921) M. W. N. 413; 14 L. W. 453.

(3) 70 Ind. Cas. 615; 45 M. 716; (1922) M. W. N. 280; 31 M. L. T. 91; 43 M. L. J. 229; (1922) A. I. R. (M.) 373.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 4216 OF 1924.

February 5, 1925.

Present:—Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

CHELASANI RATLAYYA—PETITIONER

versus

ANNE BRAHMAYYA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to His Majesty in Council—Valuation in plaint accepted by defendant—Plaintiff, whether can question valuation.

Where a plaintiff values the property which is the subject-matter of the suit at Rs. 10,000 and the valuation is accepted by the defendant, it is not open to the plaintiff on an application by the defendant for leave to appeal to the Privy Council to show that the value of the property is less than Rs. 10,000.

Rachappa Subrao v. *Shidappa Venkatrao*, 50 Ind. Cas. 280; 43 B. 507; 17 A. L. J. 418; 25 M. L. T. 298; 36 M. L. J. 437; 20 C. L. J. 452; 21 Bom. L. R. 489; 10 L. W. 274; 24 C. W. N. 33; 1 U. P. L. R. (P. C.) 83; 46 I. A. 24 (P. C.) and *Alagappa Chetty* v. *Nachippan*, 69 Ind. Cas. 385; 43 M. L. J. 728; 16 L. W. 517; (1922) M. W. N. 683; (1923) A. I. R. (M.) 125; 31 M. L. T. 335, followed.

Petition presented under s. 110 and O. XLV, rr. 2 and 8, C. P. C., praying that in the circumstances stated therein, the High Court will be pleased to grant a certificate to enable the petitioner to appeal to His Majesty in Council against a decree of the High Court, dated the 13th February 1924, and passed in A. S. No. 186 of 1921, preferred against that of the Court of the Subordinate Judge at Bezwada, in O. S No. 41 of 1919.

Mr. *B. Somayya*, for the Petitioner.

Messrs. *A. Krishnaswami Iyer* and *P. Satyanarayana Rao*, for the Respondents.

ORDER.—This is an application for leave to appeal to His Majesty in Council. The value of the subject-matter of the suit in the Court of first instance and the value of the subject-matter in dispute on appeal to His Majesty in Council must be Rs. 10,000 or upwards: (section 110, C. P. C.). The suit was for setting aside an adoption and an alienation. The alienated properties were set forth in the schedule to the plaint and were valued at Rs. 5,000 in para. 4 of the plaint. That there are other properties affected by the adoption and by the suit is admitted and the value of all the properties was described in para. 3 of the plaint as Rs. 10,000, 30 years ago. The plaintiffs finally valued the suit for purposes of jurisdiction at Rs. 10,000 (see para. 7 of the plaint). This value must be the market value of the subject-matter of the suit. It cannot be the artificial valuation prescribed under s. 7 of the Court Fees Act which is inapplicable to the case as the suit is for declaration without consequential relief and, therefore, falls under Ch. II, cl. (17) of the Court Fees Act. Under s 12 of the Civil Courts Act, the jurisdiction depends on the value of the subject-matter of the suit and that value (which, in that

section, means market value) has been stated to be Rs. 10,000. The plaintiffs are, therefore, barred by their valuation [see *Alagappa Chetty* v. *Nachiappan* (1) where the valuation though under the Court Fees Act, was also of the market value as the suit related to sites and buildings and not lands and, therefore, was governed by s. 7, cl. (v) (*e*) and not cls. (*a*) to (*d*)]. The decision of the Judicial Committee in *Rachappa Subrao* v. *Shidappa Venkatrao* (2) involves the same principle. It was held in that case that the plaintiff's valuation having been accepted by the defendant, the defendant cannot be allowed to raise the question that the value was less than Rs. 5,000 and to contend that no appeal lay to the High Court. The present case is stronger. It is not the opposite party but the plaintiff himself that wants to show that the value of the subject-matter is less than Rs. 10,000 to avoid appeal to the Privy Council, he having valued the subject-matter at Rs. 10,000 when he filed his suit, a valuation accepted by the other side. It is not suggested that, if the value of the subject matter in suit is Rs. 10,000 or upwards, the value of the subject-matter in appeal has become different.

The judgment is a reversing judgment and the petitioner is entitled to the leave prayed for which is accordingly granted.

Leave granted.

V. N. V.

Z. K.

(1) 69 Ind. Cas. 385; 43 M. L. J. 728; 16 L. W. 517; (1922) M. W. N. 683; (1923) A. I. R. (M.) 125; 31 M. L. T. 335.

(2) 50 Ind. Cas. 280; 43 B. 507; 17 A. L. J. 418; 25 M. L. T. 298; 36 M. L. J. 437; 29 C. L. J. 452; 21 Bom. L. R. 489; 10 L. W. 274; 24 C. W. N. 33; 1 U. P. L. R. (P. C.) 83; 46 I. A. 24 (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 1113 OF 1924.

August 7, 1925.

Present:—Mr. Rupchand Bilaram, A. J. C.

Wadero Haji DOST MAHOMED AND ANOTHER—PLAINTIFFS

versus

MOHANDAS LALCHAND AND ANOTHER—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 3, O. XXX, r. 4—Contract Act (IX of 1872), s. 45—Suit by persons jointly entitled to sue—Death of plaintiff pending suit—Legal representatives not brought on record within statutory period—Abatement of suit—Interpretation of Statutes—Conflicting constructions, preference between.

Order XXX, r. 4 of the C. P. C. applies to suits which not only *may* but *are*, as a matter of fact, instituted in the name of a firm. The rule has no application to suits instituted in the names of individual partners. [p. 575, col. 1.]

All partners living at the time of the institution of a suit contemplated by s. 45 of the Contract Act should join as co-plaintiffs and the failure to bring on the record all such partners within the statutory period prescribed for institution of the suit would result in its dismissal. [p. 574, col. 1.]

Failure to bring on the record within the statutory period the legal representatives of a necessary party to a suit who was on the record and who dies pending the suit would result in the abatement or dismissal of the suit. [*ibid.*]

Of two alternative constructions of the provisions of a Statute which are both possible, the one which does not lead to absurdity should be accepted especially when such construction is most in accordance with the intention of the Legislature so far as it can be gathered from the provisions of the Act taken as a whole. [p. 575, col. 2.]

[Case-law discussed.]

Mr. *Kodumal Lekhraj*, for the Plaintiffs.

Mr. *E. V. Castollino*, for the Defendants.

JUDGMENT.—This suit was instituted by the two plaintiffs Dost Mahomed and Tejumal for rendition of accounts in respect of certain agricultural produce sent by them on their joint account to the defendants at Karachi for sale on commission. Tejumal has died since the suit. His legal representatives have not been brought on the record within the statutory period, and the suit as regards Tejumal has abated under O. XXII, r. 3, cl. (2), C. P. C. The question now for my consideration is whether Dost Mahomed is competent to continue the suit alone.

The plaintiff is silent as to the rights of the two plaintiffs *inter se*. They are both described in the heading of the plaint as *zemindars*. Whether the produce sent by them for sale came from fields jointly or separately owned by them or was purchased by them jointly, the plaintiffs may for the purposes of this case be treated as partners or *quasi* partners in the produce and its sale-proceeds.

From the pleadings it is clear that the cause of action on which the suit for accounts is based, is a promise made by the defendants to render an account of the sale-proceeds of this produce to both the

plaintiffs jointly and, therefore, according to the provisions of s 45, Indian Contract Act, the right to claim such account from the defendants rested during the lif time of Tejumal with both the plaintiffs jointly and now it rests jointly with the plaintiff Dost Mahomed and the legal representatives of Tejumal and not with the plaintiff alone.

The effect of s. 45, Indian Contract Act, on the rights of some of the partners to sue for the benefit of themselves and of others in respect of a joint cause of action has been the subject of several decisions before the passing of the C. P. C. of 1908. It would appear from those decisions that the Courts in India were of the view that all partners living at the time of the institution of a suit contemplated by s. 45, Indian Contract Act, should join as co-plaintiffs, and that the failure to bring on the record all such partners within the statutory period prescribed for institution of the suit resulted in its dismissal: *Kalidas Keraldas* v. *Nathu Bhagran* (1), *Relumal Derlaram* v. *Chellaram Jodharam* (2). It would also appear to be equally clear that failure to bring on the record within the statutory period the legal representatives of a necessary party to a suit who was on the record and who died pending the suit, resulted in the abatement or dismissal of the whole suit: *Raj Chunder Sen* v. *Ganga Das Seal* (3). There was a divergence of opinion as to the effect of the failure to join legal representatives of a partner who had died before suit. The Calcutta High Court was of opinion that the same rule applied : *Ram Narain Nursingh Doss* v. *Ram Chunder Lall* (4). The Bombay, Madras and Allahabad High Court had adopted a different view. *Gobind Parsad* v. *Chandra Sekhar* (5) *Motilal Bechardoss* v. *Ghellabhai Hariram* (6), *Vaidya Natha Ayyar* v. *Chinnasami Naik* (7) and *Debi Das* v. *Nirpat* (8). This question came before the Bombay High Court in *Motilal's case* (6) on a reference made by the Chief Judge of the Bombay Court of Small Causes, where a long standing practice had prevailed of entertaining suits without joining the legal representatives of a deceased partner, and the Court permitted this practice to continue though it was contrary to the provisions of s. 45, Indian Contract Act, as would appear from the following observations of Farron, J., at page 14* of the report :—

"The introduction, into s. 45, of the words 'as between him and them' occasions, no doubt, a serious difficulty in adopting the ruling of the High Court of Allahabad. It is difficult to give these words their full effect, if the surviving contractors in the case of partners are allowed to sue alone. The right to performance of the contract, as far as the other contracting party is concerned, rests just as much with the representative of the deceased partner as with the surviving partner. Can the latter, then sue without joining the former as a party to the suit? Logical consistency points to an answer in the negative. The case of partners is, however, as we have shown, anomalous and we think that as the Legislature has not enacted that the representatives of a deceased partner must join in suing in a partnership contract jointly with the surviving partners, we are not wrong in holding that, notwithstanding the provisions of the Contract Act, the old practice of the Small Cause Court need not be changed".

This exception of permitting the living partners to sue, given effect to by judicial decisions of the three High Courts against the provisions of s. 45, Indian Contract Act does not appear to have been extended so as to permit of a suit being continued without bringing on the record the legal representatives of a partner who had died pending the suit.

It is, however, contended that O. XXX, r. 4 of the C. P. C. of 1908 contains a legislative modification of the provisions of s. 45, Indian Contract Act, and that in a suit filed by partners in the ordinary form it is not necessary now to bring on record the legal representatives of a partner dying pending the suit. Reliance has been placed on the observations of Fletcher, J., in *Bal Kissen Das* v. *Kanhya Lal* (9). It is no doubt true that at first sight O. XXX,

(1) 7 B. 217; 7 Ind. Jur. 428; 4 Ind. Dec. (N. S.) 147.
(2) 1 S. L. R. 191.
(3) 31 C. 487; 8 C. W. N. 442; 14 M. L. J. 147; 31 I. A. 71; 1 A. L. J. 145; 8 Sar. P. C. J. 623 (P. C.).
(4) 18 C. 86; 9 Ind. Dec. (N. S.) 58.
(5) 9 A. 486; A. W. N. (1887) 133; 5 Ind. Dec. (N. S.) 761.
(6) 17 B. 6; Chitty's S. C. C. R. 336; 9 Ind. Dec. (N. S.) 4.
(7) 17 M. 108; 6 Ind. Dec. (N. S.) 74.
(8) 20 A. 365; A. W. N. (1898) 73; 9 Ind. Dec (N. S.) 594.
(9) 21 Ind. Cas. 509; 17 C. L. J. 648.

*Page of 17 B.—[*Ed.*]

r. 4 would appear not to be limited to suits instituted by or against a firm in the firm's name, but also to refer to suits instituted by partners in their individual names. The rule refers to suits which may be filed, and not to suits which are, as a matter of fact, filed in the name of the firm. It may fairly be argued that this rule modifies the provisions of s. 45, Indian Contract Act, so as to permit of suits being instituted in the ordinary form and to permit of such suits being continued by one or more of the partners in a firm, without impleading or joining the legal representatives of a deceased partner.

There are, however, some difficulties in accepting this view, and it appears to me, with all due respect to the learned Judges who were parties to the decision in *Bal Kissen Das' case* (9) that O. XXX, r. 4 applies to suits which not only *may* but *are*, as a matter of fact, instituted in the name of the firm and does not apply to suits instituted in the names of individual partners. In this view I am supported by a later ruling of another Division Bench of the same High Court in *Monmohan Panday* v. *Bidhu Bhusan Roy Chowdhury* (10) where *Bal KissenDas' case* (9) appears not to have been referred to or considered. The point at issue in this later case was as to the maintainability of an appeal where one of the successful respondents had died pending appeal. The original suit had not been filed by the partners in the firm's name, and one of the difficulties of accepting the view that r. 4 applied as well to suits instituted in the names of the individual partners has been brought out in the following passage of their Lordships at page 270:*—

"But even if we were to hold that the appeal can proceed in the absence of the representatives of the deceased plaintiff, we do not think that there would be any benefit to the appellants because the representatives of the deceased plaintiff can apply for execution of the entire decree against the defendants as the decree in their favour cannot be touched by us."

Two different rules as to joinder of parties depending on whether such joinder is to be made in a suit or in an appeal, could not have been within the contemplation of the Legislature and should not prevail. Pushed to its logical conclusion r. 4, as so interpreted, would lead to any absurdity. When a suit is instituted by the sole surviving partner of a firm in his own name, on this interpretation, it would appear that on his death the suit may be continued without bringing his legal representatives on the record, or as a matter of that, without having any person on the record as plaintiff whether such person be his personal legal representative or not—a possibility which could never have been intended by the Legislature.

Rule 4 is equally open to the construction that it applies to suits which not only may be instituted under r. 1 of the same Order, but are, as a matter of fact, instituted under that rule. This rule forms part of O. XXX which regulates generally the special procedure in suits by and against firms, and does not form part of O. XXII which refers to joinder of legal representatives in an ordinary suit. Though a suit instituted under O. XXX, C. P. C., in the name of the firm, is on behalf of all the partners of the firm, their names do not appear on the record. *Prima facie*, therefore, there would appear to be no need for an application to join the legal representatives of any of such partners dying pending suit. This accounts for the express provision in r. 4 that s. 45, Indian Contract Act, shall not have the effect of making such joinder necessary. The same considerations do not apply to a suit filed in the ordinary form. Of the two alternative constructions which are both possible, the one which does not lead to an absurdity should be accepted: per Lord Wensleydale on *Grey* v. *Pearson* (11) and specially so when it is one which in the words of Lord Herschel in *Colquhoun* v. *Brooks* (12) is most in accordance with the intention of the Legislature so far as it can be gathered from the provisions of the Act taken as a whole. I, therefore, hold that O. XXX, r. 4, C. P. C. is limited in its operation to suits instituted by or against partners in the name of their firm, and not in their individual names. The result is that this suit fails and is dismissed with costs.

Suit dismissed.

P. B. A.

Z. K.

(10) 48 Ind. Cas. 309; 28 C. L. J. 268.

*Page of 28 C. L. J.—[*Ed.*]

(11) (1857) 6 H. L. C. 61 at p. 106; 26 L. J. Ch. 473; 5 W. R. 454; 10 E. R. 1216; 3 Jur. (N. S.) 823; 108 R. R. 19.

(12) (1889) 14 A. C. 493 at p. 506

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 529 OF 1925.

July 23, 1925.

Present:—Mr. Justice Ramesam.

THE MAHARAJA OF JEYPORE—PETITIONER

versus

SOBHA SUNDAR DALAI—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 111, 112—Civil Procedure Code (Act V of 1908), s. 115—Sale of holding, application for, by land-holder—Order of Revenue Divisional Officer, whether revisable by High Court—Board of Revenue, refusal of, to interfere—Interference by High Court—Arrears of rent, payment of, by stranger—Acceptance by land-holder, effect of—Interest of person paying, whether can be questioned.

A Revenue Divisional Officer before whom an application is made by the land-holder under s. 111 of the Madras Estates Land Act for directing the sale of a *raiyat's* holding is a Court subordinate to the High Court and his order is, therefore, revisable under s. 115 of the C. P. C.

Where, however, the Board of Revenue has declined to interfere with the order of the Revenue Officer, the High Court will refuse to interfere in revision, unless its non-interference would lead to a gross miscarriage of justice.

A total stranger cannot, by depositing the amount of rent under s. 112 of the Madras Estates Land Act obtain a stoppage of the sale. He ought to possess an interest which will be affected by the sale.

Where, however, the land-holder accepts the amount deposited by a stranger, it must be taken that he accepts it, as if it was paid for rent due by the *raiyat* and if that is so, he cannot change his position afterwards and question the interest of the person paying it.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act of 1915, praying the High Court to revise an order of the Agency Divisional Officer, Oriya Agency, Koraput, dated the 23rd October 1922, in E. L. A. No. 1 of 1922.

Mr. *P. Somasundaram*, for the Petitioner.

Mr. *K. N. Rajagopala Sastry*, for the Respondent.

JUDGMENT.—A preliminary objection has been taken that the revision petition does not lie but following *Paramaswami Ayyengar* v. *Alamu Nachiar Ammal* (1) and *Ramaswami Goundan* v. *Kali Goundan* (2) I hold it lies. The learned Vakil for the respondents says that there is not even a suit which might go to the District Court and, therefore, the reason of Ayling, J., in *Paramswami Ayyengar* v. *Alamu Nachiar Ammal* (1) does not apply. But we have got an application under s. 111 of the Act. A suit to question it might have been filed by the defaulter under s. 112. I think this is enough to make the Revenue Divisional Officer a Court subordinate to the High Court. How far I should interfere is a difficult matter. Coming to the merits I remember (1) that this civil revision petition has been filed in April 1925, against an order of October 1922, (2) that the Board of Revenue has declined to interfere and, if possible, I should not create a conflict between an order of this Court and an order of the Board of Revenue unless there will be such a gross miscarriage of justice by my non-interference as to require my passing an order differing from the Board of Revenue [*vide* Devadoss, J., in *Burla Appanna* v. *Amala Latchayya* (3).]

It is true that a total stranger may not, by depositing the amount of rent, obtain a stoppage of the sale. He ought to possess an interest which will be affected by the sale. It is doubtful if that is the case here. The respondent alleged that he was a *mokhasadar* of the suit land and all the proceedings taken by the petitioner against the tenants were bogus proceedings. If so his interest cannot be affected by the sale. The only other way in which a sale may be stopped is by the payment of the amount in default by the respondent or by some other person on his behalf. In this case, the petitioner at first accepted the amount. We must take it that he accepted it, as if it was paid for rent due by the *raiyat*. If so, he cannot change his mind about it and question the interest of the person paying it.

It is obvious on the facts of this litigation that the two parties must soon face each other in a regular suit and it is clear that it is more desirable that the matter in dispute between them should be tried in such a suit rather than be enquired into in a proceeding of this kind. Having regard to this consideration and to the conditions I have already set forth at the earlier part of the judgment, I decline to interfere.

The petition is dismissed with costs.

Petition dismissed.

V. N. V.

Z. K.

(1) 49 Ind. Cas. 11; 42 M. 76; 35 M. L. J. 632; 9 L. W. 26; (1918) M. W. N. 107.

(2) 52 Ind. Cas. 634; 42 M. 310; 36 M. L. J. 571.

(3) 79 Ind. Cas. 372; 47 M. 250 at p. 259; 45 M. L. J. 735; 33 M. L. T. 92; 18 L. W. 849; (1924) A. I. R. (M.) 119.

MADRAS HIGH COURT.

CIVIL APPEAL No. 176 OF 1922.

February 24, 1925.

Present:—Justice Sir Charles Gordon Spencer, KT., and Mr. Justice Ramesam.

KANDASWAMI NAICKER AND OTHERS—DEFENDANTS NOS. 1 TO 3—APPELLANTS

versus

VENKATA REDDIAR AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 4 TO 6—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 74, 91—Subrogation—Mortgage by father for himself and son—Partition between father and son—Father undertaking discharge of mortgage—Mortgage, subsequent, by father—Part of consideration applied towards discharge of prior mortgage—Second mortgagee, whether entitled to be subrogated to first mortgagee's rights against son.

A Hindu father executed a mortgage of certain properties on behalf of himself and his minor son. There was subsequently a partition between the father and the son, who had then attained majority by which the father undertook to discharge the mortgage and the properties comprised in the mortgage were allotted to the son. The father thereafter executed a second mortgage on the same properties on behalf of himself and another minor son subsequently born. Part of the consideration for the second mortgage went towards the discharge of the first mortgage. In a suit by the second mortgagee, after the death of the father against the sons:

Held, (1) that the doctrine of subrogation could not be availed of by the second mortgagee, [p. 578, col. 2]

(2) that there was no presumption of an intention on the part of the parties to the second mortgage that the first mortgage should be kept alive after it was discharged as there was no intermediate encumbrance against which it might have served as a shield; [p. 578, cols. 1 & 2.]

(3) that the plaintiff was not entitled by subrogation to bring to sale the properties of the son who was divided from his father and was not a party to the second mortgage merely on account of the fact that part of the consideration for the second mortgage had gone towards the discharge of the debt due under the prior mortgage. [p. 578, col. 2.]

Chidambara Nadan v. *Musuvathi Muni Nagendrayyan*, 58 Ind. Cas, 813; 39 M. L. J. 445; (1920) M. W. N. 534; 12 L. W. 393; 28 M. L. T. 300, *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*, 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.) and *Mollayya Padayachi* v. *Krishnaswami Aiyar*, 85 Ind. Cas. 855; 47 M. L. J. 622; (1925) A. I. R. (M.) 95; 21 L. W. 336, distinguished.

Mohesh Lal v. *Mohant Bawan Das*, 9 C. 961; 10 I. A. 62; 13 C. L. R. 221; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424; 4 Ind. Dec. (N. S.) 1291 (P. C.), followed.

Appeal against a decree of the Court of the Subordinate Judge, Ramnad at Madura, in O. S. No. 8 of 1921.

Mr. *K. Rajah Aiyar*, for the Appellants.

Messrs. *T. R. Rama Chandra Aiyar*, *S. Sundaraja Aiyangar* and *S. Jagadisa Aiyar*, for the Respondents.

JUDGMENT.

Spencer, J.—The facts of this case appear from my learned brother's judgment which I have had the benefit of perusing, and from the judgment of the Court below. The important points to be noted are first that the 1st defendant, who was an adult in 1912 when the suit mortgage (Ex. A) was executed by his father Akkal Naicker, did not join in executing it and that, therefore, he and his minor sons, defendants Nos. 2 and 3, who are the three appellants before us, are not directly bound by it; secondly, that between the date of the earlier mortgage of 1898 executed by Akkal Naicker on behalf of himself and his then minor son 1st defendant and the date of the suit mortgage, there was a partition in 1907 between Akkal Naicker and 1st defendant, in which the mortgage of 1898 was allotted to the share of the father Akkal Naicker, and, therefore, Akkal Naicker had no power to encumber the separate estate of 1st defendant even if he intended to do so, and that he had an intention to do so is not apparent from his action in signing only on behalf of himself and the 4th defendant, his minor son by a second wife. The only question for our decision in this appeal, apart from a question of limitation which it becomes unnecessary to decide if on this point we find for the appellants, is whether the plaintiff has any right through subrogation to bring the properties of the appellants to sale on account of part of the consideration of Ex. A having gone to discharge the debt under Ex. B.

Upon this question I think that the Subordinate Judge was mistaken in following the decision in *Chidambara Nadan* v. *Musuvathi Muni Nagendrayyan* (1), as if the facts of that case were similar to the present. That was a case, where there was an intermediate encumbrance. The fourth mortgagee having paid off the first and third mortgagees claimed to stand in the shoes of the first mortgagee and to have priority over the second mortgagee. The learned Judges held that because the fourth mortgagee had undertaken in writing to pay off the prior mortgage with his own money there was a presumption that he intended to keep that encumbrance alive for his own benefit. They refer to certain observations of K. Srinivasa Iyengar, J., in

(1) 58 Ind. Cas. 813; 39 M. L. J. 445; (1920) M. W. N. 534; 12 L. W. 393; 28 M. L. T. 300.

Mathammal v. *Razu Pillai* (2) as *obiter* and say that they were coloured by a view of the effect of *Mohesh Lal* v. *Mohant Bawan Das* (3) which they regarded as erroneous. I can only understand this as meaning that they considered Srinivasa Iyengar J.'s view to be erroneous and not that they doubted the correctness of *Mohesh Lal* v. *Mohant Bawan Das* (3) which is a Privy Council decision. I do not find any essential conflict of principle between *Mohesh Lal* v. *Mohant Bawan Das* (3) and *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (4) which is also a decision of the Privy Council. The latter was a case where a purchaser of the equity of redemption, who exercised the owner's right of redeeming his property from encumbrance, paid off the first mortgagee and then used that prior mortgage as a shield against the claims of a subsequent mortgagee. When the question arose whether the party paying off the charge intended to extinguish it or to keep it alive, their Lordships observed that he must be presumed to have acted according to his interest. In *Mohesh Lal* v. *Mohant Bawan Das* (3) the plaintiff lent a sum of Rs. 10,641 in cash which was used by Mangal Das partly to pay off a debt to another creditor named Lakshminarain, to whom he had mortgaged not only three villages belonging to a religious institution held by him under a grant from the then *mohant* but also one village of his own purchased by him with money lent by the plaintiff previously. The question arose whether Mangal Das intended to keep Lakshminarayan's mortgage alive. Their Lordships held that Mangal Das had no interest in keeping Lakshminarain's mortgage alive, and that it was paid off by him and not by the plaintiff. Then they observe: "it must be presumed that, when the plaintiff lent the money to Mangal to pay off the mortgage, he lent it upon the security expressed in the bond and for which he stipulated. Equity cannot give him an additional security because the security relied upon turns out to be bad as regards a portion of the lands included in it." Similarly, in the present case, there is no room for a presumption of an intention on the part of the parties that Ex. B should be kept alive after it was discharged. There was no intermediate encumbrance against which it might have served as a shield. Before the subsequent mortgage was executed, the prior mortgage had been discharged and ceased to exist. Section 74 of the Transfer of Property Act gives a subsequent mortgagee a right to pay off a prior mortgagee, but he cannot by so doing enlarge the scope of the security which he has got by his own mortgage-deed upon the property of his mortgagors. This section covers independent acts of subsequent mortgagees, paying off prior mortgagees and has no application to the facts of this case for Avudaiyammal's mortgage was finally discharged on April 12th, 1912, before the plaintiff's mortgage was executed on April 21st, 1912, as it appears from the endorsement on Ex B. Section 91 is not applicable, because the plaintiff had no interest in redeeming property other than what was legally the subject of his mortgage. In the words of Sir Barnes Peacock: "There is nothing in the bond, or in the evidence, or even in the surrounding circumstances to show that the mortgagor (there Mangal, here Akkal Naicker) intended to keep the mortgage (there Lakshminarain's, here Avudayammal's) alive or that he or the plaintiff intended that the latter should hold the mortgage as an additional security for the loan". The mortgagor's interest was to extinguish Avudayammal's mortgage which carried 12 per cent. interest by giving a mortgage to the plaintiff at 9 per cent. and he, therefore, cannot be presumed to have intended to agree to its being kept alive.

Following *Mohesh Lal* v. *Mohant Bawan Das* (3), I agree with my learned brother that this appeal must be allowed with costs in both Courts and the plaintiff's suit dismissed against defendants Nos. 1 to 3. The decree will be drafted so as to make the 4th defendant's properties alone liable.

Time for payment is extended to six months from this date.

Ramesam, J.—The appeal arises out of a suit brought on a deed of mortgage (Ex. A, dated 21st April 1912) executed by one Akkal Naicker on his own behalf as well as on behalf of his (then) minor son Alagiriswami Naicker 4th defendant. The 1st defendant is another son of the said Akkal Naicker by a different wife. So he is

(2) 44 Ind. Cas. 753; 41 M. 513; 23 M. L. T. 106; (19188) M. W. N. 251: 7 L. W. 420.

(3) 9 C. 961; 10 I. A. 62; 13 C. L. R. 221; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424; 4 Ind. Dec. (N. S.) 1291 (P. C.).

(4) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

a half brother of the 4th defendant. Second and third defendants are his sons. The defendants Nos. 1, 2 and 3 were impleaded on the ground (among other grounds which need not be considered) that part of the consideration of Ex. A went in discharge of an earlier mortgage bond (Ex. B, dated 20th July 1898) executed by the said Akkal Naicker for himself and as guardian of the 1st defendant. To the extent it was so utilised, the Subordinate Judge granted a decree against defendants Nos. 1 to 3, who appeal.

It is now conceded that the 1st defendant and Akkal Naicker had been divided on the date of Ex. A and a suit by Akkal Naicker for re-opening the partition was actually pending on that date. The suit was afterwards dismissed. It is also conceded that properties which had fallen to the share of the 1st defendant in the partition according to the findings in the suit were included in the document (Ex. A). *Prima facie*, this document cannot, by itself, bind the appellants or their properties. But the Subordinate Judge held, following *Chidambaram Nadan* v. *Musuvathi Muni Nagendrayyan* (1), that the plaintiff could claim the rights of the mortgagee by subrogation. It may be at once observed that that decision cannot help the respondent. That was the case of a fourth mortgagee, the consideration being partly the discharge of a third mortgage, which itself was in consideration of paying off a portion of the first mortgage, and partly the discharge of the balance of the first mortgage. It was held that the fourth mortgagee could claim priority over the second mortgagee. I agree with the decision, though not with the remarks in the judgment which imply that the decision in *Mohesh Lal* v. *Mohant Bawan Das* (3) is inconsistent with that in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (4) that the former presented some difficulty which has to be got over; and that the observations in Srinivasa Iyengar, J., in *Muthammal* v. *Razu Pillai* (2) are erroneous. I do not think that the observations in *Muthammal* v. *Razu Pillai* (2) are erroneous though some are *obiter*. In my opinion, the two decisions in *Mohesh Lal* v. *Mohant Bawan Das* (3) and *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (4) are not inconsistent and represent two types of cases. In *Mohesh Lal* v. *Mohant Bawan Das* (3) there was no intermediate incumbrance, whereas there was one in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (4). The latter governed the facts of *Chidambaram Nadan* v. *Musuvathi Muni Nagendrayyan* (1) and was rightly applied but, there was no need to explain the decision in *Mohesh Lal* v. *Mohant Bawan Das* (3) as it could not present any difficulty in the disposal of the case. On the other hand the decision in *Koopmia Sahib* v. *Chidambaram Chetti* (5) and *Chellamcherla Kalagayya* v. *Mummareddi Yanadamma* (6) follow and apply *Mohesh Lal* v. *Mohant Bawan Das* (3) in similar facts. On a close examination of the facts of the last case, I find it difficult to distinguish it from the facts before us. The first mortgage effected by Mangal Das on 2nd July, 1869 (in that case) corresponds to Ex. B and the suit mortgage in it corresponds to Ex. A. The appellants before us stand on the same footing as Bavan Das, the Mohant of the Asthal of Jankinagar. The same four parcels of property (three of them belonging to the Asthal and one belonging to Mangal Das) were mortgaged under this. The first mortgage was assumed to be binding on the Asthal but it was held that the second was not, as Mangal Das ceased to be the agent. "Mr Ramachandra Iyer who appeared for the plaintiff relied on the decision in *Mollayya Padayachi* v. *Krishnaswami Aiyar* (7). Though the learned Judges in that case agreed in the conclusion, they gave differing reasons. The reasons of Kumaraswami Sastri, J., are not applicable in the present case. Spencer, J., relied on *Narayana Kutti Goundan* v. *Pechiammal* (8) and *Bhagwan Singh* v *Muhammad Mazhar Ali Khan* (9) and held that the plaintiff was interested in paying the amount. The case in *Narayana Kutti Goundan* v. *Pechiammal* (8) was the case of a reversioner and as was pointed out by me in *Narayanasami Naicker* v. *Periasamy Odayar* (10), a reversioner may, in certain circumstances, be entitled to redeem even during the lifetime of the widow [the report at page 959 erroneously refers to *Meda Vengamma* v. *Mitta Chelamiah* (11) instead of the case in *Narayana Kutti Goundan* v. *Pechiammal* (8)]. The case in *Bhagwan Singh*

(5) 19 M. 105; 6 Ind. Dec. (N. S.) 778.
(6) 9 Ind. Cas. 139; 21 M. L. J. 180; 9 M. L. T. 258.
(7) 85 Ind. Cas. 855; 47 M. L. J. 622; (1925) A. I. R. (M.) 95; 21 L. W. 336.
(8) 15 Ind. Cas. 206; 36 M. 426; 11 M. L. T. 174; (1912) M. W. N. 353; 22 M L. J. 364.
(9) 23 Ind. Cas. 339; 36 A. 272; 12 A. L. J. 394.
(10) 68 Ind. Cas. 734; 44 M. 951 at p. 960; 14 L. W. 116; (1921) M. W. N. 465; 41 M. L. J. 163.
(11) 15 Ind. Cas. 17; 36 M. 484; 12 M. L. T. 293; 23 M. L. J. 168.

v. *Muhammad Mazhar Ali Khan* (9) is the case of a co-mortgagor. Neither of these cases nor the decision in *Mollayya Padayachi* v. *Krishnaswami Aiyar* (7) are helpful to me in deciding the present case. Mr. Ramachandra Iyer also relies on *Dinobundhu Shaw Choudhry* v. *Jogmaya Dasi* (12) and *Ammani Ammal* v. *Ramaswami Naidu* (13). But these cases are distinguishable. In the former, the second mortgage became futile even against the mortgagor as it was effected during the pendency of an attachment and it was held that the first mortgage was intended to be kept alive. But in the case before us, Ex. A remains perfectly valid, against Akkal Naicker and 4th defendant and their properties and the plaintiff wishes to add to the security by claiming a charge even against the appellant's properties wrongly included in Ex A I at first thought that Ex. A being a valid mortgage of Akkal Naicker's properties (common to Exs. A and B) as regards the consideration other than that which was utilised in the payment of Ex. B, the plaintiff might be regarded as second mortgagee of Akkal Naickers's properties and could thus redeem Ex. B (s. 74 of the Transfer of Property Act and thus subrogate himself to the rights of the mortgagee under Ex. B., and thus indirectly could claim a charge even against such of the properties of the 1st defendant which were common to Exs. A and B. But the same might be said on the facts of *Mohesh Lal* v. *Mohant Bawan Das* (3) and as the Judicial Committee refused any relief against Bavan Das (by splitting up the suit bond into two parts), I do not think this line of reasoning is permissible: See *Chellamcherla Kalagayya* v. *Mummareddi Yanadamma* (6); *Koopmia Sahib* v. *Chidambaram Chetti* (5) and *Govindaswami Thevan* v. *Doraiswami Pillai* (14).

If the plaintiff after finding he was misled by Akkal Naicker in dealing with the properties of 1st defendant abstained from the payment of the amount due on Ex. B as provided for in Ex. A and informed Akkal Naicker of the same, he might then possibly become a second mortgagee of Akkal Naicker's properties only, whether he would then be entitled to redeem Ex. B by reason of his position as such second mortgagee, need not be discussed as it is not suggested in the present case that the payment of the amount due on Ex. B was paid otherwise than in pursuance of the terms of the deed (Ex. A). We are bound to follow *Mohesh Lal* v. *Mohant Bawan Das* (3). It is not suggested that there are any other facts from which an intention to keep Ex. B alive can be inferred. The primary object of Ex. A was to pay off Ex. B.

In the view I take of this point, it is unnecessary to consider the question of limitation.

The result is that the appeal must be allowed and the plaintiff's suit will be dismissed with costs throughout so far as the defendants Nos. 1 to 3 are concerned. The decree against 4th defendant will stand. A fresh mortgage-decree will be drawn up against the properties of the 4th defendant only. The time for payment is extended to 24th August 1925.

V. N. V. *Appeal allowed.*

Z. K.

(12) 29 C. 151; 29 I. A. 9; 6 C. W. N. 209; 12 M. L. J. 73; 4 Bom. L. R. 238; 8 Sar. P. C. J. 217 (P. C.).

(13) 51 Ind. Cas. 57; 37 M. L. J. 113; 10 L. W. 75; (1919) M. W. N. 866.

(14) 6 Ind. Cas. 781; 34 M. 119; 20 M. L. J. 374; 8 M. L. T. 132; (1910) M. W. N. 390.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 462 OF 1922.

January 27, 1925.

Present :—Justice Sir Charles Gordon Spencer, Kt., and Mr. Justice Ramesam.

OBLA K. SUBBIER AND OTHERS—PLAINTIFFS—APPELLANTS

versus

C. M. VENKATACHALAPATHI AYYAR—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 39—Contract for purchase of goods—Notice of arrival—Failure to take delivery—Default to give notice of later arrivals—Refusal of part performance of contract, whether amounts to implied repudiation of whole.

Plaintiffs agreed to sell 25 bales of yarn to the defendants to be delivered at the plaintiffs' godown. No time was fixed for performance of the contract but the terms of the contract were that the plaintiffs were to intimate the arrival of the bales from the mills and the defendants were to take delivery next day. Defendants accepted delivery of three bales out of the total consignment of 25 bales. As regards 7 of the remaining bales, the plaintiffs gave notices in their letters, but the defendants failed to take delivery. In respect of the remaining 15 bales the plaintiffs gave no notice of arrival, but in a letter relating to the delivery of the 7 bales, plaintiffs stated that if the defendants failed to take delivery of the 7 bales within two days, they would be deemed to have broken the contract even as regards the remaining 15 bales which were yet to arrive. Defendants did not answer this letter,

In a suit for damages by the plaintiffs for breach of contract as to the 22 bales of goods:

Held, (1) that due notice of the arrival of the goods having been given to the defendants, the defendants had committed a breach of contract in respect of the 7 bales; [p. 582, col. 1]

(2) that the plaintiffs' failure to give notice with respect to the remaining 15 bales amounted to a breach of contract on their part, and that they could not claim damages as they had failed to perform the first step in the performance of their part of the contract, and the defendants' conduct did not amount to a repudiation of the whole contract so as to render the giving of notice of the arrival of the remaining goods unnecessary. [*ibid.*]

Per *Ramesam, J.*—For a plaintiff to succeed in an action for breach of contract he must prove first his readiness and willingness to perform the contract which includes his capacity to perform the contract. [p. 582, col. 2.]

In this case, in respect of the 7 bales, the presence of the goods in the godown, was not a condition precedent to the plaintiffs' intimating to the defendants asking them to take delivery of the goods. It was enough if the plaintiffs had practically the goods at their disposal in the custody of the mills. [*ibid.*]

An implied repudiation by the defendants of the whole contract ought not to be inferred merely from their refusal to perform a part of the contract. [p. 583, col. 1.]

Appeal against a decree of the Subordinate Judge, Madura, in O. S. No. 24 of 1920.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Mr. *T. S. Venkatesa Iyer*, for the Respondent.

JUDGMENT.

Spencer, J.—The contract between the plaintiffs and the defendants was for the sale of 25 bales of yarn to be delivered at the plaintiffs' godown at Madura. The defendants paid an advance of Rs. 1,250. The price at which the goods were to be sold was Rs 13-2-0 per bundle that is, at the rate of 89 bundles to the bale, Rs. 1,050 per bale. No time was fixed for performance, but the terms of the contract were that the plaintiffs were to intimate the arrival of the bales from the Madura Mills and that the defendants, next day, were to bring the price and take delivery of the goods. These terms are contained in a letter (Ex. A) written by the plaintiffs' agent to the defendants. The defendants accepted 3 bales of the total consignment of 25 bales, and the present suit relates to the remaining bales. As regards 7 of the remaining bales the plaintiffs gave notices in their letters Exs. D, G, G1 and G2 but the defendants failed to take delivery. The Subordinate Judge awarded damages to the plaintiffs as regards these 7 bales, calculating the prevailing price at Rs. 9-4-0 at the difference between that and the contract rate of Rs. 13-2-0. In respect of the remaining 15 bales, the plaintiffs' suit was dismissed.

The defendants appeal and the plaintiffs file a memorandum of objections. As regards the 7 bales, the arrival of which the plaintiffs announced to the defendants, the defendants' Vakil's argument is that there was no compliance with the terms of the contract, because the plaintiffs failed to prove that they had goods in their hands available for delivery. On receiving a letter of advice, the defendants were entitled to proceed to the plaintiffs' godown and inspect the goods before taking delivery. It has not been established in the present case that the goods never reached the plaintiffs' godown, or that they would not have been available if the defendants had applied for delivery. The defendants do not say that they went and saw the plaintiffs' godown and found it empty. The conclusion of the Subordinate Judge that the defendants failed to substantiate this contention that the letters of advice were not in accordance with the terms of the contract appears to be correct.

As regards the rate at which damages were calculated, the evidence of P. W. No. 1 is that the price fell in October to Rs. 12, and Rs. 12-8, and in November to Rs. 9 and Rs. 9-8. Plaintiff's witness No. 2 says that the price on the 8th of *Masi*, that is on the 19th February was Rs. 9-4. As the price in November about the time when defendants failed to take delivery had fallen and then varied between Rs. 9 and Rs. 9-8, I think that the Subordinate Judge was right in taking Rs. 9 4 as the mean between these prices, and in calculating damages on the difference between that rate and the contract rate and that he was not misled by referring to the price prevailing at the time when the plaintiffs treated the defendants as having broken their contract through the letter, Ex. H of February 17, 1919. The plaintiffs are not entitled to damages in respect of the remaining 15 bales in respect of which they gave no notice of arrival. Defendants also are not entitled to damages in respect of these 15 bales as they suffered no loss.

In the memorandum of objections, the plaintiffs have put forward the plea that the defendants, having failed to take delivery of 7 bales, showed by their conduct that they had repudiated their contract

even as regards the remaining 15 bales. The only support for this contention is the letter (Ex. H) written by the plaintiffs to the defendants, in which they said that if the defendants failed to take delivery of the 7 bales within two days, they would be deemed to have broken the contract, and added that even as regards the remaining 15 bales which were yet to arrive, they would calculate damages at the same rate. Defendants did not answer this letter and it is now suggested that their conduct in not answering it amounted to a repudiation of the whole contract, when it is coupled with the fact that the market was falling and that they had not kept their contract in respect of any portion of the goods which they contracted to buy. The Subordinate Judge held in respect of this portion of the case that the plaintiffs' failure to give notice with respect to 15 bales was really a breach of contract on their part, and that they could not claim damages when they failed to perform the first step in the performance of their part of the contract, I see no reason to differ from this conclusion. I think that it would not be justifiable to infer merely from the fact that the defendants sent no reply to Ex. H that they agreed to treat the whole contract as no longer existent. It is evident from Ex. I that there was no booking and no despatch of goods from the Mills after 20th November 1918. As time for performance of this part of the contract had not arrived, I think that until the plaintiffs gave the defendants notice that they had available 15 bales ready for delivery to them, or unless they informed them that if they failed to reply to their letter, they would treat the whole contract as having been broken by them, they had no right to presume from their conduct that the defendants would not take delivery of the bales that remained to be delivered, whatever market rates might be prevailing at the time of tender.

The appeal and the memorandum of objections are dismissed with costs.

Ramesam, J.—I agree, and will add a few words. The first point argued by the learned Vakil for the appellants is that the plaintiffs have not substantially complied with the terms of the contract, when they wrote letters Exs. D, G, G1 and G2, as they had not the bales in their godown. When we examine the contents of Ex. 1, the ledger kept by the Madura Mills, it is not clear that plaintiffs had not the goods ready when they addressed these letters, though perhaps the contention is true as to Ex G1; but assuming they had not the goods in their godown, I do not think that possession of the goods in the godown is a condition precedent to their intimating to the defendants asking them to take delivery of the goods. It is enough if the plaintiffs had practically the goods at their disposal in the custody of the Mills, Ex. A cannot be construed as if the words "arrival of the bale or bales" amount to a description of the goods similar to the words "July or August Shipments" in *Bowes* v. *Shand* (1). Mr. C.V. Ananthakrishna Iyer relied on a decision in *Ramier* v. *Runa Cheena Mana Navanna Ona & Bros* (2). We observe that Phillips, J., agreed to the conclusion reluctantly; and he later differed from that conclusion in *Lakshmana* v. *Ramalinga Mudaliar* (3). A similar view was taken by the Chief Justice and Srinivasa Iyengar, J., in A. S. No. 60 of 1922. It is true that for a plaintiff to succeed, he must prove first his readiness and villingness to perform the contract which, no doubt, includes his capacity to perform the contract: vide my observations in *Rayulu Iyer* v. *Kuppu Iyer* (4). It is clear on the facts of this case that the plaintiffs were not only ready and willing to perform the contract but able to perform the contract as regards the 7 bales. That being so, this point fails.

I have nothing to add to my learned brother's judgment on the second point.

As regards the memorandum of objections it is difficult to construe Ex. H as a notice of cancellation of the whole contract by the plaintiffs. The first part of the letter deals only with the contract so far as it related to the 7 bales and only towards the end of the letter reference was made to the remaining 15 bales. It is difficult to construe this letter as giving notice to the defendants that they will be deemed to have broken the whole contract. Even assuming that the defendants may be deemed to have broken the whole contract, certainly it cannot be said that the letter amounts to a cancellation of the contract by the plaintiffs on account of the breach by the defendants, even assuming that the

(1) (1877) 2 A. C. 455; 46 L. J. Q. B. 561; 36 L. T. 857; 25 W. R. 730.
(2) 78 Ind. Cas. 326; 19 L. W. 654.
(3) 90 Ind. Cas. 206; 48 M. L. J. 522; (1925) A. I. R. (M.) 888.
(4) 88 Ind. Cas. 241; 21 L. W. 503; 49 M. L. J. 1; (1925) A. I. R. (M.) 974.

plaintiffs are entitled to do so, which is doubtful having regard to the case of *Simpson* v. *Crippin* (5). Seeing that the plaintiffs offered at the most 10 bales from July to February one cannot assume that the remaining 15 bales were going to be manufactured. One cannot assume that they will be ready before May or even within another 10 months. It is possible that the market may become a rising market. I do not say there may not be cases in which with reference to the facts of the particular case, an implied repudiation of the whole contract might be inferred from refusal of part-performance of the contract. *Lakshmana* v. *Ramalinga Mudaliar* (3) is a case in which the goods were ready in Subbier's godown, and there was nothing more to be done for getting the goods. I do not see that s. 39 of the Indian Contract Act helps them, for it is doubtful whether this is a contract which could be said to have been broken in its entirety by the refusal to accept the 7 bales. Secondly, it is not clear from Ex H that the promissee has put an end to the contract. This section cannot, therefore, help. I agree with my learned brother that the memorandum of objections should be dismissed with costs.

I agree with the order proposed by my learned brother.

Appeal dismissed.

V. N. V.

Z. K.

(5) (1873) 8 Q. B. 14; 42 L. J. Q. B. 28; 27 L. T. 546; 21 W. R. 141.

OUDH JUDICIAL COMMISSIONER'S COURT

FIRST CIVIL APPEAL No. 24 OF 1923.

February 26, 1925.

Present:—Mr. Dalal, A. J. C., and Mr. Wazir Hasan, A. J. C.

BAIJ NATH SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BAHADUR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 35, 49—Pedigree-table prepared for purposes of settlement, whether relevant—Custom, proof of—Wajib-ul-arz, *entry in, value of—Opinion of persons having special means of knowledge, whether relevant*—Dikhat Thakurs *of Unao—Succession—Daughters, whether excluded—U. P. Land Revenue Act (III of 1901), ss. 111, 112, 233* (k)*—Partition proceedings—Objection not taken*—Res judicata.

A pedigree prepared for the purposes of a settlement which is the basis of the entries in the *khewat* is relevant under s. 35 of the Evidence Act. [p. 584, col. 2.]

Settlement Officers in recording customs in *wajib-ul-arz* have to perform the duties which the Government orders them to perform. One of these duties is to record customs as the Settlement Officer finds them and not as he might think that they ought to be. Where it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom and it does not appear that the statement of the custom is ambiguous the record of custom in a *wajib-ul-arz* is most valuable evidence in support of the custom. [p. 588, col. 1.]

It is not necessary that the existence of a custom recorded in a *wajib-ul-arz* or *riwaj-i-am* should be supported by instances. [p. 592, col. 2.]

The Court can take judicial notice of the existence of a custom which is generally prevalent among a certain class of people. [*ibid.*]

Among *Dikhat Thakurs* of Unao, daughters and their issue are excluded from inheritance by the collaterals of the last male-holder by virtue of a custom to that effect which is prevalent among them. [p. 589, cols. 1 & 2.]

The very nature of a claim for partition amongst all the co-sharers involves an enquiry into the share of every one of them whether the claim is made in a Revenue Court or in a Civil Court. What is material is that a person should be a party to the partition proceedings and it is immaterial whether he is an applicant for partition or is arrayed on the opposite side. [p. 590, col. 1.]

Section 111 of the U. P. Land Revenue Act imposes a duty upon each co-sharer to put forward any ground of claim or defence involving a question of proprietary title in the matter of the partition of a *mahal*. If a co-sharer omits to take any objection which he is required by law to take, it must be deemed that he has taken that objection and that under cl. (c) of sub-s. (1) of s. 111 of the Act the Collector has decided that objection against that co-sharer. To the decision of such a question the provisions of the rule of *res judicata* would extend and it would not be open to a person who was a party to the partition proceedings to agitate that question in a subsequent suit in the Civil Court. [p. 590, cols. 1 & 2.]

[Case-law discussed.]

Appeal against a decree of the Subordinate Judge, Unao, dated the 28th February 1923.

Pandit *G. N. Misra*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.

Wazir Hasan, A. J. C.—This is the defendants' appeal from the decree of the Subordinate Judge at Unao dated the 28th February 1923. The property in suit is a 2 annas 6 pies share in *Mouza* Bijahra and an 8 annas share in *Mouza* Hanaura, *Pargana* Gauranda Parsandan, in the District of Unao. This property originally belonged to one Gulab Singh, who died many years ago. On his death his widow, *Musammat* Hausa Kaur, came into the in-

heritance and possession of the property left by him in the character of a Hindu widow. *Musammat* Hausa Kaur died in January 1913. The plaintiffs claim possession of the property in suit on the title that they were the nearest reversioners to the estate of Gulab Singh at the time when the succession opened on the death of his widow. There were 13 plaintiffs to the suit. The Trial Court has come to the conclusion that the title to the property in suit vests in two plaintiffs alone, that is Bahadur Singh No. 1 and Basawan Singh No. 13. The Court has accordingly de reed the suit in favour of those two persons except in respect of a 2-annas share in village Bijahra and dismissed the claim of the other plaintiffs. The plaintiffs have acquiesced in the decree of the Court below and none of them has either appealed against it or filed any cross-objection in respect thereof.

The chief defendants to the suit are (1) Baijnath Singh, (2) Sundar Singh and (3) Gajraj Singh. These three defendants are brothers and sons of the daughter of Gulab Singh. The daughter predeceased the widow and on the death of the widow these defendants entered into the possession of the property in suit and obtained mutation of names in their favour from the Court of Revenue.

Under the Mitakshara Law the title to the property in suit vests in these defendants. To defeat that title the plaintiffs' case is that "according to the custom prevailing in *Mouzas* Bijahra and Hanaura wherein lies the ancestral *zamindari hakiat* of the plaintiffs and the late Gulam Singh and the one obtaining in the plaintiffs' family and the *Dikhat Thakurs*, to which clan the plaintiffs belong, the daughters and their sons do not get the assets and the collaterals inherit the same." (*Vide* para. 3 of the plaint).

The relationship of the plaintiffs with Gulab Singh is set forth by them in a pedigree attached to the plaint. The defence to the suit with which we are now concerned in appeal was: (1) the denial of the pedigree on which the plaintiffs relied; (2) the denial of the custom; and (3) the bar arising out of ss. 112 and 233 (*k*) of the U. P. Land Revenue Act, 1901. The Court below has found that the pedigree is proved and that the custom alleged by the plaintiffs is also proved and it has further held that neither s. 112 nor s. 233 (*k*) of the U. P. Land Revenue Act bars the claim of the plaintiffs. All the three findings of that Court are impugned in appeal before us.

On the question of pedigree, we are of opinion that the finding of the Trial Court is correct. Apart from the oral evidence which the plaintiffs have produced in proof of their relationship with Gulab Singh deceased, their case mainly rests on two pedigrees, the originals of both of which exist in the Settlement files of 1862 of villages Bijahra and Hanaura. The pedigree in the Bijahra file (Ex.2) is signed amongst others by Gulab Singh. It, however, omits to mention the links connecting the plaintiffs' line with that of Gulab Singh and those links form the subject-matter of controversy between the parties. That pedigree, therefore, is not of much consequence. The pedigree in the Hanaura file (Ex. 16) supplies the omission in the Bijahra pedigree, and if the former pedigree is reliable and admissible in evidence, the plaintiffs' relationship with Gulab Singh is established. On its face the Hanaura pedigree does not bear the signature either of any of the co-sharers of the village or of any Settlement Officer. The file of the case, however, in which this pedigree is contained comprises the report of the *Sadar Munsarim* dated the 21st November 1864 (Ex. 62). The report is addressed to the Settlement Officer and expressly refers to a pedigree of the *zemindars* of the village which the *Sadar Munsarim* sent to the Settlement Officer together with the *khewat* of the village. The *khewat* is also a part of the same record (Ex. 9). There is no other pedigree to which reference in the *Sadar Munsarim's* report may be attributed than the pedigree in question There can be no doubt, therefore, that this pedigree was prepared for the Settlement purposes and is the basis of the entries in the *khewat*. We must, therefore, take it that the acceptance of the pedigree on the record of the case by the Settlement Officer was an act done by him in the discharge of his official duty and the pedigree would thus be relevant under s. 35 of the Indian Evidence Act, 1872. Apart from this there can be no doubt as to the authenticity of the pedigree in question. The entries in the *khewat*, as we have said before, are founded on the pedigree and the *khewat* was attested by Gulab Singh and other co-sharers on the

21st December 1864 in the presence of the Settlement Officer. The whole village is represented by the unit of 20 *biswas*. Ten *biswas* are shown in the *khewat* as belonging to Gulab Singh and the remaining 10 *biswas* are divided into two equal moieties amongst the descendants of Chedi Singh and Udit Singh, the two sons of Chaudhri Singh. The irresistible inference is that the village in its entirety once belonged to a common ancestor of the two branches represented by Chaudhri Singh and Bhao Singh. Finally the evidence of Basawan Singh plaintiff brings the authorship of the pedigree home to Saktu Singh, Bhawani Singh, Gulab Singh, Kuber and Basawan Singh himself. Basawan Singh is 85 years old and we see no reason to reject the testimony which he furnishes in respect of the preparation of the pedigree in question. These persons had also attested the *khewat* before the Settlement Officer and it is highly probable that the pedigree represented their statement as to the relationship evidenced by it. Except Basawan Singh all those persons died long ago. It cannot be doubted that they had special means of knowledge as to the contents of that pedigree. At the time when the pedigree was prepared there was no controversy on any matter relating to it. The pedigree is, therefore, also admissible in evidence under s. 32, cl. (5), of the Indian Evidence Act, 1872.

The next point for decision is the question of custom. In the statement of the plea as contained in the third paragraph of the plaint the custom is described to be local, tribal and a family custom. No attempt has been made to establish the custom as merely local in its scope. The Trial Judge on the evidence tendered in the case found that the custom was established both as a tribal as well as a family custom. For the proof of the plea of custom the plaintiffs' case mainly rests on the entries in the *wajib-ul-araiz* of a large number of villages owned by *Dikhat Thakurs*. We now proceed to deal with the entries in these *wajib ul-araiz*

Exhibit 40.—This is the *wajib-ul-arz* of village Hanaura. Gulab Singh owned an 8-annas share in this village and that share is in dispute in the present litigation. This *wajib-ul-arz*, therefore, has a very important bearing on the question under consideration. To the same effect is the *wajib-ul-arz* of village Bijahra (Ex. 63). The relevant entry in the *wajib-ul-arz* of Hanaura is as follows:—"After their (*i. e.*, widows') death the heir nearest to and descended in the direct line from their husband shall take possession of the share"; and the entry in the Bijahra *wajib-ul-arz* is "After their (widows') death whoever is the nearest heir in the ancestral line will get possession of the share." The Hanaura *Wajib-ul-arz* was verified amongst others by Gulab Singh on the 6th August 1865 and bars the signature of the Settlement Officer under the order that it be placed on the Settlement file and has come before us from that file. The clause relating to the verification of the Bijahra *Wajib-ul-arz* has not been filed in the case but there is internal evidence that that *wajib-ul-arz* was also prepared on the information furnished to the Settlement Officer by the *zemindars* of the village, one of whom was Gulab Singh. The signature of the Settlement Officer is at the end of the *wajib-ul-arz*. Paragraph 2 describes the *khewat* of the village which is the same as the *khewat* separately filed by the plaintiffs and marked Ex. 1 in the suit. Exhibit. 1 bears the signature of Gulab Singh amongst others and over the signature of the Settlement Officer is the verification clause and in that clause Gulab Singh is again mentioned as one of the persons who verified the *khewat*. The entries in these *wajib-ul-araiz* are, therefore, admissible in evidence under s. 35 as well as s. 32, cl. (4) of the Indian Evidence Act, 1872 as containing the statement of Gulab Singh as to the existence of the custom.

Exhibit A-18.—This is the *wajib-ul-arz* of village Chamrauli which is owned by *Dikhat Thakurs* and is situated in the same district of Unao in which the villages Hanaura and Bijahra lie. The first paragraph of the *wajib-ul-arz* relates to the history of the village and contains a pedigree which shows that the *zemindars* of Hanaura are the descendants of one Bhau Singh who was the descendant of Bar Nath, the founder of the village Chamrauli. Paragraph 1 of the *Wajib ul arz* of Bijahara (Ex. 63) also recites the fact that Rawat Singh and Lagan Singh, the ancestors of the *zemindars* of Bijahra, had founded that village and that they were originally the residents of village Chamrauli. The *zemindars* of Chamrauli may, therefore, be regarded as belonging to the same family as the *zemindars* of Bijahra and Hanaura. To the same effect is the evidence given by Surat Singh plaintiff as P. W. No. 2. The relevant

entry in the *Wajib-ul-arz* of Chamrauli is that "after their (widows') death the heirs of the husband will succeed to it—the heirs being of the same stock (*jaddi*) and nearer (*karib*)."

Exhibit 42.—This is the *wajib-ul-arz* of village Bhauli, District Unao. The village is owned by *Dikhat Thakurs*. The paragraph relating to the history of the village shows that Ber Nath, the founder of the village Chamrauli, was the brother of Gandharap Singh, whose son Ganesh founded this village. We are thus in a position to trace the connection between this village and the villages of Gulab Singh. The entry in the *wajib-ul-arz* with which we are concerned is as follows:—"After their (widows') death the heirs of their husband will be owner and possessor of the property of the deceased."

Exhibit 43.—This is the *Wajib-ul-arz* of village Kundra, District Unao. The village is admittedly owned by *Dikhat Thakurs*. The relevant entry is as follows:—"After her (widow's) death her husband's heirs of the same blood shall succeed to the possession of the estate."

Exhibit 46.—This is the *Wajib-ul-arz* of village Ajgain, District Unao. The co-sharers of the village are *Dikhat Thakurs*. The relevant entry is as follows:—"On the death of those childless widows any heir descended in the direct line from their husband shall get possession of their share." The pedigree recited in Ex. A-18, the *Wajib-ul-arz* of village Chamruali, shows that Ajgain was founded by Bhau Singh, one of the grandsons of Ber Nath, who populated Chamruali. Thus there is a family connection between the *Thakurs* of Ajgain and the *Thakurs* of Hanaura to which village Gulab Singh, whose property is in dispute, belonged.

Exhibit 48.—This is the *Wajib-ul-arz* of village Mustafabad, District Unao. The custom is recorded in para. 4 in the following words:—"On their (widows') death the heirs of the husband shall get possession." Besides the *Dikhat Thakurs* there are also Brahman and Musalman co-sharers in the village and the *wajib-ul-arz* recites that the custom of "the division of assets of a deceased person" is the same in respect of all of them.

Exhibit A-5.—This is the *Wajib-ul-arz* of Raudan Khera and is produced by the defendants. The village lies within the District of Lucknow but is situated on the borders of the two Districts of Unao and Lucknow and is owned by *Dikhat Thakurs* whose ancestors migrated from village Mustafabad and founded Raudan Khera. The entry as to the custom of the village is as follows:—"After their (widows') death near heirs of their husband will be owners."

Exhibit A-7.—This is the *Wajib-ul arz* of village Bhediun, District Unao, and is produced by the defendants. The village is the property of *Dikhat Thakurs*. The relevant entry is "when they (widows) die the near relatives of their husband will get possession of their share."

Exhibit A-9.—This is the *Wajib-al-arz* of village Raipur Garhi, District Unao, and is produced by the defendants. The village is owned by *dikhat thakurs*. The entry is as follows:—"After the death of the childless widows the heirs of their husband will succeed."

Exhibit A-12.—This is the *Wajib-ul arz* of Purwa, District Unao, and is produced by the defendants. The village was founded by one of the grandsons of Bar Nath, who was also the ancester of the *Thakurs* of Chamruali. The *Thakurs* of Purwa are, therefore, connected by blood relationship with the *Thakurs* of Hanaura and Bijahra. The entry in this *wajib-ul-arz* relating to the custom under consideration is as follows:—"After their (widows') death the near heirs of their husband will be the owners in possession".

Exhibit A-43.—This is the *Wajib-ul-arz* of village Sadahra, district Unao, and is produced by the defendants. The village is owned by *Dikhat Thakurs*. The entry as to the custom is as follows:—"After their (widows') death the near heir from the family of their husband will come in possession of their share."

Exhibit A-46.—This is the *Wajib-ul-arz* of Pali, District Unao, and is produced by the defendants. The village is owned by *Dikhat Thakurs*, whose ancestor, Naurang Rai, migrated from Chamrauli and founded this village. Naurang Rai was a grandson of Ber Nath, the remote ancestor of the *Thakurs* of Chamrauli as recited in the pedigree of that village. The *Thakurs* of Pali are all descendants of the same ancestor from whom the *Thakurs* of Hanaura and Bijahara are descended. The entry as to the custom is that "on their (widows') death the shares will be taken by their husbands' real co-sharers (heirs)."

It will be readily seen that the language of the entries regarding the custom under

consideration as used in the *wajib-ul-araiz* noted above is not the same in all of them but is slightly different. There can be no doubt, however, that the substance is the same. In the setting in which the entries quoted above are placed they can have no meaning but one and that is the recognition of the right of the nearest male heir of the propositus according to the lineal descent to succeed immediately on the death of a widow without a male issue. In such a scheme of succession neither the daughter's sons nor the daughters of the propositus have any place. In our judgment this interpretation of the entries of the *wajib-ul-araiz* is free from any doubt, the language of the entries being in itself clear and unambiguous. The interpretation is further supported by the entries in three more *wajib-ul-araiz* which the plaintiffs produced in support of their plea of custom and to which we shall now refer.

Exhibit 65.—This is the *Wajib-ul-arz* of village Bachhayun, District Unao. The *zemindars* of the village are admittedly *Dikhat Thakurs*. The history of the village recited in para. 1 of the *wajib-ul-arz* shows that the ancestors of the *Thakurs* of the village Chamrauli and of this village are the descendants of a common ancestor. Thus the *wajib-ul-arz* under consideration relates to persons with whom the *thakurs* of Hanaura and Bijahara have blood relationship. The relevant entry in this *wajib-ul-arz* is as follows:—"On their (widows') death the nearest lineal heir of their husband. shall succeed to possession .....Daughters have no right of inheritance in the property left by the deceased."

Exhibit 66.—This is the *Wajib-ul-arz* of village Mandahra, District Unao. The *Dikhat Thakurs*, of the village are the descendants of Zinda Sah, who was a descendant of Bar Nath, whose pedigree is given in the *Wajib-ul-arz* of Chamrauli, to which reference has frequently been made in the preceding portions of this judgment. Thus there is a blood relationship between the *Thakurs* of Mandahra and of Hanaura and Bijahara. The entry as to the custom of succession is that "upon a widow dying childless the nearest relative in the husband's family shall succeed to her share... Daughters have no right in the share left by the deceased."

The last *wajib-ul-arz* of a similar nature is Ex. 67 of village Kusumbhi, District Unao. In the para. relating to the history of the village connection between the *Dikhat Thakurs* of this village and of village Chamrauli is traced. Thus it has an important bearing on the question of custom as prevalent amongst the *Thakurs* of Hanaura and Bijahara. The relevant entry in this *wajib-ul-arz* is as follows:—"After their (widows') death the heir of the husband by blood or nearness of relationship shall succeed to possession.....Daughters have no share in the estate left by the deceased."

There is thus formidable array of *wajib-ul-araiz* reciting the custom on which the plaintiffs rely in clear and unambigous language. The entries, in our opinion, constitute overwhelming evidence in proof of the custom. The learned Advocate for the defendants-appellants directed his attack on this evidence on two lines: (1) That no instances were proved by the plaintiffs in support of the custom recorded in these *wajib ul-araiz* and (2) that the entries connoted the wishes of the *zemindars* who dictated the *wajib-ul araiz* for a rule of succession to be hereafter adopted rather than a pre-established custom. We are not disposed to regard this criticism as sufficient to outweigh the evidence furnished by the entries. The evidential value of the entries made in these *wajib-ul-araiz* is not, in our opinion, in any manner minimised by the fact that the plaintiffs have not supported those entries by proof of instances of succession in accordance with those entries. It has never been the rule of evidence in cases of a similar nature decided by this Court that the occurrence of instances in accordance with an alleged custom was a necessary part of the proof of the custom and that in the absence of such instances the plea of custom must fail in spite of overwhelming evidence of a different nature. In the case of *Beg* v. *Allah Ditta* (1) the *riwaj-i-am* produced in that case was considered by their Lordships of the Privy Council to form a strong piece of evidence in support of the custom where no instances were proved to have occurred in accordance with the alleged custom. As to the *riwaj-i-am* their Lordships said "The *riwaj i am* was produced and exhibited as evidence at the very outset of the case; it is a public record

(1) 33 Ind. Cas. 354; 44 I. A. 89; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 45 P. R. 1917; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175 (P. C.).

prepared by a Public Officer in discharge of his duties, and under Government rules; it is clearly admissible in evidence to prove the facts therein entered subject to rebuttal." A *wajib-ul-arz* does not stand on a less firm ground than a *riwaj-i-am*. In the case of *Balgobind* v. *Badri Prasad* (2), which went in appeal before their Lordships of the Privy Council from a decision of this Court, Sir John Edge, in delivering the judgment of the Board made the following observation:

"Settlement Officers in recording customs in *wajib-ul-araiz* have to perform duties which the Government orders them to perform. One of these duties was to record customs as the Settlement Officer found them, and not as he might think they ought to be. When it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen." In the case before us there is no suggestion that the Settlement Officer was in any way guilty of dereliction in the performance of his official duty.

The second ground of attack was sought to be supported by two facts: (1). That no instance was proved prior to the entries made in the *wajib-ul-araiz* and (2) that in respect of some other incidents of the general custom of succession recorded in these *wajib-ul-araiz* there are differences in the various entries, for instance as to the extent of the share of the senior married wife in the entries in Exs. 40 and 65. From both these facts the learned Advocate draws the inference that the entries cannote merely the wishes of the *zemindars* of the villages as to what the rule of succession ought to be and not a pre-established custom.

We do not agree with the learned Advocate. A large number of *khewats* filed in this case of villages owned by *Dikhat Thakurs* which are either incorporated in the *wajib-ul-araiz* of the villages or separately prepared shows that a daughter or a daughter's son has never succeeded. In our judgment the entry as to the custom in those *wajib-ul-araiz*, even if we read it to have been made in the absence of a pre-existing instance, reveals a well-founded tradition amongst *Dikhat Thakurs* as to the total exclusion of a daughter and her issue. As to the variation in the extent of share which a senior married wife gets, we are of opinion that that has no bearing on the specific custom pleaded in the case before us and from that variation we are not prepared to hold that the entry now under consideration is not a true record of a pre-existing custom.

The plaintiffs have also supported their case of custom by evidence of the opinion of persons having special means of knowledge, which opinion is relevant under s. 49 of the Indian Evidence Act, 1872. They are plaintiffs' witnesses Nos. 1 to 9. Amongst them are plaintiffs, Basawan Singh and Surat Singh. The other witnesses are also *Dikhat Thakurs* and there can be no doubt that they all have special means of knowledge as to the custom in question. We see no valid ground for rejecting their testimony in so far as their opinion as to the existence of the custom goes.

Finally, the defendants rely on the rebutting evidence which they have produced in the case in disproof, or in proof of the discontinuance, of the custom. We will now proceed to consider that evidence. It consists of the proof of 8 instances of succession at variance with the custom put forward by the plaintiffs. These instances are categorically dealt with by the learned Subordinate Judge in his judgment and it will serve no useful purpose to repeat them here. Instances 5th, 6th and 8th are of recent date and there is yet time for the reversioners to contest them. Instance 2 is supported by judgment (Ex. A 6). The judgment shows that the plea of custom was set up and accepted as proved by the Court of first instance but rejected by the Court of Appeal for want of sufficient evidence. This instance occurred in village Rudan Khera and it does not appear that the *wajib-ul-arz* of that village now filed (Ex. A5) was produced in that case. The claim of the daughter to a portion of the property then in suit was also supported by a gift in her favour. The gift was upheld. The third instance occurred in Raipur Garhi and is supported by judgments (Exs. A-10 and A 11). The plea of custom was raised in that case and it

(2) 74 Ind. Cas. 449; 50 I. A. 196; 21 A. L. J. 578; (1923) A. I. R. (P. C.) 70; 9 O. & A. L. R. 581; 26 O. C. 217; 45 M. L. J. 289; 45 A. 413; 38 C. L. J. 302; (1923) M. W. N. 799; 33 M. L. T. 317; 10 O. L. J. 368; 29 C. W. N. 465 (P. C.).

appears that the only proof tendered in support of it was the oral evidence relating to certain instances of the exclusion of daughters in recent times. In the last Court of Appeal it was admitted by the propounder of the custom, though wrongly in our opinion, that there was no entry of the custom in the *wajib-ul-arz* of the village. The *wajib-ul-arz* is now before us (Ex. A-9) and on our interpretation of the entry therein the daughter is excluded from inheriting her father's estate on the death of the widow. The fourth instance is of village Bhademau. It occurred in 1907 and is supported by the entry in the *khewat* of the name of the minor daughter (Ex. A-8). It does not appear that there was any contest as to the daughter's right of succession and in any case the property was very small bearing an annual revenue of Rs. 8-14 only. The 7th instance is of village Sudehra, the *khewat* of which is Ex. (A-44). The entry in the *khewat* shows that it occurred in the year 1879. The daughter who succeeded has herself given evidence as D. W. No. 4. From that evidence the impression left on our mind is that the collaterals lost the share not for the reason that they recognised the validity of the daughter's succession but for default of their own. Instance No. 1 occurred in village Chamrauli 17 or 18 years ago and is supported by the entry in the *khewat* (Ex. A-19). There is no doubt that that was a case of succession according to the Hindu Law but we have no evidence showing the circumstances in which the daughter succeeded as against the collaterals. On the whole, we are of opinion that any occasional deviation from the well-established custom neither disproves it nor destroys it.

Lastly, we think we are justified in referring to a long course of decisions in this Court confirmed in two cases by their Lordships of the Privy Council in which the custom of the exclusion of a daughter and her issue amongst the *Thakurs* of Oudh generally was recognised. The earliest decision published in the reports is that of Mr. Capper in the case of *Surjan Singh* v. *Gur Prasad* (3). Mr. Capper expressed his opinion in the following words :—" But there can be no doubt as to the great solicitude of the Hindu *Thakurs* in Oudh to preserve the inheritance of the land in the tribe and family to which it has belonged ; and it is owing to this solicitude that custom, general and widely prevalent, has excluded daughters from inheriting ancestral landed estates". Again in the case of *Parbati Kuer* v. *Rani Chandrapal Kuer* (4), the claim of a daughter of a *Thakur* was rejected on the ground of the custom of exclusion by a Bench of two Judges of this Court. The decision was confirmed by their Lordships of the Privy Council in *Parbati Kunwar* v. *Chandrapal Kunwar* (5). Another decision of importance was delivered by a Bench of two Judges of this Court in the case of *Sheomangal Singh* v. *Jagpal Singh* (6). In this case the learned Judges considered a large number of previous decisions of this Court as interpreting uniformally *wajib-ul-araiz* similar in language to those which we have before us in favour of the custom of the exclusion of daughter and her issue. Finally, we may refer again to the decision of the Privy Council which we have already quoted, in the case of *Balgobind* v. *Badri Prasad* (2), though the case was not of *Thakurs* but of Brahmans. On these grounds, we uphold the finding of the Trial Judge that the custom is proved.

It now remains to decide the plea of estoppel raised by the defendants as against the plaintiffs' claim in respect of the Hana ura property. This plea is based on the provisions of Ch. VII of U. P. Land-Revenue Act, 1901, relating to the partition of *mahals* and particularly on cl. (*k*) of s. 233 of the same Act. My learned brother, Mr. Dalal, has dealt with this question at great length in his separate judgment and I have only little to add to what he has said.

On the 29th September 1916 an application for partition (imperfect) of village Hanaura was made to the Collector of the district by Baijnath Singh, Sunder Singh, Gajraj Singh, defendants Nos. 1, 2 and 3 respectively, and Surat Singh, Bahadur Singh, Ramadhin Singh and Basawan Singh (Ex. A21). In the penultimate column of this application the share of the seven applicants was shown as 13 *biswas* 6 *biswansis* 7 *kachwansis* 15 *anwansis* and 10 $\frac{1}{2}$ *panwansis*. It is admitted that that share comprised the unity of 10 *biswas* which originally belonged to Gulab Singh and was in possession

(3) S. C. No. 41 of 1881.

(4) 8 O. C. 94.

(5) 4 Ind. Cas. 25; 36 I. A. 125; 10 C. L. J 216; 13 C. W. N. 1073; 6 A. L. J. 767; 11 Bom. L. R. 890; 12 O. C. 304; 31 A. 457; 19 M. L. J. 605 (P. C.).

(6) 2 Ind. Cas. 253; 12 O. C. 63.

of the defendants Nos. 1, 2 and 3 at the date of application for partition. The prayer made in the application was that "a complete partition be made fieldwise (*khetbat*) and be drawn into *chaks* (*chakbat*)".

To my mind it is wholly immaterial as to which of the co-sharers of the village were the applicants and which were arrayed on the opposite side. The very nature of a claim for partition amongst all the co-sharers involves an inquiry into the share of every one of them whether the claim is made in a Revenue Court or in a Civil Court. What is material is that they were parties to the partition proceedings.

The application for partition must be taken to have been made in virtue of the provisions of s. 107 of the Land Revenue Act, 1901, and as soon as it was made the Collector acquired jurisdiction over the subject-matter of the application, the subject-matter being the partition of village Hanaura. That jurisdiction was exclusive as is clear from s. 233 (*k*) of the same Act. "No person shall institute any suit or other proceeding in the Civil Court with respect to the partition or union of *mahals* except as provided under ss. 111 and 112." In the absence of any evidence to the contrary it must be presumed that the Collector acted according to law and issued the necessary proclamation under s. 110 of the Land Revenue Act. The proclamation invited all such recorded co-sharers in the *mahal* as had not joined in the application to appear before the Collector within sixty days of the date of the proclamation and "to state their objections (if any) to the partition." According to s. 111, sub-s. (1), such an objection may involve a question of proprietary title.

Thus the law clearly imposes a duty upon each co-sharer to put forward any ground of claim or defence involving a question of proprietary title in the matter of the partition of the *mahal*. It follows, on general principles that if a co-sharer omits to make any objection which he is required by law to make, it must be deemed that he had made it and that under cl. (*c*) of sub-s. (1) of s. 111 it must further be deemed that the Collector had proceeded to inquire into the merits of the objection and had decided them within the meaning of sub-s. (3) of the same section. And by virtue of s. 112 a decree passed by the Collector under sub-s. (3) of the preceding section is to be regarded as a decree of a Court of civil jurisdiction.

The rule of *res judicata* extends to a question which must be taken to have been decided in effect though not in express terms. In the case of *Soorjomonee Dayee* v. *Suddanund Mohapatter* (7) their Lordships of the Privy Council made the following observations:—"But even if this interpretation were not correct, their Lordships are of opinion that this cl. (2) in the C. P. C., would by no means prevent the operation of the general law relating to *res judicata* founded on the principle '*nemo debet bis vexari pro eadem causa*.' This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to *Gregory* v. *Molesworth* (8) in which Lord Hardwicke held that where a question was necessarily decided in effect though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the *Duchess of Kingston* (9)."

The contrary view maintained by the learned Counsel for the plaintiffs-respondents would place the finality of the partition proceedings as contemplated by the Legislature entirely at the mercy of a co-sharer. According to that view his own omission and inaction will entitle him to re-open the entire partition proceedings and the adjudication of title involved therein by suit in the Civil Court. This could not have been the intention of the law.

Section 112 of the Land Revenue Act, 1901, gives to the decree of the Collector the character of a decree of Court of Civil Judicature. This to my mind directly attracts the application of the provisions of s. 11 of the C. P. C., 1908, to the decree of the Collector. Explanation IV of that Section is as follows :—

"A matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

(7) 12 B. L. R. 304; 20 W. R. 377; Sup. Vol. I. A. 212; 3 Sar. P. C. J. 285 (P. C.).
(8) (1747) 3 Atk. 626; 26 E. R. 1160.
(9) (1776) 2 Sm. L. C. 6th Ed. p. 674 (11th Ed. p. 731).

There is no question that the plaintiffs might and ought to have raised as a ground of defence or attack in the partition proceeding the question of title to the share of Gulab Singh which they have now directly raised in the present suit. Not having done then they cannot be permitted to do so now. What did the Collector decide in those proceedings in respect of the share now in suit? He allotted them to the three defendants. This is clear from Ex. A 49, which is the proclamation made in pursuance of the final order in the partition proceedings. The area of the 10 *bis was* share formerly belonging to Gulab Singh was in its entirety thrown into one *patti* called "Baijnath Bakhsh Singh's *patti*" and the revenue payable by that *patti* was separated from the rest of the village and shown to amount to the sum of Rs. 130. The object of the present suit in so far as the Hanaura property is concerned is to recover that share from the hands of the persons to whom it was decreed by the Collector. This is clearly barred by the rule of *res judicata* as already stated and also by cl. (*k*) of s. 233 of the Land Revenue Act, 1901.

The case law on the subject has been considered in the judgment of my learned brother. I may only say that the view which I have taken is supported by a Full Bench decision of the High Court at Allahabad in the case of *Muhammad Sadiq* v. *Laute Ram* (10). The Bench consisted of five learned Judges of the Court including the Chief Justice Sir Arthur Strachey who delivered the leading judgment in the case. Another Full Bench decision of the same High Court to which reference may be made in support of the view expressed above is the case of *Bijai Misir* v. *Kali Prasad Misir* (11). The decision of their Lordships of the Privy Council in the case of *Chokhey Singh* v. *Jote Singh* (12) was referred to us as supporting the view contended for on behalf of the respondents. That decision has, according to our judgment, no application to the present case. In that case their Lordships clearly held that the Collector had not decided the question of proprietary title but had expressly reserved it for decision by a Court of civil jurisdiction.

The appellant's learned Advocate raised a subsidiary question also at the hearing of the appeal to the effect that the two plaintiffs, Bahadur Singh and Basawan Singh, to whom the Court below has given the decree under appeal, had no title to the entire reversionary estate of Gulab Singh but that they were entitled only to ⅓rds of that estate. The facts involved in this argument are as follows: It is clearly proved, indeed it is now admitted, that on the death of the widow of Gulab Singh there were six persons alive who were entitled to the estate of Gulab Singh in equal shares. They were Bahadur Singh plaintiff No. 1 and his two brothers, Bhabhuti Singh and Madho Singh; Jagannath Singh and Sumer Singh, sons of Bhola Singh, and Basawan Singh plaintiff No. 13. Bhabhuti Singh and Madho Singh died afterwards and their share in the inheritance of Gluab Singh devolved upon Bahadur Singh. The result was that Bahadur Singh became entitled to 3/6th share in that estate and the remaining 3/6th devolved in equal shares upon Jagannath Singh, SumerSingh and BasawanSingh. Basawan Singh was thus entitled to only $\frac{1}{6}$th share in the estate. The learned Advocate, therefore, asks that the decree of the lower Court should be modified by striking out the shares of Jagannath Singh and Sumer Singh, *i. e.*, $\frac{1}{3}$rd. We are unable to accede to this prayer. Basdeo Singh and Sheopal Singh plaintiffs Nos. 10 and 4 respectively, sons of Jagannath Singh, are the heirs of their father and uncle Sumer Singh. They were plaintiffs in the Court below. The defendants-appellants have not chosen to make them parties to the appeal. This, however, will not justify us in awarding that share to the defendants. The proper course for us to follow in the circumstances is to decree Bahadur Singh's claim for one-half share, Basawan Singhs' claim for $\frac{1}{6}$th share and the claim of Basdeo Singh and Sheopal Singh to the remaining $\frac{1}{3}$rd share in the 1-anna share of Bijahra with proportionate liability to pay the sum of Rs. 1,253 to the defendants Nos. 4 and 5, Ram Singh and Ram Bakhsh Singh as directed by the lower Court. This we are authorised to do by the provisions of r. 33 of O. XLI of the C. P. C.

The result of the finding recorded above

(10) 23 A. 231 A. W. N. (1901) 86.
(11) 41 Ind. Cas. 912; 39 A. 469; 15 A. L. J. 496.
(12) 1 Ind. Cas. 166; 36 I. A. 38; 31 A. 73; 11 Bom. L. R. 69; 13 C. W. N. 274; 6 A. L. J. 100; 9 C. L. J. 151; 5 M. L. T. 167; 19 M. L. J. 123; 12 O. C. 288 (P. C.).

is that the appeal is allowed, the decree of the lower Court is reversed and the plaintiffs' suit in respect of the Hanaura property is dismissed altogether and their claim in respect of the 1-anna share of Bijahra is decreed as directed above. The parties will pay and receive costs in both the Courts in proportion to their success and failure. In lieu of the decree of the Court below a fresh decree in terms of this order shall be prepared in this Court.

Dalal, A. J. C.—I agree with the order proposed but desire to state my reasons for the two findings: (1) that the custom of exclusion of daughters is proved and (2) that the suit is barred under the provisions of s. 233 (*k*) of the Land Revenue Act so far as the property in village Hanaura is concerned.

There can be no doubt that according to the terms of succession given in the *Wajib-ul-araiz* of Hanaura and Bajahra daughters are excluded from succession. The *wajib-ul-araiz* are printed at pages 90 and 67 respectively of the printed record part III. The line of succession which is fixed under these two *wajib-ul-araiz* after the death or the widow excludes daughters and daughters' sons. The exclusion is definite and not by implication though it is not stated in so many words that daughters are excluded.

The definite statement of the exclusion of daughters is contained in the record of the manner of succession, entered in the *Wajib-ul-arz* of Bachhayun (124), Moondhara (page 111) and Kusumbhi (page 104). The history of the villages of Bachhayun and Kusumbhi. given in the *wajib-ul-araiz* of these villages at the commencement traces the descent of the *zemindars* of these villages from one Udaibhan from whom are also descended the *zemindars* of Hanaura and Bajahra, because they trace their descent to a common ancestor of Chamrauli (page 14), the *zemindars* of which village trace their descent from the same Udaibhan. It may, therefore, be accepted that the *Wajib-ul-araiz* of Bachhayun and Kusumbhi record the manner of succession of the same family of *Dickchit Thakurs* to which the parties to this suit belong.

I am satisfied, therefore, that the record of the *wajib-ul-arz* excludes daughters from succession.

The next question is whether this is a record of a custom or only the record of the opinion of the *zemindars* of the village at the time of the Settlement. Ordinarily such a record is the record of a custom. The Settlement Officer was directed to make a record of customs governing succession and there is no reason to believe that in this particular case the record was made not of a custom, but of the opinion of certain *zemindars* as to the manner in which succession should subsequently be governed in the family. It may be mentioned that the custom of exclusion of daughters is very general among *Thakurs*. The learned Counsel for the appellants had doubts as to whether this Court can take judicial notice of the existence of such a custom. I am of opinion, that it can. We have the example before us of the Privy Council, where in *Balgobind* v. *Badri Prasad* (2), their Lordships observed that a custom of primogeniture was not an unknown custom in Oudh when construing the terms of a custom entered in a *wajib-ul-arz*.

There is no ambiguity in the several *wajib-ul araiz* produced in this case so I think that the custom of exclusion of daughters is established.

It was pointed out on behalf of the appellants that no instances of exclusion of daughters from inheritance were cited by the plaintiffs-respondents. It is not necessary, however, that the existence of a custom recorded in a *wajib-ul-arz* or *riwaj i-am* should be supported by instance [*Beg* v. *Alla Ditta* (1).]

The appellants' learned Counsel based his arguments mainly on the 8 instances of the succession of daughters conveniently tabulated at pages 52 and 53 of the lower Court's judgment. They are not of great value, when analysed. In case (1) of Chamrauli, the property ultimately came into the possession of the collateral relation by purchase. The second instance is of Rudan Khera, where the *Thakurs* do not trace their ancestry back to Udaibhan and probably belong to a different family from the *Thakurs* of the villages in suit. The third case is based on Civil Court decisions, where the apparent mistake was made by this Court in thinking that no custom of exclusion of daughters was recorded in the *wajib-ul-arz* of that village (see judgment Ex. A-11, page 247, Part III). The custom is recorded in the *wajib-ul-arz* of Raipur Garhi (Ex. A-9, page 12, Part III). In the fourth case of Bhademao the daughter, who took her father's property, was a minor, the extent of the property was 1/80th of the village and the revenue Rs. 8-14-0. In

such a case the collateral male relative of the minor's father would not like to assert his claim. In cases Nos. 6 and 8 there is still time for the collateral male relative to sue in the Civil Court. In Case No. 7 of Sudhara, the female, who succeeded, deposed that she had litigation with her father's relations in Revenue and Civil Courts, but no proof of any such litigation was produced. Here also the property was a small one paying a revenue of less than Rs. 7.

I hold that the custom pleaded by the plaintiff is established and has not fallen into desuetude.

It is laid down in s. 233 (*k*) of the Land Revenue Act (Local Act III of 1901) that no person shall institute any suit or other proceeding in the Civil Court with respect to partition or union of *mahals* except as provided in ss. 111 and 112 of that Act. Prior to the passing of this Act the Oudh Land Revenue Act, 1876, was in force wherein corresponding section barring the jurisdiction of the Civil Court was s. 219 which laid down in cl. (*d*) that no Civil Court shall exercise jurisdiction over the distribution on partition of the land or allotment of the revenue of a *mahal*. There was a separate Land Revenue Act for the North Western Provinces which barred the jurisdiction of the Civil Court under s. 241 (*f*) of Act IX of 1873 over the distribution of the land or allotment of the revenue of a *mahal* by partition. It will be noticed that the present Act is much wider in its phraseology.

On 29th September 1916 certain co-sharers of village Hanaura applied for partition of the village into separate *mahals*. The applicants were the three defendants Baijnath Singh, Sundar Singh and Gajraj Singh of the present suit, who claimed to be owners of 10 *biswas*, that is, half the village, and Surat Singh, Bahadur Singh, Ramadhin Singh and Basawan Singh. In the present suit disputes relate to the succession to the property of one Gulab Singh. The three defendants mentioned above, who are appellants here and with whom alone we are concerned in this appeal, are daughter's sons of Gulab Singh. At the time of Gulab Singh's death the next reversioners in existence in equal degree were Bahadur Singh and Basawan Singh (the respondents here) Mahadeo and Bhabhuti, deceased brothers of Bahadur, and Jagannath Singh and Sumer Singh, who are dead and were represented in the Trial Court by Basdeo and Sheopal, sons of Jagannath. Out of the reversioners, therefore, only Basawan and Bahadur, that is, 2 out of 6 reversioners, were applicants to the partition. In the partition, a separate *mahal* of 10 *biswas*, was allotted to the defendants-appellants. The reversioners sued in the present suit for possession of this *mahal*. Their suit was decreed and hence the defendants' daughter's sons of Gulab Singh have appealed.

It will be seen that the lower Court's decision that the reversioners were saved from the bar under s. 233 (*k*) of the Land Revenue Act because they were arrayed on the same sides as the defendants in the partition suit is based on a misapprehension of the facts. Only two out of the six reversioners were arrayed along with the defendants-appellants as applicants for partition.

I do not think that the array of parties will make any difference to the bar of jurisdiction of the Civil Court. The Revenue Court has decided that a particular 8-annas equal to 10 *biswas mahal* be allotted to the defendants, so the bar under s. 233 (*k*) (if any) will apply against the claims of applicants to partition also when brought in the Civil Court.

In my opinion the language of the clause by itself establishes such a bar. It was argued on behalf of the respondent that only questions as to the area of a *mahal* and the revenue assessed thereon are barred from the jurisdiction of a Civil Court and not any question of title. If this argument were correct, there would be no necessity to make an exception in the clause. An exception is made when the matter is generally included in the preceding words. The jurisdiction of the Civil Court is limited to appeal powers under s. 112 and to suits instituted under the direction of the Collector under s. 111 for fear of a contradiction between those sections and cl. (*k*) of s. 233. The provisions of those sections are specially excepted from the bar of the jurisdiction of the Civil Court. If the words "partition or union of *mahals* did not include determination of questions of title inferentially by the Revenue Court in favour of those to whom shares were allotted as separate *mahals*, there would have been no need to provide for the exception.

A Full Bench ruling of the Allahabad High Court has interpreted the wording of

s. 241 (*f*) of the North Western Provinces Land Revenue Act of 1873 which, as I have already indicated, was not so wide in its terms as the present cl. (*k*) of s. 233 of the Land Revenue Act. In *Mohammad Saddiq* v. *Laute Ram* (10) all the five Judges of the Court held that if a question of title affecting the partition which might have been raised under ss. 112 and 113 of the Act (corresponding to ss. 111 and 112 of the Land Revenue Act) during the partition proceedings is not so raised and the partition is completed, s. 241 (*f*) of the Act debars the parties to the partition from raising subsequently in a Civil Court any such question of title. This ruling has been followed by a Single Judge of this Court in *Sanwal Singh* v. *Bhikhari* (13). The ruling of the Full Bench of the Allahabad High Court has been consistently followed by that Court whenever it was referred to before a Bench though a contrary opinion was given when reference to that ruling was omitted by Counsel appearing in other cases. It was followed in *Nathi Mal* v. *Tej Singh* (14), *Lachman Das* v. *Hanuman Prasad* (15), *Raghubhir* v. *Tulshi Ram* (16), by the majority of Judges in *Bijai Misir* v. *Kali Prasad Misir* (17), *Bhupal Singh* v. *Ujagar Singh* (18), *Ram Subhag Singh* v. *Dip Narain Singh* (19). In *Shambhu Singh* v. *Daljit Singh* (20) and *Kalka Prasad* v. *Manmohan Lal* (21) the principle of the Full Bench ruling were overlooked. I am in agreement with the opinion expressed by, Chief Justice Richards in his dissentient judgment in 39 Allahabad that if the two cases of 38 Allahabad were correctly decided the bar of s. 233 (*k*) of the Full Bench ruling cannot be maintained. As already mentioned the Full Bench ruling was not brought specifically to the notice of the Judges, who formed the Full Bench in the two cases reported in 35 Allahabad.

The case reported in 42 Allahabad was different in facts because one *mahal* was allotted to all the parties jointly who were parties on the opposite side in the Civil Court [*Lal Behari* v. *Parkalli Koer* (22)]

It was argued on behalf of the respondents that their Lordships of the Privy Council had not accepted this view. The circumstances, however, of the case of *Chokhey Singh* v. *Jote Singh* (11), which was decided in 1908, but which was governed by Act XVII of 1876 were different. Under the present Land Revenue Act a question of title must be settled finally in one of three ways, the Collector may decline to grant the application for partition until the question of title is determined by a competent Civil Court or he may require any party to the partition to institute within three months a suit in the Civil Court for the determination of the question or proceed to inquire into the merits of the question of title himself. Under the Act of 1876, the second power of requiring a party to get the question of title determined by a Civil Court within a certain fixed time was not given to the Collector. He had either to decline to grant the application for partition or to inquire into the merits of the question of the title himself.

When considering the judgment of their Lordships of the Privy Council this difference must be borne in mind. In that case Jote Singh respondent had replied for partition whereupon the appellant Chokhe Singh had objected that a certain property belonged to him and not to Jote Singh in the village of Bihat Biram. Jote Singh in reply to this objection to a partition stated that the share of Munnu Singh should be divided at present according to possession and a separate suit will be filed in a competent Court as regards the title in respect to the property of Munnu Singh. The Collector accepted this position and proceeded to make a partition. Their Lordships proceeded on the ground that the Revenue Court gave effect to this application of Jote Singh and the question of title was left to be decided by the Civil Court in Jote Singh's civil suit which was subsequently filed. There was, therefore, no ground of estoppel in the opinion of their Lordships.

The provisions of s. 219 (*d*) would not be applicable because the Collector in neither declining to partition the village nor deciding the question of title himself proceeded to make a partition contrary to law. His

(13) 23 Ind. Cas. 860; 1 O. L. J. 38.
(14) 29 A. 604; 4 A. L. J. 578; A. W. N. (1907) 190.
(15) 8 Ind. Cas. 807; 33 A. 169; 7 A. L. J. 1156.
(16) 29 Ind. Cas. 222; 13 A. L. J. 548.
(17) 41 Ind. Cas. 912; 39 A. 469; 15 A. L. J. 496.
(18) 58 Ind. Cas. 122; 18 A. L. J. 928; 2 U. P. L. (A.) 306; 43 A. 88.
(19) 64 Ind. Cas. 438; 44 A. 74; 19 A. L. J. 865; (1922) A. I. R. (A.) 158.
(20) 33 Ind. Cas 19; 38 A. 243; 14 A. L. J. 293.
(21) 38 Ind. Cas. 86; 38 A. 302; 14 A. L. J. 373.
(22) 55 Ind. Cas. 22; 42 A. 309; 18 A. L. J. 110; 2 U. P. L. R. (A.) 50.

proceeding, therefore, would be without jurisdiction. Their Lordships took the equitable view of permitting the Civil Court to decide the question of title without disturbing the partition already made. The opinion of their Lordships gives no support to the proposition that where a question of title is not raised, as it ought to be, during a partition in the Revenue Court it may be raised subsequently in a civil suit without the provisions of s. 233 (*k*) of the Land Revenue Act being a bar to the civil suit. Abstract questions of equity and justice do not arise in interpreting a Statute unless its language is ambiguous. It was represented that injustice will be done if the plaintiffs' right of agitating their claim within 12 years of the death of *Musammat* Hans Kuar in 1913 was curtailed on account of a partition application lodged in 1916, that is, from 12 years to 3 years. In the present case, the plaintiffs acted with their eyes open and some of them actually joined the defendants in applying for a partition. The clear words of a Statute cannot be destroyed by Courts of Law on grounds of equity or unreasonableness.

By the Court.—We decree the appeal with respect to the Hanaura property and dismiss the plaintiffs' suit with respect to that property with proportionate costs of both the Courts. The Hanaura property is described in the plaint as 8-annas *zemindari*.

We uphold the lower Court's decree for possession of one anna of the Bijahra property with the burden directed by the lower Court but modify it in this respect that the decree shall be passed in favour of Bahadur Singh to the extent of one-half, in favour of Jagannath Singh and Summer Singh to the extent of one-third and in favour of Basawan Singh to the extent of one-sixth. The plaintiff shall receive their proportionate costs of both the Courts with respect to this property.

G. H.
Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 112 OF 1923.
March 10, 1925.

Present:—Justice Sir Kumaraswami Sastri, Kt., and Mr. Justice Krishnan.

K. G. MUHAMMAD HUSSAIN SAHIB AND OTHERS—DEFENDANTS—APPELLANTS

versus

P. BABA SAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Nuisance—Temple or mantapam, *building of, whether nuisance.*

In the absence of evidence it cannot be assumed that a temple, if built, would by itself amount to an actionable nuisance to the neighbours of the locality; much less can it be assumed that the building of a *mantapam* annexed to a temple would be such a nuisance. [p. 596, col. 1.]

If subsequently, however, in the way in which the temple authorities use the temple or the *mantapam* an actionable nuisance is committed by them, a cause of action may arise. [p. 597, col. 1.]

Appeal from a decree and judgment of Mr. Justice Courts-Trotter, dated the 12th July 1923, and passed inthe exercise of the Ordinary Original Civil Jurisdiction of the High Court, in C. S. No. 484 of 1918.

Mr. *K. Nara Simha Iyer*, for the Appellants.

Mr. *G. Krishnasamy Iyer*, for the Respondents.

JUDGMENT.

Kumaraswami Sastri, J.—This is an appeal against the judgment of the Chief Justice restraining the defendants by an injunction from proventing the plaintiffs from building upon their lands. The plaintiffs are *Dharmakarthas* of the Balasubramaniswami temple in Pudupet situte in Narayana Naicken Street. The defendants are interested in a mosque which was separated from the temple by three houses and a road which was about 16 feet broad where it took off from Narayana Naicken Street and was tapering off. It was about 13 feet broad by the time it reached the end of the mosque. The temple originally was in a small building but subsequently the *Dharmakarthas* acquired three houses which brought the temple property to the street which separated the mosque from the three houses. Having purchased the property the *Dharmartkarthas* wanted to erect a *mantapam* after demolishing the three houses which adjoined the original temple. In this they were obstructed by the Muhammadans who were interested in the mosque,

There were Police proceedings and the plaintiffs had to go to Court because they were restrained by the order of a Magistrate from building upon the temple property. The suit was originally tried by Mr Justice Bakewell who thought the plaintiffs had no cause of action and dismissed it. On appeal it was remanded by Justices Ayling and Odgers and the suit finally came on for trial before the Chief Justice. There was no evidence let in on remand and, so far as the evidence in the case goes, there is no evidence that the building proposed to be erected would necessarily be a nuisance. In the plaint which was filed in the suit all that is said in para. 10 is "with a view to meet the essential requirements of the temple and its worshippers, the plaintiffs demolished the house marked B just next to the temple with a view to build on its site a *mantapam* to be used for various purposes connected with the temple" I said before there was no evidence to show that this building, if erected, would necessarily amount to a nuisance so as to entitle the Court to prevent the building in anticipation of a nuisance that was likely to be caused. Mr. Narasimha Iyer argues that the very fact that a temple is going to be built necessarily would be a nuisance to the adjacent inhabitants owing to the music and the *tom-tom* and other accompaniments of a temple. I do not think we can hold in the absence of evidence that the mere fact that a temple is built would justify us in assuming that the temple, if built, would be an actionable nuisance to the neighbours of the locality ; much less can we hold that the building of a *mantapam* annexed to a temple would be such a nuisance. The temple according to the plaintiffs, and it is not found against, was an old temple which existed for several years. It was about three houses off this mosque and any *tom-tom* must have been a nuisance for several years. There is no objection now to the worship which is conducted in the temple but it is complained that the building of that *mantapam* will create such an actionable wrong as to justify its prevention. As I said before, I do not think we can hold in the absence of any evidence that it will be a nuisance. Several cases were cited by Mr. Narasimha Iyer but they were all cases where there was evidence that there was a nuisance or that the proposed building was of such a character as necessarily to amount to a nuisance if completed, but in the case before us those elements are wanting. We think that Justice Coutts-Trotter has correctly defined the rights of the parties. He says in his judgment "the *Dharmakarathas* are entitled to alter and extend the present temple building marked A in any lawful manner they choose and to erect on the sites marked B, C, D and E any buildings which shall conform to the requirements of the Municipal Law now or hereafter to be in force and that the defendants are not entitled to interfere in any way with such acts of the plaintiffs". This is the sole declaration which the learned Judge says he makes. As regards the argument that it may be a nuisance, later on the Judge observes, "I am not going to make any declaration touching the user of the building, and when I restrain the Muhammadans from interfering I mean from interfering by physical acts." It is difficult to see how any objection can be taken to the injunction as actually granted by the learned Judge or to the decree in which that injuction is embodied unless we can hold that the mere building would be such an act as necessarily to amount to a nuisance as to which there is no evidence whatever. In these circumstances, I do not think there is any reason for interfering with the judgment of the learned Judge who has confined the injunction to legitimate limits so far as the plaintiffs' rights are concerned. The appeal, therefore, fails and is dismissed with costs.

The plaintiffs have filed a memorandum of objections but I do not think there is anything in it. So far as the orders of the Magistrate are concerned, the learned Judge was right in saying he could not interfere with those orders. They were passed by the Government and the Magistrate in the exercise of their discretion. So far as the costs are concerned I do not see any principle which the learned Judge violated. The plaintiffs expressly asked in their plaint, prayer C to set aside the orders and the learned Judge held that he had no power to do so. To that extent the claim failed and the learned Judge was right in giving the defendants some benefit in respect of the reliefs which the plaintiffs asked infructuously. The memo of objections fails and is dismissed with costs.

Krishnan, J.—The facts of this case are all set out in the judgment of the learned Chief Justice and also by my learned brother

who has just delivered his judgment. The appellants' argument is based on the contention that the building of a temple is in itself a nuisance to the neighbourhood as there is likely to be some music and other noises emanating from the temple when the worship in the temple goes on. The appellants' Vakil, therefore, wanted us to hold that the building of a temple, particularly in street in a city like Madras, must be treated as in itself a nuisance and be inhibited by an injunction order. I am entirely unable to agree with the learned Vakil for the appellants that the building of a temple can be treated as in itself a nuisance. If afterwards in the way in which the temple authorities use the temple an actionable nuisance is comitted by them, it will be time enough for the appellants then to take action. The declaration that has been given by the learned Judge in this case will not prevent their rights being put forward in any Court if they do have any such rights resulting from the action of the plaintiffs. So far as I can see the declaration that has been given to the plaintiffs is one that cannot be objected to at all. The learned Judge declares that plaintiffs are entitled to build in a lawful manner whatever building they like to put upon the site they have acquired and that is a right which every owner of property has got. It is not pretended that the building in this case will in any way interfere with the light and air or other rights of any neighbouring owners There is no ground whatsoever for objecting to the declaration granted. The learned Judge says expressly in his judgment that he was not going to make any declaration touching the user of the building and, as I say, if the user proves to be a nuisance, it will be time enough for the defendants to take action.

In the memorandum of objections, it was urged by the plaintiffs that nothing is said in the decree about their right to build a gate. Although there may be nothing expressly in the decree the learned Judge has stated in his judgment that "the plaintiffs can build what they like; they can build a gate if they like". Evidently the right to build a gate is included in the right to build given by the decree. There was no object in filing the memo. of objections on that point. As regards the costs I agree that this is not a case in which we can properly interfere with the discretion exercised by the Trial Judge. The appeal fails as also the memmorandum of objections and they are dismissed with costs.

V. N. V. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 413 OF 1923.

April 29, 1925.

Present:—Mr. Justice Phillips.

Nawab SHUJA-UL-MULK BAHADUR —DEFENDANT No. 1—RESPONDENT No. 1—APPELLANT

versus

UMIR-UL-UMRA BAHADUR AND OTHERS —PETITIONERS NOS. 1, 2 AND 4—PLAINTIFFS NOS. 1, 2 AND 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48—Decree directing recovery from one party only on failure of another party to pay—Limitation for execution against former, commencement of.

Per *Phillips, J.*—(agreeing with *Davadoss, J.*, *Wallace, J., contra*).—Where a decree directs that money be recoverable from a party only on failure to recover from another party, the execution of the decree becomes barred against the former after twelve years from the date of the decree. [p. 605, col. 2.]

Where a decree directed "that first defendant do pay to plaintiff his costs of the suit; that in case of failure to recover them from first defendant, the same be recovered from the income of the trust property":

Held, that under the provisions of s. 48 of the C. P. C. the decree became incapable of execution against the trust property after the expiry of twelve years from its date. [p. 605, cols. 1 & 2.]

Jnanendra Nath Bose v. *Khulna Loan Company, Limited*, 24 Ind. Cas 35; 18 C. W. N. 492, and *Khulna Loan Company* v. *Jnanendra Nath Bose*, 45 Ind. Cas. 436; 22 C. W. N 145 (P. C.), relied on.

Rameshvar Singh v. *Homeshar Singh*, 59 Ind. Cas. 636; 40 M. L. J. 1; 1 P. L. T. 731; 19 A. L. J. 26; (1921) M. W. N 21; 33 C. L. J. 109; 25 C. W. N. 337; 6 P. L. J. 132; 13 L. W. 546; 23 Bom. L. R. 721; 30 M. L. T. 189; 48 I. A. 17 (P. C.), explained.

Aiyasamier v. *Venkatachela Mudali*, 37 Ind. Cas. 741; 40 M. 989; 31 M. L. J. 513; (1916) 2 M. W. N. 296; 20 M. L. T. 391; 4 L. W. 507, held overruled.

Appeal against an order of the District Court, Kurnool, dated the 20th August 1923, in E. P. No. 12 of 1922, in O. S. No. 17 of 1901.

This appeal coming on for hearing on the 1st December 1924, upon perusing the petition of appeal, the order and judgment of the lower Court and the material papers in the case and upon hearing the arguments of Mr. *L. S. Viraraghava Ayyar*, for the Appellant, and of Mr. *K. V. Krishna-*

swami Ayyar, for the Respondents, and the case having stood over for consideration till the 8th January 1925, the Court (Devadoss and Wallace, JJ.) made the following **Order of Reference** to a third Judge:—

Devadoss, J.—The main question argued in this appeal is whether the execution of the decree in plaintiffs' favour is barred by reason of s. 48 of the C. P. C. The District Judge has held that the execution application is not barred by limitation and the 1st respondent in the lower Court has preferred this appeal. The decree in O. S. No. 17 of 1901 was passed by the District Court of Kurnool on 30th March 1904. It was confirmed by the High Court on 17th January 1907. The defendants in that suit were the trustees of a religious and charitable institution. The defendants were removed from the office of trustees, and the 1st defendant was directed to pay the plaintiff's costs and in case the plaintiff was unable to obtain the costs from the 1st defendant, he was to recover them from the income of the trust property. Attempts were made by the plaintiff to recover the costs from the 1st defendant, and he recovered only a portion and a considerable amount now remains to be recovered. The plaintiff's legal representatives have now applied for execution against the income of the religious and charitable institution, namely, the *darga*. The contention of Mr. Viraraghava Ayyar for the appellant is that the decree being more than 12 years old is incapable of execution by reason of s. 48 of the C. P. C. Section 48, cl. 1, is in these terms: "Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from—(*a*) the date of the decree sought to be executed, or (*b*) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree." The decree in this case being a decree for money, and there being no time fixed after which the plaintiff was to proceed against the *darga* property, it is urged, the application after 12 years from the date of the decree is barred under s. 48. The District Judge following *Aiyasamier* v. *Venkatachela Mudali* (1), and *Narayana Iyer* v. *Singaraveloo Vannian* (2), held that the remedy against the income of the *darga* was available to the plaintiffs only after he exhausted his remedies against the 1st defendant, and, therefore the plaintiff had 12 years' time from 1915 when he failed to get the amount from the 1st defendant.

Under the C. P. C. of 1882 s. 230, "a decree for payment of money became barred after 12 years from (*a*) the date of the decree sought to be enforced or of the decree...on appeal affirming the same, or (*b*) where the decree or any subsequent order directs any payment of money, or the delivery of any property, to be made at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree." Under the old C. P. C. attempts were made to get over the 12 years' period by showing that the decree was not a decree merely for money. In *Vaidhinadasamy Ayyar* v. *Somasundram Pillai* (3) it was held that "a decree directing the sale of mortgaged properties in default of payment of money is a decree for money, whether there is a direction to pay personally or not and whether the remedy against the property is exhausted or not. Such decrees will be money decrees under ss. 230, 258 and 295 of the C. P. C., although they will not be so under ss 220 and 222 of the Code." Under the present Code there is no distinction made between a decree for money and any other decree. Section 48 is clear in its terms, and no distinction, therefore, could be made between a decree for money and any other decree. The section provides for decrees whereby money is made payable on or after a certain date or money is payable by instalments and for cases of recurring liability as in the case of decrees for maintenance, etc. The question, therefore, is whether a decree which does not come within one of the exceptions to the 12 years' rule in s. 48 can be executed after the expiry of 12 years from the date on which it was passed or affirmed by the Appellate Court. The argument advanced for the

(1) 37 Ind. Cas. 741; 40 M. 989; 31 M. L. J. 513; (1916) 2 M. W. N 296; 20 M. L. T. 391; 4 L. W. 507.

(2) 42 Ind. Cas. 282; 33 M. L. J. 543; (1917) M. W. N. 845; 6 L. W. 675.

(3) 28 M. 473; 15 M. L. 126.

respondent and which has found favour with the lower Court is that the decree against the income of the *darga* was unexecutable till the remedy against the 1st defendant was exhausted. The terms of the decree are against such a construction. All that the decree says is "in case of failure to recover the costs from the 1st defendant, the same shall be recovered from the income of the trust property." Can it be said in this case that the plaintiff has 12 years from the date of the decree for pursuing his remedy against the 1st defendant, and, on failure to realize the amount from him, he could proceed against the income of the *darga* for another 12 years? Where the decree does not specifically mention the period after which the decree becomes executable against a particular individual or institution, the decree is deemed executable from the date on which it is passed : supposing a decree directs the principal debtor to pay the decree amount and that on the failure of the plaintiff to recover it from the principal debtor, he should be entitled to proceed against the surety, it cannot be said that the creditor has 12 years' limitation against the principal debtor and another 12 years against the surety. The decision in *Aiyasamier* v. *Venkatachela Mudali* (1) which was followed in *Naragana Aiyar* v. *Singaraveloo Vannian* (2), no doubt, supports the contention of the plaintiff to some extent. In *Aiyasamier* v. *Venkatachela Mudali* (1) a Full Bench held that "where a mortgage-decree provides for recovery of any balance from the other properties of the mortgagor in case the sale-proceeds of the mortgaged properties are found insufficient to satisfy the entire decree amount, the decree holder has, under s. 48 of the C. P. C. twelve years for the recovery of such balance reckoned from the time when it is ascertained to be due." Abdur Rahim, Officiating Chief Justice, observed at page 997* "When the reliefs given in respect of those rights are distinct and enforceable at different periods of time, then for purposes of execution, there is in fact, more than one decree, though embodied in one document. In such cases, it is only reasonable to hold that the date of the decree sought to be executed within the meaning of s. 48, cl. (*a*) of the C. P. C., may not be what it bears on its face. It is the date when the particular adjudication sought to be enforced becomes ripe for execution according to the terms of the decree." This observation is as regards a mortgage-decree whereby the other properties of the mortgagor could be proceeded against only after exhausting the remedy against the mortgaged properties. In the present case who is to determine whether all the remedies against the 1st defendant have been exhausted? The decree simply says that in case of failure to recover the costs from the 1st defendant, the same be recovered from the income of the trust property. It is not a condition precedent in this decree that all the remedies against the 1st defendant should be exhausted before the income of the property could be proceeded against. This case on the facts is distinguishable from the decision in *Aiyasamier* v. *Venkatachela Mudali* (1). But the authority of the Full Bench decision in *Aiyasamier* v. *Venkatachela Mudali* (1) has been considerably shaken by the decision of the Privy Council in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4). There the same point as was under consideration in *Aiyasamier* v. *Venkatachela Mudali* (1) was the subject of decision. The Calcutta High Court disallowed the contention that the decree should be read as directing the payment of money at a certain date, that is, after the mortgaged properties had been sold. The learned Judges observed*: "The terms of s. 48 seem to us to be perfectly clear, and according to that section, time runs from the date of the decree. The date of the decree is fixed by O. XX, r. 6 and we cannot understand how there can be any other date of the decree, from which limitation should run. It has been suggested that this case may be regarded as one in which the decree directed the payment of money to be made at a certain date, namely, after the mortgaged property had been sold. It appears to us that a direction of such a kind would, certainly, not be a direction to pay money at a certain date. The date would not be certain."

On appeal to the Privy Council, the judgment of the Calcutta High Court was affirmed. In the course of the argument the learned Counsel for the appellant urged the very same argument that was put forward in *Aiyasamier* v. *Venkatachela Mudali* (1). He submitted it was not an effective decree as it could not be enforced until all the mortgaged properties had been sold, and time, therefore, did not begin to run against the appellant from the date of the decree.

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(4) 45 Ind. Cas. 436; 22 C. W. N. 145 (P. C.).

See 24 Ind. Cas. 35.

The law required that two decrees ought to be made: "The appellants are entitled to 12 years from each decree, that is, from the decree for sale as well as the decree under s. 90." Lord Dunedin, in delivering the judgment of their Lordships, simply stated: "Their Lordships did not see any reason to differ from the judgment of the High Court in this case." It is suggested for the respondents that this decision has not been reported in the Indian Law Reports and, therefore, it is not binding on us. The Indian Law Reports Act, Act XVIII of 1875, s. 3, is in these terms: "No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case decided by any of the said High Courts on or after the said day, other than a report published under the authority of the Governor-General in Council." This act has no application to a decision of the Privy Council, and, therefore, we are at liberty to refer to unauthorized report of the decision of the Privy Council and, if we are satisfied that it is a correct report, we are bound to follow it. The point was specifically raised before the Privy Council, and their Lordships overruled the contention of the appellant. This decision of the Privy Council was followed in *Baranashi Koer* v. *Bhabadeb Chatterjee* (5). In *Rameshvar Singh* v. *Homeshvar Singh* (6), there was no executable decree against Ekradeshvar on the date it was passed. As observed by their Lordships:— "The decree against Ekradeshvar could not have been executed without a further application This application could not have been made till Ekradeshvar had come into possession of the property of Janeshvar, and by Art. 181 in the Schedule to the Limitation Act the period of limitation for making an application is three years from the time when the right to apply accrues." In the present case no fresh decree need be passed against the *darga* as the decree of 1904 enables the plaintiff to proceed against its income on his failure to recover the decree amount from the 1st defendant.

It is contended by Mr. K. V. Krishnaswami Ayyar for the respondents that there was no executable decree against the income of the *darga* till the remedy against the 1st defendant was exhausted. He contends that the Privy Council case even, if it be an authority, cannot apply to the present case, as the mortgagor was only one person against whom the decree was passed, though the mortgaged property was to be proceeded against in the first instance and afterwards his other properties were to be proceeded against I do not think the Privy Council decision can be explained away on this basis. Whether the decree is against one person or more than one person, unless a time is fixed for proceeding against any particular person, limitation under s. 48 would begin to run from the date of the decree and not from any other date

It is also contended that time should be calculated only from the date of the decree which is sought to be executed, namely, the decree against the *darga*, in other words that the decree consists of two decrees, one against the 1st defendant and the other against the *darga*. Whether the remedy is against one or more persons is immaterial so long as no time is fixed for the execution of the decree against the particular individual. The mere fact that, in the first instance, the 1st defendant should be proceeded against and on failure to recover the amount from him the income of the *darga* property should be proceeded against is not tantamount to fixing a particular date, after which alone the decree against the *darga* could be executed. If such a contention is tenable the question would arise: When was the failure to recover the costs from the 1st defendant? and what amounts to a failure to recover costs from the 1st defendant? I do not think such a contention is tenable in the absence of a specific date in the decree after which alone it is to be executed against the particular individual or institution.

In *Gopaldas Ganpatdas* v. *Tribhovan Jethiram* (7) it was held that the application for execution of a mortgage-decree more than twelve years after the passing of the decree absolute was barred by s. 48 of the C. P. C. In that case the main argument was that the decree was under the Code of 1882 and that s. 48 did not apply to a decree passed under the old Code. A Bench consisting of the learned Chief justice and Fawcett, J., held that that contention was untenable. Macleod, C. J., observed at page 376*: "It would have been

(5) 66 Ind. Cas. 758; 34 C. L. J. 167.

(6) 59 Ind. Cas. 636; 40 M. L. J. 1; 1 P. L. T. 731; 19 A. L. J. 26; (1921) M. W. N. 21; 33 C. L. J. 109; 25 C. W. N. 337; 6 P. L. J. 132; 13 L. W. 546; 23 Bom. L. R. 721; 30 M. L. T. 189; 48 I. A. 17 (P. C.).

(7) 59 Ind. Cas. 790; 45 B. 365; 22 Bom. L. R. 1120.

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better if the attention of holders of mortgage-decrees had been drawn to the alteration made by s. 48 of the Code of 1908, so that they might have been able to realize that no fresh application for execution could be entertained after the expiry of twelve years from the date of their decrees."

In that case the defendants' Counsel did not raise the contention that the mortgagee decree-holder had 12 years' limitation from the time the mortgaged property was sold for proceeding against the other properties of the mortgagor.

The case in *Aiyasamier* v. *Venkatachela Mudali* (1) was decided in August 1916 and the decision of the Privy Council in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4) was on 21st June 1917. The decision of the Madras High Court does not seem to have been brought to the notice of their Lordships; but that is no ground for holding that the decision in *Aiyasamier* v. *Venkatachela Mudali* (1), is a proper enunciation of the law on the subject. I, therefore, hold that the plaintiffs' application for execution is barred under s. 48 of the C. P. C.

The next contention on behalf of the respondents is that the order was made on 3rd March 1916 for payment of the amount due in three instalments and the application, therefore, is in time. Under O. XX, r. 11, the application is to be made to the Court which passed the decree within six months and the order could be made only with the consent of the decree-holder. But the application to pay in instalments was made long after the passing of the decree; and from the order of the District Judge it does not appear that the plaintiffs consented to receive the amount in three instalments. It is not necessary to consider this in detail.

Wallace, J.—I regret that in this case I have not been able to agree with my learned brother.

It is clear that a narrow interpretation of the strict terms of s. 48, C. P. C., places great difficulties in the application of the section to particular cases. If the decree is not executable except on the happening of certain contingency and that contingency does not happen until after twelve years, is the decree waste paper? Or to take an illustration given by Sadasiva Ayyar, J., in *Aiyasamier* v. *Venkatachela Mudali* (1), when a compromise decree is passed making a certain sum payable to a minor girl on her marriage and she does not marry until after 12 years from the date of decree, is the decree waste paper? In the case of such decrees, it is clear that the decree itself implies that there shall be a subsequent order or direction by the Court that the time for executing the decree has arrived and that from that date the decree is executable and time will begin to run. Such an order need not perhaps be explicit, although it will be better if it were so; but it certainly is implicit. The Court in deciding whether such a decree was time-barred, would enquire first, whether 12 years had run from the date when the decree became executable, that is, it would decide as on what date the decree became executable and then begin to compute the 12 years from that date. This is on the well-known principle that a decree which cannot be executed cannot be time barred. The Courts would stultify themselves if they administered justice on the theory that a party will be barred from a relief because he did not seek it during a period when it was not open to him to seek it.

In order to reconcile this principle with the strict wording of s. 48, C. P. C., some learned Judges have at times held that the phrase "sought to be executed" in cl. 1 (*a*) indicates that the date has to be ascertained with reference to the time when the decree becomes capable of execution. Other learned Judges have held that the word "certain" in cl. 1 (*d*) means "that which may be rendered certain." I would suggest that the difficulty may be resolved by giving a liberal interpretation to the words "or any subsequent order" in cl. 1 (*b*). Clearly such subsequent order must be one contemplated by the decree. But if the decree requires such subsequent order to be made before the date on which the money is to be paid or the property is to be delivered becomes certain, and if that date is not certain without such order, then limitation will begin to run from the date of such order. The order becomes in a sense a decree within a decree. It would be passed naturally by the Court which passed the decree acting as such and not by the Court executing the decree [see *Jurawan* v. *Mahabir Dube* (8).] Such an order, as instanced in that case, would be an order under O. XX, r. 11, C. P. C. But I can see no reason why the phrase should be confined to such orders. In the case of a decree on

(8) 44 Ind. Cas. 24; 40 A. 198; 16 A. L. J. 71.

the face of it not immediately executable, there ought to be a subsequent order declaring it to be now executable.

If the decree directs payment on a certain contingency happening, there ought to be a subsequent order declaring that that contingency has happened. If the decree is not executable against a certain person until and unless a certain contingency happens, there ought to be a subsequent order declaring that that contingency has happened and fixing the date of its occurrence. Such subsequent order will direct the payment of money or delivery of property to be made at a certain date, and cl. 1 (*b*) will then apply in terms.

The decree now before us declared that the trust was only liable if and when the 1st defendant failed to satisfy the decree personally and to the extent to which he so failed. This implies that, before the trust can be made liable, there must be a further order of the Court, implicit if not explicit, that the 1st defendant has failed by some particular date to satisfy the decree, and laying down to what extent he has failed. Only then has the right to execute the decree against the trust accrued, and only then, on the general principle laid down above, does the decree become executable against the trust and limitation begins to run against the decree-holder in respect of that relief. This principle is clearly not affected by the fact that the decree was immediately executable in some other form or against some other person. When the decree-holder has been prevented by the decree itself from seeking his remedy in the form in which, or against the person against whom, he now wishes to seek it, then the decree itself implies that there must be a subsequent order removing this bar to execution in the desired form, before the decree-holder can have the right to execute it in that form or against that person. The decree-holder, when he comes to execute against the trust is in substance, although perhaps not in form, asking for an order that his remedy against the trust has opened, and it is the duty of the Court to consider whether it has so opened, that is, whether there is a failure of the first party to satisfy the decree, before it allows the decree-holder to pursue his remedy against the trust.

It is clear also, I hold, that in the case of a decree like the one now before us, it must be the Court and no one else who is to be the judge when the second remedy provided for in the decree has opened, that is, in this case, when the failure of the first party to satisfy the decree occurred. It cannot be the decree-holder because it would be always open to the second party against whom execution was sought to contend that the decree-holder had not exhausted his remedies against the principal party or that the principal party was colluding with the decree-holder against him and, therefore, it was impossible to say that there had been as yet any failure to satisfy the decree, and an Executing Court would certainly not permit the decree-holder to execute against the second party until he has satisfied the Court that the principal party has failed to satisfy the decree, and that there is no further reasonable hope of his being able to satisfy it. Therefore, it must be left to the Court to decide between these conflicting views. That is only to say that the subsequent order of the Court which the decree implies must be a judicial order. The Court will further enquire whether the decree-holder has been diligent in coming forward to enforce his remedy against the second party, diligent both in enforcing his remedy against the first party and diligent in coming forward to obtain an order, implicit or explicit, that his remedy against the second party has now opened. Unless the decree-holder at once diligently executes his decree against the principal party, his remedy against the second will not accrue, and the ordinary 12 years' rule will apply. But if owing to circumstances not under his control, some obstruction to execution which he has to surmount, he is unable, say for some years, to pursue to the end his remedy against the principal party, so that his diligent and *bona fide* pursuit of his remedy against the principal party occupies, say, 12 years, from the date of the decree, then, unless the view I indicate prevails, he is deprived of the very remedy against the second party which he obtained by his decree.

I would hold, therefore, that in a case like the present the decree-holder's remedy against the second party accrued not on the date of the decree but on the date of the failure of the first party to satisfy the decree which date must be fixed by an order of Court, and that limitation begins to run in respect of that remedy from the date of that order. Such order would, in my view, have the effect of a fresh decree directing

the payment of money by the second party to be made from the date of its order, and s. 48 would apply to it as such; that is, 12 years' limitation for the relief against the second party will run from the date of such an order.

An analogous case would be that of a mortgage-decree which provides for recovery of any balance from the other property of the mortgagor in case the sale-proceeds of the mortgaged property are insufficient to satisfy the entire decree amount. In such a case a Full Bench of this Court has held that when the reliefs given in respect of rights under a decree are distinct and enforceable at different periods of time, then for purposes of execution there is in fact more than one decree although embodied in one document, and that the decree-holder has, under s. 48, 12 years from the time when such balance, is ascertained to be due, thus implying a subsequent order of the Court declaring on what date that sum was ascertained to be due. It must be admitted that the authority of this decision has been shaken by a later Privy Council case reported as *Khulna Loan Company* v. *Jnanendra Nath Bose* (4), a case reported with disconcerting brevity but it would appear that the Subordinate Judge in that case dated the 12 years from an order under s. 90 of the Transfer of Property Act. This was an appeal from the Calcutta High Court which had followed the view that if the decree originally provided for realization of the balance from the other property of the judgment-debtor, an order under s. 90 of the Transfer of Property Act was not necessary. See *Lalla Tirhini Sahai* v. *Lalla Hurruk Narain* (9), and in any case was an order in execution and not an order in the suit. It may be that the High Court in that case held that the *terminus a quo* of s. 48 could not be an order *in execution*, and, therefore, held the application for execution barred, and that their Lordships of the Privy Council who give no reasons for their judgment followed that line of reasoning. I do not think that report is full enough for us to conclude that that ruling has reversed the principle of our Full Bench ruling. It may be noted that another Privy Council ruling in *Rameshvar Singh* v. *Homeshvar Singh* (6) holds with reference to an interpretation of Art. 182 of the Limitation Act that in the case of a decree not executable except on the happening of a particular contingency, time will not begin to run until that contingency occurs. If the ruling in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4) really means that in all cases of decrees, whether immediately executable or not, the decree is to run from its date, that will conflict with the principle of this ruling, since in that case the decree may become time-barred before it ever becomes capable of being executed. The case in *Narayan* v. *Timmaya* (10), a case of a decree against a principal and a surety does not assist. The decision there turned on the question whether where the decree-holder might proceed either against the principal or against the surety, execution proceedings against the former will avail to save the bar of time against the latter. *Narhar Raghunath Naphad* v. *Krishnaji Govind Nadgavandi* (11) is somewhat analogous to the present case as the personal remedy against the judgment-debtor only came into force on the happening of a certain contingency and the Court held that limitation began to run from the happening of that contingency. The decision in *Parbbu Narain Singh* v. *Lalji Singh* (12) does not seem to me to assist and I do not think it necessary to dwell on other cases cited before us.

My general conclusion then is that what is essentially required before limitation begins to run in a case of this kind is an order of the Court stating that the decree-holder's right to execute against the second party has either accrued from a fixed date from which time will begin to run against him in the matter of that supplemental execution or that it has not accrued at all. In the present case there is no such order and I think it is essential that there should be such an order. The lower Court has not adopted the proper principle in deciding that the right accrued in 1915. It fixes that date merely because the decree holder chose then to abandon his remedy against the 1st defendant, and to seek his remedy against the trust, that is, it has allowed the decree-holder himself to decide when his right to proceed against the trust began. I am clear that that is not the proper way in which the case should be decided. I would hold, therefore, that the lower Court's

(9) 21 C. 26; 10 Ind. Dec. (N. S.) 650.

(10) 31 B. 50; 8 Bom. L. R. 807.

(11) 15 Ind. Cas. 822; 36 B. 368; 14 Bom. L. R. 381.

(12) 16 Ind. Cas. 190; 34 A. 636; 10 A. L. J. 256.

order is not correct and that the case will have to go back to the lower Court being the Court which passed the decree for a fresh decision on the principles laid down above (1) as to whether the plaintiff's right to execute the decree against the trust has accrued, (2) if so, on what date it accrued and (3) whether calculating limitation from that date the decree is, or is not, time barred.

By the Court.—In view of the difference of opinion for a disposal of the appeal, we think that the preliminary point should be referred to another Judge under s. 98, C. P. C.

"Where a decree directs that money be recoverable from a party only on failure to recover from another party, does the execution of the decree become barred against the former after 12 years from the date of the decree?"

This appeal coming on for hearing on the 23rd April 1925, upon perusing the petition of appeal, the order and judgment of the lower Court, the above order of reference dated the 8th January 1925 and the material papers in the case and upon hearing the arguments of Mr. *L. S. Viraraghava Ayyar*, for the Appellant, and of Mr. *N. Swaminatha Ayyar* for Mr. *K. V. Krishnaswami, Ayyar* for the Respondents, and the case having stood over for consideration till this day, the Court delivered the following

OPINION.—The question "Where a decree directs that money be recoverable from a party only on failure to recover from another party, does the execution of the decree be come barred against the former after 12 years from the date of the decree?" has been referred to me under s. 98 of the C. P. C., owing to a difference of opinion between two learned Judges of this Court. The material portion of the decree in this case is,

"that 1st defendant do pay to plaintiff his costs of the suit Rs. 1,129; that in case of failure to recover these costs from 1st defendant the same be recovered from the income of the trust property."

The question put in the above form has not been definitely answered in any reported decisions, but a very similar question is the subject of conflicting decisions. That similar question is whether when there is a decree directing sale of mortgage property and, in default of the decree amount being realized, directing payment by the mortgagor, the decree is capable of execution more than 12 years after its date. It was held by a Full Bench of this Court by a majority of the Judges that the 12 years for enforcing the personal remedy against the mortgagor will run from the date of the sale of the mortgage property—*Aiyasamier* v. *Venkatachela Mudali* (1). The same point was considered by the Calcutta High Court and it was held that the 12 years ran from the date of the decree—*Jnanendra Nath Bose* v. *Khulna Loan Company, Limited* (13). The Calcutta case went up to the Privy Council on appeal and the decision of the High Court was affirmed—*Khulna Loan Company* v. *Jnanendra Nath Bose* (4). In the present case the two referring Judges do not appear to agree as to whether the decision of the Privy Council has the effect of overruling the Full Bench ruling of this Court, Devadoss, J., holding that it does do so and Wallace, J., concluding that it does not do so. The reason given by Wallace, J., is that the report is not full enough to enable him to decide that the principle of the Madras Full Bench ruling has been reversed, but I must observe that, although the judgment of the Privy Council is very brief, it states that their Lordships do not see any reason to differ from the judgment of the High Court. As they use the word "judgment" and not "decree" I think it is clear that they adopt the reasoning contained in the judgment of the Calcutta High Court, and consequently we must accept the principle there laid down. The decision is based on the terms of s. 48 of the C. P. C., and on the fact that the date of the decree being fixed by O. XX, r. 7, there can be no other date for the decree. This was one of the main points relied upon by me in my dissenting judgment in *Aiyasamier* v. *Venkatachala Mudali* (1) where I held that a decree can only bear one date and that, therefore, under s. 48, 12 years must be calculated from that date. It is argued that the decision of the Privy Council on this point is considerably affected by a later judgment *Rameshwar Singh* v. *Homeshwar Singh* (6) where it was held that in the case of a decree not executable except, on the happening of a particular contingency, time will not begin to run until that contingency occurs. This decision has reference to Art. 182 of the Limitation Act and not to s. 48 of the C. P. C., but I

(13) 24 Ind. Cas. 35; 18 C. W. N. 492.

think it can be distinguished on another ground, namely, that it deals with a decree which was wholly unexecutable on the date it was passed. In the present case, and in the case of mortgage-decrees, the decree is undoubtedly executable, at least in part, on the date of the decree, and consequently so far as that part is concerned, the 12 years under s. 48 must undoubtedly run from the date of the decree itself. If the Legislature had intended that in such a case a further period of limitation should commence from the date when the second portion of the decree became executable, I think it would have said so, for there is a provision in s. 48, cl. 1 (*b*), that where a decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making payments or delivery in respect of which the applicant seeks to execute the decree is to be the date from which the 12 years is to run. Therefore, in a mortgage decree and other decrees like the present it may well be open to the Court to pass a subsequent order declaring that the second portion of the decree had become executable, and directing execution to proceed, and such an order would come within the meaning of the subsequent order referred to in s. 48, cl. 1 (*b*). In the present case, the decree directs payment of the costs by the 1st defendant and that in case of failure to recover these costs from the 1st defendant, the same be recovered from the income of the trust property. It would, therefore, have been open to the plaintiff to ask the Court for a declaration that the costs could not be recovered from the 1st defendant and for an order directing payment out of the trust property, in which case undoubtedly a further period of limitation would begin under s. 48, cl. 1 (*b*). It is pointed out with some force by Devadoss, J., in his Order of Reference that it cannot be said that under the decree the plaintiff has 12 years to pursue his remedy against the 1st defendant and a further 12 years against the trust property. Section 48 provides an unqualified prohibition of the execution of the decree after 12 years from its date, unless certain specified circumstances exist, and consequently I do not think that it is open to Courts to extend that period, which after all is a very long period, unless the provisions of s. 48 are strictly complied with.

The other cases cited for and against the proposition do not materially further the determination of the question before me. In *Ramana Reddi* v. *Babu Reddi* (14) it was held that, in executing a decree which had left the question of mesne profits to be determined in execution, an application to determine the profits, made after 12 years from the date of the decree was barred under s. 48. In *Venkata Perumal* v. *Prayag Dossjee* (15), a Bench of this Court followed the Calcutta ruling in *Jnanendra Nath Bose* v. *Khulna Loan Company Limited* (13), in preference to the ruling in *Narhar Raghunath Naphad* v. *Krishnaji Govind Nadgavandi* (11). The case in Bombay was not one of mortgage decree, but was determined on the principle that the 12 years period under s. 48 runs only from the date when the decree became in all its parts ripe for execution. This was the view taken by the majority of the Full Bench in *Aiyasamier* v. *Venkatachala Mudali* (1). As I have pointed out above, this is not in accordance with the judgment of the Privy Council and appears to contemplate the proposition that a decree can bear two separate dates, the first date being the date of the decree, on which it can be partially executed, and the second date being the date on which the right to apply for execution of the latter portion falls due. This latter principle is not at all supported by the ruling in *Khulna Loan Company, Limited* v. *Jnanendra Nath Bose* (4).

In view of all these circumstances I must answer the question referred to me in the affirmative.

V. N. V. *Reference answered in the affirmative.*

(14) 18 Ind. Cas. 586; 37 M. 186; 13 M. L. T. 79; (1913) M. W. N. 114; 24 M. L. J. 96.
(15) 29 Ind. Cas. 556.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1561 OF 1922.
January 28, 1924.
Present:—Mr. Justice Moti Sagar.
JAIMAL SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
CHAND SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Declaration of title, suit for—Limitation, commencement of.

Limitation for a suit for a declaration of title to a property commences from the date of the first denial of plaintiff's title. Any subsequent denial is only a reiteration of the denial and not a fresh invasion giving a fresh cause of action. [p. 607, cols. 1 & 2.]

Hakam Singh v. *Waryaman*, 140 P. R. 1907; 187 P. W. R. 1907, *Jahana* v. *Wali*, 53 Ind. Cas. 595; 98 P. R. 1919, distinguished.

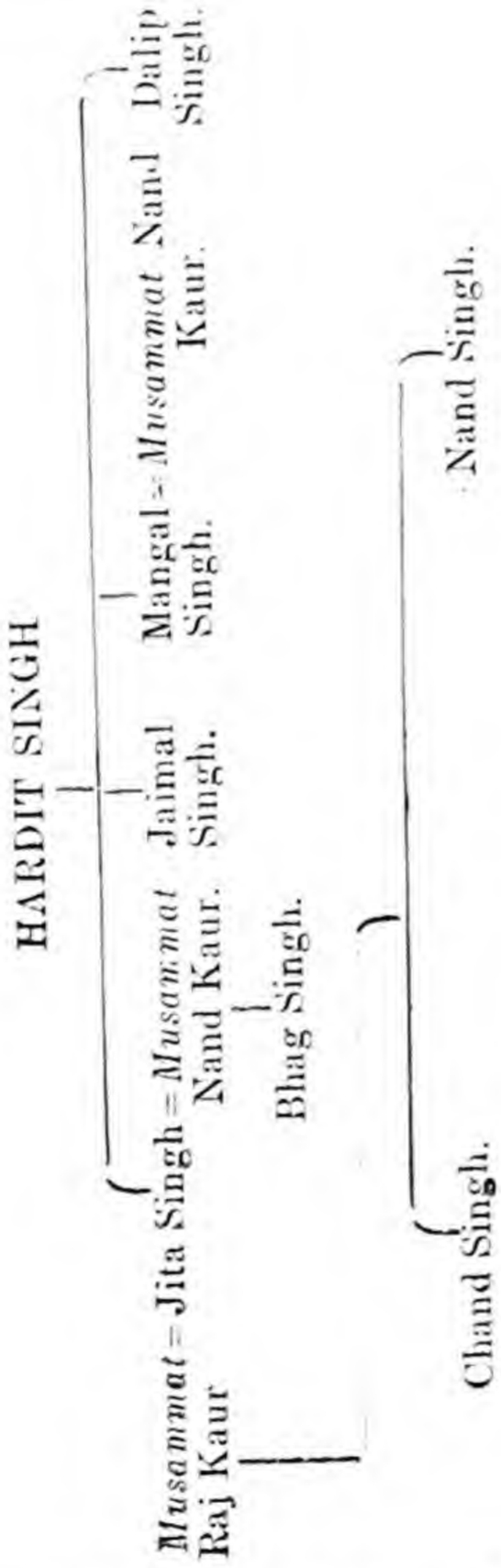
Ghulam Hussain v. *Saifullah Khan*, 42 Ind. Cas. 346; 79 P. R. 1917; 140 P. W. R. 1917, followed.

Second appeal from a decree of the District Judge, Ferozepore, dated the 12th April 1923.

Lala *Fakir Chand*, for the Appellant.

Lala *Badri Das*, R. B., for the Respondents.

JUDGMENT.—The sole question to be determined in this second appeal is whether the plaintiffs' suit is or is not barred by the law of limitation. The following pedigree-table will tend to elucidate the facts of this case :—



Mangal Singh died during the lifetime of his father Hardit Singh leaving him surviving a widow *Musammat* Nand Kaur who subsequently re-married Jita Singh, brother of her deceased husband, and had a son Bhag Singh by him. On the 19th of August 1892 Hardit Singh made a gift of 1/5th share of his land in favour of *Musammat* Nand Kaur of which she remained in possession as long as she was alive. After her death this land was mutated in favour of her son Bhag Singh. On Bhag Singh's death which took place in 1900 his share was mutated in favour of Jita Singh one-half, and Jaimal Singh and Dalip Singh one-quarter each. It appears that during the lifetime of Bhag Singh, Hardit Singh had effected a division of his property keeping a 1/5th share to himself. Hardit Singh is alleged to have died in 1904 and after his death his sons Jita Singh, Jaimal Singh and Dalip Singh succeeded to the 1/5th share, of which he was in possession in equal shares. The result was that in the revenue papers 22 shares were shown as owned by Jita Singh's branch and 19 shares each by Jaimal Singh and Dalip Singh. These entries continued unaltered from the death of Hardit Singh right up to the date of the institution of the suit.

In 1920 the plaintiffs applied for partition alleging that the entries in the Revenue Records were wrong and that they and their nephews Chand Singh and Nand Singh, sons of Jita Singh, were entitled to a $\frac{1}{3}$rd share each in the whole of the land which originally stood in the name of Hardit Singh. Their application was kept pending and they were directed to establish their right by a civil suit.

On the 31st of August 1920 the plaintiffs accordingly brought this suit for the establishment of their title praying that it should be declared that they and Jita Singh representatives were entitled to have $\frac{1}{3}$rd each of Hardit Singh's inheritance. Both the Courts below have dismissed the suit holding that it was barred by limitation under Art. 120 of the Indian Limitation Act.

The plaintiffs have now come up in second appeal to this Court, and it has been urged on their behalf that a fresh cause of action accrued to them in 1920 when their rights were denied in the partition proceedings and that the suit, which has been brought within six years from that date is, therefore, within time. A reference to the mutation proceedings of 1900 makes it clear that the plaintiffs at that time asserted their right to succeed equally to the share of which Bhag Singh was in possession, but that the defendants denied their right

to do so. In spite of their assertion the question was decided against the plaintiffs by the Revenue Officer and mutation effected one-half in favour of the defendants and one-quarter each in favour of the plaintiffs. It is thus clear that the denial of the plaintiffs' title took place in 1900 and that if they wanted to sue they should have done so within six years allowed by Art. 120, First Schedule to the Indian Limitation Act. The only question for consideration is whether there has been any fresh cause of action since 1900. It is urged on behalf of the plaintiffs that the denial of the plaintiffs' title in the partition proceedings of 1920 is a fresh invasion of their rights giving rise to a fresh cause of action. Reliance is placed in support of this contention on *Hakam Singh* v. *Waryaman* (1) and *Jahana* v. *Wali* (2). Both these cases are clearly distinguishable. In *Hakam Singh* v. *Waryaman* (1) the facts were briefly these:—A widow died in 1895 and on her death the members of the *patti* in which the land which she had held was situate claimed to be the owners. The claim was contested by the plaintiffs who set up their own title and alleged their possession. Mutation was effected in the names of the *pattidars* who were entered as owners, and in the names of the plaintiffs who were entered as in possession. The possession of the plaintiffs, however, was not disturbed, and they did not bring a declaratory suit. In 1904 the *pattidars* applied for partition and the plaintiffs who objected were directed to bring a regular suit to establish their title. They accordingly brought a suit in 1905 and it was contended by the *pattidars* that the suit was barred by limitation, inasmuch as the cause of action to the plaintiffs arose in 1897 when their claim to be entered as owners was denied and the *pattidars*' names entered. It was held that a fresh cause of action constituting a fresh invasion of the plaintiffs' title did take place when it was attempted to oust the plaintiffs from possession by means of partition in 1904 and that the claim was, therefore, within time. It will be observed that in the present case it is not only that the defendants have been entered as owing certain shares in the property which was originally held by Hardit Singh but that they have also been in uninterrupted possession thereof since 1900. Further, it is not the defendants who are applying for partition as was the case in *Hakam Singh* v. *Waryaman* (1), but the plaintiffs themselves and it is, therefore, difficult to understand where the fresh invasion of their right comes in.

In *Jahana* v. *Wali* (2) the plaintiffs claimed to be entitled to succeed according to *chundawand* rule and not according to *pagwand* rule as erroneously entered in the Revenue Records. They alleged that they became aware of the wrong entries only when the defendants applied for partition. It was held that although the plaintiffs' right to sue for a declaration in regard to the Settlement entries had accrued many years ago and had become time-barred, a new cause of action accrued to them when the defendant applied for partition and that the suit was consequently within time.

Here again the facts are entirely different. The plaintiffs have all along been aware of the entries in the Revenue papers and mutation in favour of the defendants in 1900 in fact took place in spite of their (plaintiffs') protest.

In my opinion the denial made by the defendants of the plaintiffs' claim in 1920 was merely a reiteration of the former denial and not a fresh invasion. As observed in *Ghulam Hussain* v. *Saifulla Khan* (3) a case exactly in point:—"To hold otherwise would amount to this, that a plaintiff in such a case could always renew limitation at will; he could at any time go to his opponent and say: 'Do you still deny my claim?' and getting the answer he expected could come into Court, basing his suit on the repeated denial. Article 120 would then become a mere farce." I am in full agreement with the view taken in the above case and am clearly of opinion that the suit is barred by limitation.

I dismiss the appeal with costs throughout.

R. L. *Appeal dismissed.*

(1) 140 P. R. 1907; 187 P. W. R. 1907.
(2) 58 Ind. Cas. 595; 98 P. R. 1919.
(3) 42 Ind. Cas. 346; 79 P. R. 1917; 140 P. W. R. 1917.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 733 OF 1923.

August 17, 1925.

Present:—Mr. Justice Madhavan Nair.

PAYIDA RAMAKRISHNAYYA AND OTHERS—PLAINTIFFS—PETITIONERS

versus

BARREY NAGARAZU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 69—Co-sharers—Purchase by one of share of other—Vendor continuing in possession—Payment of dues to zemindar by purchaser—Suit to recover amount from vendor, maintainability of

Plaintiff and defendant were co-sharers in certain property on which certain dues had to be paid to the *zemindar*. Plaintiff purchased defendant's share in the property but the latter continued in possession. Plaintiff paid the dues to the *zemindar* for the whole property, and sued the defendant to recover from him the portion of the dues payable in respect of the defendant's share in the property:

Held, (1) that after the sale of his share to the plaintiff the defendant was a mere trespasser and was not a person bound in law to pay the dues to the *zemindar* within the meaning of s. 69 of the Contract Act and that the plaintiff was not, therefore, entitled to maintain the suit;

(2) that the remedy of the plaintiff was to sue the defendant for mesne profits.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the judgment of the Court of the District Munsif, Peddapur, dated the 28th November 1922, in S. C. S. No. 855 of 1922.

Mr. *C. Rama Rao*, for the Petitioners.

Mr. *B. Satyanarayana*, for the Respondents.

JUDGMENT.—The plaintiffs are the petitioners. The plaintiffs and defendants were co-sharers of certain property on which certain dues had to be paid to the *zemindar*. The plaintiffs purchased the defendants' portions and paid the dues to the *zemindar* for the whole property. They now claim to recover from the defendants that portion of the dues payable for the share of the defendants.

The defendants after the purchase by the plaintiffs of their share, remained in possession of the property. Clearly, therefore, the defendants were in the position of trespassers. The plaintiffs, in order to entitle them to re-imbursement, rely upon s. 69 of the Indian Contract Act and state that since they paid the dues payable by the defendants as well, they are entitled to get back that amount. For the application of s. 69, it is necessary to show that the defendants are the persons bound in law to pay. From what I have already said it would appear that the defendants are trespassers pure and simple and are not persons bound in law to pay dues to the *zemindar*. The plaintiffs, therefore, have no cause of action against the defendants for re-imbursements under s. 69 of the Indian Contract Act. The plaintiffs' remedy clearly will be to sue defendants for mesne profits. I find the District Munsif says in the beginning of his judgment that the plaintiffs had already filed a suit O. S. No. 140 of 1916 in which a decree was given to them for mesne profits. If so, the plaintiffs have neither in equity nor in law any claim against the defendants.

The decree of the lower Court is right and the revision petition is dismissed with costs.

V. N. V. *Petition dismissed.*

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1232 OF 1923.

June 8, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

SATISH CHANDRA CHAKRAVARTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Syed ABDUL HASIR *alias* RANJANALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 103—Landlord and tenant—Tenure-holder—Plot of land shown in possession of tenant under landlord—Rent realized by tenure-holder—Record of Rights, entry in—Presumption—Rebuttal.

Plaintiffs who were tenure-holders under the defendants brought a suit to recover possession of a piece of land which they alleged formed part of their tenure of which they had been dispossessed by the defendants. The defence was a denial that the land in suit formed part of any permanent tenure of the plaintiffs. The Record of Rights which was published in 1916 showed one A as the tenant of the land in dispute under the defendants. There was no evidence that the defendants had ever realized any rent in respect of the land in dispute. On the other hand the plaintiffs proved that they had realized rent in respect of the land in dispute before the publication of the Record of Rights and had also obtained rent-decrees against A after the publication of the Record of Rights:

Held, (1) that in the circumstances the presumption raised by the entry in the Record of Rights was very slight and did not require very much to rebut it; [p. 609, col. 2.]

(2) that the presumption had been sufficiently rebutted by evidence that the plaintiffs had realized rent in respect of the land in dispute. [*ibid.*]

Appeal against a decree of the Second Additional District Judge, Mymensingh, dated the 13th of January 1923, reversing that of the Officiating Munsif, Second Court, Kishoreganj, dated the 8th December 1921.

Babus *Tarak Chandra Chakravarty* and *Birendra Kumar De*, for the Appellants.

Messrs. *Nuruddin Ahmed* and *M. A. S. M. Akram*, for the Respondents.

Babu *Biraj Mohan Majumdar*, for the Deputy Registrar.

JUDGMENT.—This is an appeal by the plaintiffs against a decision of the Second Additional District Judge of Mymensingh which reverses a decision of the Second Munsif of Kishoreganj. The plaintiffs are tenure-holders under the defendants and this suit was brought by the plaintiffs to recover possession of what they alleged formed part of their tenure under the defendants and of which they say they had been dispossessed by the defendants. The defence was a denial that the lands in suit formed part of any permanent tenure of the plaintiffs held under the defendants. The first Court found in favour of the plaintiffs' contention and decreed the suit. The second Court reversed that decision.

Now, three points have been urged before us in second appeal. First, it is said that although the Record of Rights which was published some time after May 1916 shows one Amiruddi as the tenant of the lands in suit under the defendants the presumption of the record has been rebutted by reason of the fact that the plaintiffs have given evidence of realisation of rent from Amiruddi for eight years from 1315 to 1323. The date of the last rent-decree obtained by the plaintiffs against Amiruddi was August 1917 which was for the rent up to August 1916. Further, the plaintiffs say that they also show realisation of rent from one Nemai in the year 1895.

Secondly, they contend that the defendants have adduced no evidence whatsoever that any rent was ever realised by them in respect of these lands from Amiruddi or from Nemai.

Thirdly, it is urged that the learned Additional District Judge was wrong in not taking into account the evidence of a certain *chitta* prepared during partition proceedings under Act VIII of 1876 and also of the Schedule prepared by the Deputy Collector under s. 111 of the Act. So far as the third point is concerned, it is not necessary for us to decide whether the learned Additional District Judge was wrong in saying as he did, that the *chitta* was not admissible in evidence in reliance on the cases to which he referred for it seems to us that if his judgment is considered that it would appear that he did take into account such evidence as contained in the *chitta* and also in the Schedule prepared under s. 111 of the Partition Act (VIII of 1876). He specifically states in his judgment that the partition record was obviously wrong in respect of the rental and of the area and he refers to a certain mistake or what he alleges is a mistake appearing therein It appears that he clearly took into consideration for what it was worth the evidence to be adduced from the partition proceedings. Nothing, therefore, turns on this point.

So far as the second point is concerned there was no obligation on the defendants to show payment of rent to them by Amiruddi or by Nemai in respect of the lands and they were entitled to rely, as they have done, on the presumption raised by reason of the entry in the Record of Rights in their favour. Accordingly, it seems to us that the whole question really resolves itself into this namely, whether the learned Additional District Judge has drawn the right inference from the evidence with regard to the realisation of rent by the plaintiffs from Amiruddi for the eight years from 1315 to 1323. Some question was raised in argument on behalf of the respondents and it is also referred to in the judgment of the learned Judge with regard to a question of adverse possession. It seems to us that no question of adverse possession arises. The question really for the Court was whether there was sufficient evidence of possession by the plaintiffs of the land in suit to rebut the presumption raised by the entry in the Record of Rights and, in my opinion, the learned Judge has not drawn the correct inference from the evidence which was before him. After all the presumption raised by the Record of Rights is very slight. There seems to have been no evidence whatsoever of any realisation of rent by the defendants in respect of the land in suit. Accordingly, it did not require very much to rebut the presumption raised by the entry in the record. When you have the fact as here of realisation of rent by suit from Nemai in 1895 and also for eight years from 1315 to

1323 by decrees against Amiruddi it does seem to us that there is evidence which rebuts the presumption raised by the entry in the Record of Rights.

We think, therefore, the learned Judge in the Court of Appeal below drew the wrong inference from the evidence which was before him and he should have held that the presumption raised by the record had been rebutted and that the plaintiffs' suit should succeed.

The result is that the appeal succeeds and the plaintiffs will be entitled to their costs in all Courts.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 223 OF 1922.

April 20, 1925.

Present:—Justice Sir Charles Gordon Spencer, KT., and Mr. Justice Ramesam.

AUDIAPPA NAIDU—APPELLANT

versus

MUTHULAKSHMI ACHI—RESPONDENT.

Hindu Law—Joint family—Manager, whether can dedicate family property to temple.

The manager of a joint Hindu family can lawfully dedicate a small portion of the family property to a temple on the occasion of the funeral of a deceased member of the family.

Ramalinga Chetty v. *Sivachidambara Chetty*, 49 Ind. Cas. 742; 42 M. 440; 9 L. W. 224; 25 M. L. T. 253; 36 M. L. J. 575; (1919) M. W. N. 426, relied on.

Appeal against a decree of the Court of the Subordinate Judge, Nagapatam, in Original Suit No. 187 of 1917.

Mr. *T. V. Muthukrishna Iyer*, for the Appellant.

JUDGMENT.—As the respondent's Vakil has no instructions we have not had the advantage of hearing arguments on both sides. Mr. Muthukrishna Ayyar for the appellant has very fairly placed the facts and the law arising out of the parties' contentions before us. The main question to be decided is whether two trust deeds, Exs. B and B-1, one being in favour of a Pilliar Temple and the other for the feeding of *Brahmins*. are valid and binding on the executor of Ramalingam Pillai and the members of his family. The Subordinate Judge has found in favour of both. So far as B-1 a registered trust deed of 1914 is concerned, we have no doubt that he was right in treating it as valid. It was made on the occasion of Ramalingam's father's and mother's and brother's death and the only other co-parcener in the family, Muthuvelu, consented to it and was himself constituted a trustee under it. It was held in *Ramalinga Chetty* v. *Sivachidambara Chetty* (1) that the manager of a Hindu family could lawfully dedicate a small portion of joint property to a temple on the occasion of the funeral of a deceased member. In the Will, which is the subject of the connected Appeal No. 243 of 1922, Ramalingam made no attempt to revoke this gift. But he did purport to revoke Ex. B as not being in force. The other members of the family did not attest Ex. B, and there is no proof that they gave their consent to it. There was no religious occasion for making this gift, and the statement of D. W. No. 9 that it was acted upon for three years before Ramalingam's death cannot be true, seeing that the trustee died in less than three years from August 1915 when Ex. B was executed. Moreover there is a settlement in the Will Ex. I that was not in force. We must, therefore, allow the appeal in respect of the trust under Ex. B and dismiss it as regards moveables. As regards costs, we are of opinion that Muthulakshmi Ramalingam's widow is not entitled to be paid her costs in the suit O. S. No. 87, in which she took no active part or in O. S. No. 57 in which she impeached the Will and colluded with the reversioner, who was unsuccessful. In modification of the lower Court's decree she will be directed to bear her own costs throughout in both cases. The costs of the trustee in this suit and the appeal may be met from out of the income of the trust. The appeal is not pressed as regards moveables.

V. N. V.

Z. K. *Decree modified.*

(1) 49 Ind. Cas. 742; 42 M. 440; 9 L. W. 224; 25 M. L. T. 253; 36 M. L. J. 575; (1919) M. W. N. 426.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2187 OF 1922.

June 4, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

Sheikh RASAK ALI *alias* RASED ALI MANDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sheikh HAZI ABDUL RASID AND OTHERS—PLAINTIFFS—RESPONDENTS.

Co-sharers—Structures raised on portion of joint

land—Partition—Other co-sharers, whether can be deprived of their share.

The mere fact that some of the co-sharers in a property are allowed to raise structures on a portion of the joint land, would not deprive the other co-sharers of a share in the land when a general partition is effected. [p. 611, col. 2.]

Appeal against a decree of the District Judge, Hooghly, dated the 9th of June 1922, confirming that of the Subordinate Judge, Third Court of that place, dated the 31st of January 1921.

Moulvi *A. S. M. Akram*, for the Appellants.

Mr. *Mohendra Nath Roy* and Babu *Pyari Mohan Chatterjee*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the defendants and arises out of a suit brought by the plaintiffs for declaration of their 14 annas share in certain immoveable properties and also for partition, the plaintiffs' case shortly stated was this: the properties in suit belonged originally to two brothers Moshim and Basir-ud-din each had an 8-annas share in the properties. Moshim died leaving a widow Atta Bibi, a son and a daughter. It appears that in 1881 Atta Bibi for herself and as guardian of her two minor children sold a 6-annas share of Moshim's property to her brother-in-law Basiruddin. Basiruddin in his turn sold this 6-annas share purchased by him together with the 8-annas share which belonged to himself in his own right aggregating to 14-annas share in the properties in suit to one Golam Nasraf, that subsequently Pairannessa Bibi widow of Basiruddin executed in 1892 a deed of release in favour of Golam Nasraf renouncing her interest in the properties sold by her husband. Now the plaintiffs' case is that they were in possession, under the purchase of their predecessor Golam Nasraf, of the property along with the defendants who were the son, widow and the daughter of Moshim jointly to the extent of their 14-annas share. The defendants resisted the claim of the plaintiffs on the ground that the suit so far as the properties Nos. 2 and 3 were concerned was not maintainable, because there were other co-sharers in whose absence a decree for partition was not maintainable. As regards the other properties the defence was that the plaintiffs' predecessor Golam Nasraf acquired no title to the 6-annas share which was sold by Atta Bibi in the year 1881, because it was pointed out by the defendants that Atta Bibi was not competent as a guardian under the Muhammadan Law to transfer the interest of her minor children in immoveable properties inherited by them from their father. The defendants further denied the possession of the plaintiffs, more specially they denied their possession in certain structures known as Dalij; and Gohal which stood upon a portion of the properties in suit.

The Court of first instance found the plaintiffs' title as claimed and gave a decree for partition of the joint properties with the exception of plots Nos. 2 and 3.

On appeal by the defendants to the District Court the questions which were raised on behalf of the defendants were that the plaintiffs acquired no title by the conveyance executed by Atta Bibi and that the plaintiffs had not acquired any title by adverse possession to the properties in suit. Now, the learned District Judge has found that although the conveyance by Atta Bibi was invalid under the Muhammadan Law the plaintiffs were in possession of the 14-annas share in the properties from the time of their predecessor for all those years and had acquired a good title by adverse possession. The learned District Judge held, to quote his own words, "I am inclined to hold that in the present case there was adequacy, continuity and exclusiveness in the possession of the plaintiffs. As stated before, the plaintiffs had possession of the share claimed in the property, some times *khas* and some times through tenants continuously for a very long period of time" The learned Judge in that view affirmed the decree of the Trial Court.

In this second appeal it was contended by the learned Vakil for the appellants that so far as the Dalij and Gohal are concerned no adverse possession was proved, because it was admitted that the defendants were in exclusive possession of these structures. Now it appears to me that the passage which I have quoted from the judgment of the learned Judge concludes the contention of the appellant. The plaintiffs were in possession of their 14-annas share in the properties. If some of the co-sharers which the defendants admittedly were to the extent of 2-annas were allowed to raise structures on a piece of joint land then such exclusive use could not deprive the plaintiffs of a share in the properties when a general partition was effected. It was pointed out by the learned Advocate who appears for the respondents that these structures were raised only about 8 or 9 years before this suit was commenced,

The entry of the plaintiffs under their purchase was effected about 30 years before the erection of these structures, and as I have already pointed out the learned District Judge has found the title in favour of the plaintiffs by adverse possession.

Secondly it was contended by the learned Vakil for the appellant that as regards some of the properties there was a want of proper parties. But we do not find that any such question was raised in the lower Appellate Court.

Then it was lastly contended that the plaintiffs were residents of a different village and the defendants were in possession of what was their ancestral *bari* in the land. Well, that is a matter which the Commissioner in partition will take note of and it is quite possible that the plaintiffs will have no objection to the defendants' getting this site of the house if they get an equivalent land elsewhere. However that is a matter for the Court when it decides the question of equitable partition between the parties.

It seems, therefore, there is no error of law in the judgment of the learned District Judge with which we can interfere.

This appeal, therefore, fails and is dismissed with costs.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 31 OF 1925.

April 29, 1925.

Present:—Justice Sir Kumaraswami Sastri, KT., and Mr. Justice Krishnan.

P. M. A. M. RAMASWAMI CHETTIAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

LODD GOVINDOSS KRISHNADOSS VARU—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92, proviso (1)—Deed—Consideration, recital of, receipt of—Oral evidence, admissibility of, to prove incorrectness of recital—Rebuttal.

Where one party to a deed alleges and proves that the whole of the consideration, the receipt of which is acknowledged in the deed, did not pass, the case falls within the first proviso to s. 92 of the Evidence Act, and the other party is at liberty to show what the real consideration is and parol evidence can be given of the real nature of the transaction. What the first party tries to prove in such a case is failure of consideration and that brings the case within the first proviso to the section, the second party can then prove in rebuttal of the first party's case that there was in truth no failure of consideration and for that purpose show what the real consideration is. [p. 613, col. 2.]

Chunni Bua v. *Basanti Bibi*, 24 Ind. Cas. 661; 36 A. 537; 12 A. L. J. 969, relied on.

Hamid-un-nissa v. *Faiz-un-nissa*, 11 Ind. Cas. 398; 33 A. 340; 15 C. W. N. 621; 8 A. L. J. 373; 13 C. L. J. 510; 13 Bom. L. R. 391; 10 M. L. T. 23; (1911) 2 M. W. N. 370; 21 M. L. J. 1126 (P. C.) and *Adityam Iyer* v. *Ramakrishna Iyer*, 21 Ind. Cas. 458; 38 M. 514; (1913) M. W. N. 847; 17 M. L. T. 382; 25 M. L. J. 602, distinguished.

Appeal from the judgment and decree of Mr. Justice Srinivasa Iyengar, dated the 3rd March 1925, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in C. S. No. 722 of 1920.

Messrs. *A. Krishnaswami Iyer*, *A. Ramachandra Iyer* and *N. Chandrasekhara Iyer*, for the Appellants.

Mr. *V. Radhakrishnayya*, for the Respondent.

JUDGMENT.

Krishnan J.—This suit has been disposed of by the learned Trial Judge on the pleadings without taking any evidence except filing a document. He held that s. 92 of the Evidence Act barred the defendant from adducing oral evidence of his plea, as he proposed to do.

The plaintiff had assigned to one P. M. A. R. Muthiah Chettiar, whose legal representatives the respondents are, an $\frac{1}{8}$th share of a mortgage decree which his father had obtained against the Rajah of Karvetnagar and others, plaintiff having succeeded to his father's rights on his death. A copy of the deed of assignment has been filed in evidence as Document No. 3159. The consideration for the assignment is recited in this deed as follows:—

"For a consideration of Rs. 2,89,000 to be paid by Muthiah Chettiar to Lodd Govindoss (the plaintiff) whereof Rs. 89,000 is paid in advance this day and the three promissory notes, dated 24th March, 1915, and 26th April 1917, executed by Messrs. Tawker and Sons in favour of Muthiah Chettiar for Rs. 1,50,000 together with the four jewels pledged as security by the said Tawker & Sons are assigned in favour of the plaintiff free from any claim by Muthiah Chettiar against Tawker & Sons and the balance of Rs. 50,000 being payable at any time before the end of February 1918."

The deed is dated 1st October 1917. In this case we are not concerned with the second and third items of consideration

but only with the first. The plaintiff alleges in this suit that the recital in the deed that R. 89,000 was paid is incorrect and that only Rs. 60,000 were paid and he seeks to recover the balance of Rs. 29,000. The defendants conceded that only Rs. 60,000 were in fact paid but he pleaded that he was not liable to pay the balance. His contention amounts to an averment that the recital of payment in full of Rs 89,000 was made in the deed deliberately and that there was no mistake about it and he wants to adduce oral evidence to show the circumstances in which that recital was made in the document. His case is that the real consideration agreed to be paid for the assignment was only Rs. 2, 60,000 but that he agreed to consideration being stated to be nominally Rs. 2, 89,000 on condition that a recital should be made in the deed that the whole of Rs. 89,000 was paid off though only Rs. 60,000 was in reality paid. In fact the recital of consideration in the deed as Rs. 2,89,000 was according to him closely connected with and dependent on the further recital of payment of Rs. 89,000 in full though only Rs. 60,000 was paid. The document, it will be noted, further says that the amount still due under it was only Rs. 50,000 confirming the previous recital. He pleads that all these recitals were made in the circumstances above stated and that he is not bound to pay the suit amount

The learned Trial Judge relying on the decision of the Privy Council in *Sah Lal Chand* v. *Indarjit* (1) has allowed the plaintiff to go behind the recital of payment and to show that it is wrong as only Rs. 60,000 were actually paid, on the ground that such a recital was only an averment of fact and that it could be proved to be wrong by oral evidence, s. 92 of the Evidence Act not barring such proof. So far he is correct, but he has at the same time shut out the defendant from showing the circumstances in which the rectial was made as he considered that it involved proof of a consideration different from the one recited in the deed and that such proof by parol evidence was barred by s. 92 as consideration is one of the terms of the contract.

I regret I am unable to follow his view on the second point, I am clearly of opinion that if one party is allowed to show by oral evidence that a recital in a document is incorrect in fact, the other party must certainly be allowed to show by similar evidence that it is not incorrect and that the recital was deliberately put in and for the purpose of showing it he must be allowed to prove what the real consideration for the document was. Section 92 does not, in my opinion bar such proof, for such proof is adduced not for the purpose of varying or altering any term of the written contract but only to show that the recital in it is correct. To shut out oral evidence for the purpose will be to allow a gross fraud to be perpetrated.

This question was discussed in *Chuni Bibi* v. *Basanti Bibi* (2) where the learned Judges of the Allahabad High Court laid down that if one party to a deed alleged and proved that the whole of the consideration, the receipt of which was acknowledged in the deed, did not pass, the case fell within the proviso (1) of s. 92 and the other party was at liberty to show what the real consideration was and parol evidence could be given of the real nature of the transactions. What the first party tries to prove in such a case is failure of consideration and that brings it under proviso (1); the second party can then clearly prove in rebuttal of the first party's case that there was in truth no failure of consideration and for that purpose show what the real consideration was. As pointed out by the learned Judges in Allahabad, a party cannot both affirm and disaffirm the same transaction by showing its true nature for his own relief and by insisting on its apparent character to prejudice his adversary. This view is supported by the observation of the Privy Council in *Shah Mukhun Lall* v. *Baboo Sree Kishen Singh* (3) and also by the decision in several previous cases, namely, *Lala Himmat Sahai Singh* v. *Llewhellen* (4), *Kailash Chandra Neogi* v. *Harishchandra Biswas* (5), *Nathu Khan* v. *Sewak Koeri* (6) and *Hanif un nissa* v. *Faiz-un-nissa* (7). The last of these cases is a ruling of the Privy Council in which their Lord-hips had no difficulty in holding that what appeared on the face of

(1) 22 A. 370; 4 C. W. N. 485; 2 Bom. L. R. 553; 27 I. A. 93; 7 Sar. P. C. J. 702; 9 Ind. Dec. (N. S.) 1281 (P. C.).

(2) 21 Ind. Cas. 661; 36 A. 537; 12 A. L. J. 969.

(3) 12 M. I. A. 157; 11 W. R. P. C. 19; 2 B. L. R. P. C. 44; 2 Suth. P. C. J. 190; 20 Sar. P. C. J. 403; 1 Ind. Dec. (N. S.) 511; 21 E. R. 209 (P. C.).

(4) 11 C. 486; 5 Ind. Dec. (N. S.) 1083.

(5) 5 C. W. N. 153.

(6) 9 Ind. Cas. 161; 15 C. W. N. 408.

(7) 11 Ind. Cas. 398; 33 A. 340; 15 C. W. N. 621; 8 A. L. J. 373; 13 C. L. J. 510; 13 Bom. L. R. 391; 10 M. L. T. 23; (1911) 2 M. W. N. 370; 21 M. L. J. 1126 (P. C.).

the document to be a sale for a consideration might be shown to be in reality a gift and that parol evidence was admissible for the purpose. My learned brother, Srinivasa Iyengar, J., refused to follow the ruling *Chuni Bibi* v. *Basanti Bibi* (2) on the ground that it was in conflict with the ruling of this Court in *Adityam Iyer* v. *Ramakrishna Iyer* (8). With respect, I think he is wrong. The Madras case was cited to the Allahabad Judges and they distinguished it, and I think rightly. There was no question in the Madras case of a recital in a deed being allowed to be shown to be incorrect by one of the parties. That ruling does not touch the principle of the Allahabad case. It may be open to doubt whether the Madras ruling can be supported in the face of the ruling of the Privy Council in *Hanif-un nissa* v. *Faiz-un-nissa* (7) but that question we need not consider. In my view that case has no bearing on the case before us. I think the Allahabad decision embodies a sound principle and I am, with respect, prepared to follow it. No authority has been cited to us in which the correctness of that ruling has been doubted or challenged. Following it, I would hold that this case should be tried on oral evidence and as the Trial Judge has excluded such evidence, the case must go back to him for a fresh trial. I would allow the appeal and remand the case for a fresh trial. The respondent must pay the costs of this appeal. The other costs will be disposed of by the Trial Judge.

Kumaraswami Sastri, J.—I agree.

V. N. V. *Appeal allowed.*

Z. K.

(8) 21 Ind. Cas. 458; 38 M. 514; (1913) M. W. N. 847; 14 M. L. T. 382; 25 M. L. J. 602.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1212 AND 1213 OF 1923.

June 8, 1925.

Present:—Justice Sir Ewart Greaves., KT., and Mr. Justice B. B. Ghose.

MAHAMMED WASEL ALI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

NAINUDDIN MANDAL AND OTHERS— DEFENDANTS—RESPONDENTS.

Co-sharers—Adverse possession—Ouster—Rent, receipt of, absence of, effect of.

Where it is found that certain property originally belonged to certain co-sharers, the mere fact that one of those co-sharers cannot prove his actual possession over the property by receipt of rent from the others cannot operate to extinguish his title to his share of the property on the ground of adverse possession by the other co-sharers. In order to bar the title of a co-sharer by reason of the exclusive possession of other co-sharers it must be found that there was an ouster of the former. In the absence of any finding that there was an ouster or any allegation which would amount to an ouster of a co-sharer, the latter is entitled to recover possession of his share in the property.

Appeals against the decrees of the Subordinate Judge, Fourth Court, Mymensingh, dated the 21st of December 1922, reversing those of the Munsif, Second Court, Tangail, dated the 27th of June 1923.

Babus *Jogesh Chandra Roy*, *Ramgati Sircar* and *Hira Lal Ganguli*, for the Appellants.

Mr. *Atul Chandra Gupta* (with him Babu *Radhika Ranjan Guha*), for the Respondents.

Babu *Biraj Mohan Mazumdar*, for the Deputy Registrar.

JUDGMENT.

Ghose, J.—These two appeals arise out of two suits for possession of certain shares of a tenancy. The original owner of the lands was one Jamal. He left three sons, Torap, Kolom and Ajim. The appellants in Second Appeal No. 1212 are the heirs of Torap and the heirs of Kolom are the appellants in Second Appeal No. 1213. They were the plaintiffs in the Trial Court and the defendants were the heirs of Ajim who are the respondents in both the appeals. Both the Courts have found the question of title in favour of the plaintiffs. The Trial Court made a decree in their favour and ordered joint possession according to their share of the lands with the defendants. On appeal by the defendants, the learned Subordinate Judge has dismissed both the suits on the ground that the plaintiffs failed to show possession of a permissive character of the defendants or their own possession within 12 years of the date of the suit. He applied Art. 142 of the Limitation Act and dismissed the suit on the ground of limitation. The plaintiffs' allegation was that Torap and Kolom used to work away from home and they had settled their shares in Barga with their brother Ajim and were in enjoyment of their shares by receipt of Barga rent. This they failed to establish. The defendants case was that there was a partition between

the brothers during the lifetime of their father and the disputed lands were in the sole possession of Ajim as falling to his share. That case was also found by the Courts below to be not true. The position, therefore, is this, that all the three brothers had title in the property in suit as co-sharers and in order to bar the title of any of the co-sharers by reason of the exclusive possession of one of them it must be found that there was an ouster. There is no such finding in this case and the only case that was made by the defendants as regards their separate title has been found against them. The fact that the plaintiffs had not been able to prove their actual possession by receipt of Barga rent cannot operate to extinguish their title on the ground of adverse possession by their co-sharers. In the absence of any finding that there was an ouster of any allegation which would amount to an ouster of their co-sharers by the defendants the plaintiffs are entitled to succeed.

The judgment and decree, therefore, of the learned Subordinate Judge must be set aside and those of the learned Munsif restored with costs against the contending defendants in this Court and in the Court below.

Greaves, J.—I agree.

Z. K. *Appeals allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 474 OF 1923.

April 14, 1925.

Present :—Mr. Justice Venkatasubba Rao.

THE MALABAR FORESTS AND RUBBER CO., LTD., BY THEIR AGENTS MESSRS. SABRIS & Co, CALICUT—DEFENDANTS—APPELLANTS

versus

D. H. MACLEOD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Master and servant—Gross incompetence of servant—Dismissal—Damages, suit for, maintainability of.

An employer is entitled to dismiss an employee who is utterly incompetent to do the work for which he is employed and in such a case the employee is not entitled to maintain a suit for damages for wrongful dismissal. [p. 616, col. 2.]

Second appeal against a decree of the District Court, South Malabar, in A. S. No. 104 of 1922, preferred against that of the Court of the Subordinate Judge, South Malabar at Calicut, in O. S. No. 27 of 1921.

Mr. *K. Bhashyam Iyengar*, for the Appellants.

Mr. *J. R. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—The plaintiff has instituted this suit for recovery of damages in respect of wrongful dismissal. The defendant company justifies its action by alleging that the plaintiff was incompetent and grossly negligent in the discharge of his duties. The Trial Court has decided against the plaintiff finding that the dismissal was justified but on appeal the decision of the Court of first instance was reversed by the District Judge.

The lower Appellate Court in effect finds that the plaintiff was incompetent in regard to work, that pertained to timber but is of opinion that the circumstance does not entitle the defendant company to dismiss the plaintiff. Is this position correct? Before the employment in question the plaintiff had been working at Aralam. Regarding his duties at that place he says: "In Aralam it was all timber and no tea". As the conditions at Aralam were not to his liking, he sought employment at Kottanad under the defendant company. I may observe that the plaintiff some years previously had an interest in this very Kottanad estate and having become greatly indebted got it sold and the defendant company became the purchaser. The plaintiff's designation was "Superintendent of the Kottanad Estates". What then were his duties? Part of his work related to tea. The plaintiff having said this, deposes next "timber was the other source of income in Kottanad. I was the sole Superintendent and I had also to get the timber work done. I told Mr. Chari that there was a lot of timbers on the estate" Mr. Chari referred to is Mr. Raghavachari who negotiated the purchase of the Kottanad estate for the defendant company. I may now turn to another admission of the plaintiff, "I do not claim to be a timber expert. I know nothing practically about timber". Indeed the District Judge makes a point of the plaintiff's ignorance of the work connected with timber. Exhibits I and II betray such a woeful lack of knowledge that no course was possible to the plaintiff other than admitting that he was utterly

ignorant of every thing that was in any way connected with timber.

The extracts I have given above from the plaintiff's deposition itself, show beyond any possibility of doubt.

(1) that it was a part of his duty as Superintendent to do work connected with timber, and

(2) that he was utterly incompetent to discharge this part of his duty,

The result of this incompetence has been that the defendants have suffered undoubted loss. I shall take only two outstanding facts.

The plaintiff had to get timber cut for the purpose of making broad guage sleepers. The District Judge finds as a fact that the timber was in many instances not of the required length. As a result the company suffered considerable damage. These facts are not denied. But the District Judge disposes of the case in a curious manner. He says that the plaintiff was not given specific instructions on the point, meaning thereby, that he was not specifically told that the required measurement was 9 feet 6 inches. The plaintiff did not put forward any such case. On the contrary he says very distinctly that he gave definite instructions to the *maistry* to cut sleepers of this dimension and that accordingly sleepers of the required measurement were in fact cut. I shall once again reproduce his own words: "I gave strict instruction about the length and gave him a rod of 9 feet and 6 inches..... .....I personally knew that all the logs were cut into 9 feet 6 inches in length.....*I tested the whole lot I saw and* satisfied myself that every piece was long enough for broad guage sleepers". It is found as I have said that this version is not true and that many of the pieces cut were not suitable for the purpose. Where then does absence of instruction come in? I am afraid the District Judge has completely misunderstood the case.

Secondly, the defendants complain that the plaintiff negligently overpaid the *maistry*. Apart from other allegations made in this respect it now transpires if the plaintiff is to be believed, that the *maistry* disobeyed instructions and cut the timber into pieces of insufficient length. But still the plaintiff would say "When I left the estate I paid Rs. 1,050-8-0 to Cherikan *maistry* and the balance due to him was only Rs. 8-1-0.

It is unnecessary to enquire into other heads of incompetence and negligence. On the findings of the District Judge, I am clearly of the opinion that it has been amply proved that the dismissal was for justifying causes.

Mr. Ramachandra Iyer contends that I must not interfere with any finding of fact. Perfectly true. I have not tried to form my opinion on the evidence.

One point that is pressed against the defendant company is that in the matter of dismissal it was stated that the company was thankful to the plaintiff for the services rendered. Mr. Sabnis has explained this by saying that he intended the statement to be ironical. This is clearly not true and on account of this explanation I was naturally disposed to view the defendants' conduct with some suspicion. It is unfortunate that the true explanation was not offered. A careful perusal of the record, however, shows that the defendants were utterly dissatisfied with the plaintiff that on that account they transferred him to Tamaracheri within about six months of his employment, that they thought it prudent to get rid of him amicably and even offered a month's wages in lieu of notice thanking him for his past services, but that it was found that the plaintiff was on the war-path asserting what he fancied to be his legal rights and that the defendants were then finally driven in self-defence to retaliate by going up to a lawyer and withdrawing the offer, thus taking up, what they were advised, was strictly a legal stand. Though the defendants have deviated from truth in this respect, I cannot allow that fact to stand in their way and I am satisfied that the decision of the District Judge is in law wrong and I accordingly allow the appeal and dismiss the suit with costs throughout.

V. N. V.
Z. K.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 55 OF 1925.

September 7, 1925.

Present:—Mr. Dalal, J. C.

RUDRA PARTAB SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat SURAJ KUER—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 3—Limitation Act (IX of 1908), Sch. I, Art. 181—Final foreclosure decree, application for—Limitation.

An application for preparation of a final decree for foreclosure under O. XXXIV, r. 3, C. P. C., is governed by Art. 181 of Sch. I to the Limitation Act, and limitation for such an application begins to run from the date of the passing of the preliminary decree.

Jagdish Singh v. *Ram Adhin Singh*, 41 Ind. Cas. 858; 20 O. C. 205, *Lallu Ram* v. *Jot Singh*, 47 Ind. Cas. 206; 21 O. C. 176, followed.

Madho Moni Dasi v. *Pamela Lambert*, 6 Ind Cas. 537; 37 C. 796; 12 C. L J. 328; 15 C. W. N. 337, *Bishwambhar Saha* v. *Ram Sundar Kaibarta Das*, 30 Ind. Cas. 719; 42 C. 294, dissented from.

Bala Ram Naik v. *Kanhai Bharan Mahapatra*, 38 Ind. Cas. 385; 1 P. L. J. 364; 3 P. L. W. 74, referred to.

Miscellaneous appeal against the judgment of the District Judge, Fyzabad, dated the 19th March 1925, setting aside an order of the Subordinate Judge, Fyzabad, dated the 8th January 1925.

Mr. *Naim Ullah*, for the Appellants.

Mr. *H. D. Chandra*, for the Respondent.

JUDGMENT.—The ruling of this Court in *Jagdish Singh* v. *Ram Adhin Singh* (1) is entirely in favour of the appellant and the distinction drawn by the learned Judge of the lower Appellate Court does not exist. The view taken in this ruling was confirmed by a Bench of this Court in *Lallu Ram* v. *Jot Singh* (2) and the only difference was as to the period from which the limitation was to run. No such point arises in the present case. The learned Judge of this Court in *Jagdish Singh* v. *Ram Adhin Singh* (1) specifically disagreed from the Calcutta view for reasons which cannot be controverted. The plaintiff *Musammat* Sarju Kunwar applied for preparations of a final decree for foreclosure under O. XXXIV, r. 3 and the Trial Court rightly, in my opinion, rejected the application on the ground that it was barred by limitation under Art 181 of the Limitation Act. That Article lays down the period of limitation of three years for applications for which no period of limitation is provided elsewhere in Sch. I or by s. 48 of the C. P. C., 1908 from the date when the right to apply accrues. The right to apply accrued here on the date when the preliminary decree for foreclosure was passed. With all respect it may be pointed out that the learned Judges of the Calcutta High Court who decided the case of *Bishwambhar Saha* v. *Ram Sundar Kaibarta Das* (3) did not bear in mind the distinction between rr. 3 and 5 and r. 6 of O. XXXIV of the First Schedule of the C. P. C. Rule 6 requires no application and, therefore, escapes the operation of Art. 181 of the Limitation Act. Both rr. 3 and 5 make it incumbent that the decree-holder must present an application and where an application is to be presented the period of limitation provided for such an application by Art. 181 must apply. The learned Judicial Commissioner of this Court (now Mr. Justice Lindsay) has pointed out in his elaborate judgment the fallacy in the Calcutta view expressed in *Madha Moni Dasi* v. *Pamela Lambert* (4) and *Bishwambhar Saha* v. *Ram Sundar Kaibarta Das* (3). The matter is fully discussed by the Patna High Court in *Bala Ram Naik* v. *Kanhai Bharan Mahapatra* (5). In the case of *Madho Moni Dasi* v. *Pamela Lambert* (4) it was assumed that there was no rule of limitation applicable to such an application prior to the passing of the C. P. C. of 1908. That assumption was incorrect in view of the decision of their Lordships of the Privy Council in *Munna Lal Parruck* v. *Sarat Chunder Mukerji* (6). The authority of this Court is well supported by the language of the Statute and the decree-holder's application was time-barred.

I set aside the decree of the lower Appellate Court, restore the decree of the Trial Court and dismiss the plaintiff's application and direct that both parties shall bear their own costs of all the Courts.

Decree set aside.

N. H.

(1) 41 Ind Cas. 858; 20 O. C. 205.
(2) 47 Ind. Cas. 206; 21 O. C. 176.
(3) 30 Ind. Cas. 719; 42 C. 294.
(4) 6 Ind. Cas. 537; 37 C. 793; 12 C. L. J. 328; 15 C. W. N. 337.
(5) 38 Ind. Cas. 385; 1 P L. J. 364; 3 P. L. W. 74.
(6) 27 Ind. Cas. 683; 42 C. 773; 17 M. L. T. 120; 21 C. L J. 118; 2 L. W. 282; 19 C. W. N. 561; 17 Bom. L. R. 408; 28 M. L. J. 470; 42 I. A. 88 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 358 OF 1922.

March 3, 1925.

Present:—Mr. Justice Odgers.

ABDUL SAMAD KHAN KHILADAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2 —APPELLANTS

versus

BIBIJAN *alias* HANIFA KHATHUN AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 3 TO 10—RESPONDENTS.

Cause of action—Decree for partition—Agreement to hold properties as before—Subsequent suit for partition, whether maintainable—Agreement, whether requires registration—Registration Act (XVI of 1908), s. 17—Muhammadan Law—Muhammadan dealing with common property—Common benefit, presumption of—Co-tenant, whether trustee.

Where subsequent to a decree for partition in a Muhammadan family, the parties agree not to execute the decree but to continue to hold the properties as tenants-in-common without division as before, such agreement must be regarded as a matter arising subsequent to the decree and as furnishing a new cause of action and a second suit for partition is, therefore, not barred. [p. 618, col. 2.]

Such an agreement amounts only to a transaction recognising a title already subsisting and does not require registration. [*ibid.*]

Ranganayaki Ammal v. *Virupakshee Rao*, 72 Ind. Cas. 456; 45 M. L. J. 100; 17 L. W. 588; 32 M. L. T. 312; (1923) A. I. R. (M.) 621 and *Sakharam Krishnaji* v. *Madan Krishnaji*, 5 B. 232; 3 Ind. Dec. (N. S.) 154, relied on.

Prima facie a Muhammadan dealing with property owned in common deals only with what he is entitled to deal with, *viz.*, his own share. [p. 619, col. 2.]

Abdul Majeeth Khan v. *Krishnamachariar*, 40 Ind. Cas. 210; 40 M. 243; 32 M. L. J. 195; (1917) M.W.N. 346; 5 L. W. 767 and *Sukur Mahomed* v. *Asmot Mandal*, 79 Ind. Cas. 491; 50 C. 978; (1924) A. I. R. (C.) 384, followed

There is no provision in Muhammadan Law that the acquisitions of the several members are made for the benefit of the family jointly. [p. 620, col. 1.]

Hakim Khan v. *Goolkhan*, 8 C. 823; 10 C. L. R. 603; 4 Ind. Dec. (N. S.) 533 and *Krishnajiban Sanyal* v. *Mahammad Masiuddin*, 63 Ind. Cas. 244; 33 C. L. J. 369, followed.

A co-tenant is not a trustee for another co-tenant. [*ibid.*]

Kennedy v. *De Trafford*, (1897) A. C. 180; 66 L. J. Ch. 113; 76 L. T. 427, relied on.

Second appeal against a decree of the District Court, South Malabar, in A. S. No. 13 of 1921, preferred against that of the Court of the Additional District Munsif, Palghat, in O. S. No. 14 of 1920 (O. S. No. 496 of 1916 on the file of the Court of the Principal District Munsif, Palghat).

Mr. *C. V. Anantakrishna Aiyar*, for the Appellants.

Messrs. *T. R. Venkatrama Sastriar* and *D. A. Krishna Variar*, for the Respondents.

JUDGMENT.—This was a suit for the partition of the estate left by a Muhammadan named Ali Khan Khiladar who died in 1884. In 1896 defendant No. 3 sued for partition and obtained decree (Exs. I to IV). She did not execute the decree and one of the questions is whether she is competent to file a fresh partition suit. It is alleged that in spite of the previous decree there was an agreement between the co-sharers of the estate of Ali Khan (father of defendant No. 3) to continue to hold the properties as tenants-in-common without division. The District Munsif was satisfied that defendant No. 3 relied on "some such agreement" at the time the issues were framed in 1916 and found the agreement proved, and that defendant No. 3 was entitled to a share. The District Judge confirmed this finding, but a point of want of registration was taken before him and the District Judge found that parties could orally agree to remain as tenants-in-common. This is the first point taken before me in second appeal. The former decree was declaratory though final and I think the agreement must be regarded as matter arising subsequent to the decree and as furnishing a new cause of action thus distinguishing this case from a subsequent suit on the same mortgage [*Vedapuratti* v. *Vallabha Valiya Raja* (1)]. It is argued for the respondents that, if the agreement were only a transaction recognising a title already subsisting, registration is not required. In *Ranganayaki Ammal* v. *Virupakshee Rao* (2) Coutts-Trotter, J., quotes West, J., in *Sakharam Krishnaji* v. *Madan Krishnaji* (3): "What requires registration is some document which brings about a definite change of legal relation to the property by an expression of Will embodied in the document referred to." So with regard to the word 'declare' the learned Judge conceives it to mean a declaration of Will, not a mere statement of fact. I take the question of the fact of the agreement to be proved and I also take it that what is found to have really happened was that the parties simply agreed to go on as before—they had been co owners before the declaratory decree; they agreed to ignore that and they continued to live as

(1) 25 M. 300; 12 M. L. J. 128.
(2) 72 Ind. Cas. 456; 45 M. L. J. 100; 17 L. W. 588; 32 M. L. T. 312; (1923) A. I. R. (M.) 621.
(3) 5 B. 232; 3 Ind. Dec. (N. S.) 154.

they had lived for years together, each having title to a definite but undemarcated share of the property. Is this a matter requiring a registered deed? In *Venkata Readi* v. *Kuppa Reddi* (4) the question was as to a Hindu co-parcenary and it was held that joint living and joint expenses, etc., would not convert originally separate property into property of the co-parcenary and that the transfer of the share to the co-parcenary should only be regarded as a gift to it, and, therefore, required a registered deed under the Transfer of Property Act. In *Thyalambal* v. *Krishna Pattar* (5), Srinivasa Ayengar, J., found difficulty in understanding the conversion of individual property into joint family property except by way of transfers which presumably would require a registered deed. This, however, was clearly *obiter*. It has to be remembered that we are not now dealing with a joint Hindu family, but with Muhammadan co-sharers living together. There is thus no question of their status having become divided by the previous decree; they were never united or joint. A right to execute a decree does not appear to be a right in or to immoveable property, but merely a right to apply for process of the Court in execution. It is, therefore, difficult to see how an agreement not to exercise that right can be said to fall within the meaning of s. 17, Registration Act. I am, therefore, of opinion that this agreement did not require registration and that the District Judge was right on this point.

The second point which was argued at length before me relates to Ex. XV. Defendants Nos. 1 and 2 contend that the acquisition under this document was made for their own benefit and with their own funds and that plaintiff and the other heirs of Ali Khan Khiladar have no right in it. The District Munsif upheld defendant No. 1 and defendant No. 2's contention as did the District Judge. The earliest document referred to on this point is Ex. A, dated 8th February 1893. Defendants Nos. 1 and 2 executed this *karar* to their elder brother Hassan Ali Khan who died in 1898. The younger brothers were to manage the common property for 18 years, and thus the arrangement came to an end early in 1911. The two other material documents on this question are Exs. XIII and XV. They are of the same date—26th July 1915. Exhibit XIII is a second mortgage effected by defendants Nos. 1 and 2 and the question is, was it of their own shares alone or did they include the shares of the other heirs as well? "If so, by what right?" It must again be remembered that we have nothing to do with Hindu Law with its joint family and powers of the manager to bind the other co-parceners, etc. *Prima facie* a Muhammadan dealing with property owned in common deals only with what he is entitled to deal with, *viz.*, his own share [*Abdul Majeeth Khan* v. *Krishnamachariar* (6) and *Sukur Mahomed* v. *Asmot Mandal* (7).] Exhibit VIII recites the debt due to the mortgagee under Ex. IX which was a family mortgage of 1899 "due by us"; Defendants Nos. 1 and 2 no doubt, refer here to the family. They stipulate that the mortgagee shall pay of the shares of certain females in all amounting to Rs. 6,000 and refer to the family debt on other accounts for Rs. 5,000. "The amount due under this deed by us to you for our family necessity is Rs. 11,000 and the mortgagors give possession of the said items in the schedule which is para. 1 are said to belong in *jenm* to us and are in our possession". They further agree that in default, "our *jenm* rights in the schedule items should be sold" "out of us personally and out of our other properties." All this certainly strikes me as personal to the mortgagors; they happen to be borrowing from the same lender as advanced to the family under Ex. IX where the family were all parties and they refer to this family debt. Exhibit XV is a release of their claim by the four females referred to in Ex. XIII, they had been paid off. It is executed to defendants Nos. 1 and 2. If necessary this may be treated as a conveyance, *Doraisami Pillai* v. *Chinnia Goundan* (8), though it is called a release. It is said (1) that the consideration for Ex. XIII did not proceed from defendants Nos. 1 and 2. Defendant in his evidence says it was the equity of redemption

(4) 47 Ind. Cas. 716; 8 L. W. 400; (1918) M. W. N 680.

(5) 32 Ind. Cas. 955.

(6) 40 Ind. Cas. 210; 40 M. 243; 32 M. L. J. 195; (1917) M. W. N. 346; 5 L. W. 767.

(7) 79 Ind. Cas. 491; 50 C. 978; (1924) A. I. R. (C). 384.

(8) 43 Ind. Cas. 560; (1918) M. W. N. 89; 22 M. L. T 538; 34 M. L. J. 258; 7 L. W. 335.

owned by the family which was dealt with under Ex. XIII; he does not say how he came to be authorised to deal with it. His evidence may mean that as there was a mortgage on the family property by the family, their individual shares in that equity of redemption were dealt with. It was of course an equity of redemption belonging to the family in which they defendants Nos. 1 and 2 owned definite shares; (2). The execution of Ex. XIII was *benami* for the family. I see no evidence of it. There is no provision in Muhammadan Law that the acquisitions of the several members are made for the benefit of the family jointly. *Hakim Khan* v. *Goolkhan* (9) and *Krishnajiban Sanyal* v. *Mahammad Masuddin* (10). A co-tenant is not a trustee for another co-tenant. *Kennedy* v. *De Trafford* (11) which has been followed by a Bench of this Court in O. S. No. 4 of 1897 and No. 7 of 1915. Nor is there any evidence of delegation. It was finally argued that accepting all those propositions of Muhammadan Law, ss. 88 and 90 of the Trusts Act apply. In the former the person to be held liable must be in a fiduciary position to protect the interests of another. It has been pointed out that there is no such relation between co-owners. In the latter a qualified owner gains an advantage in derogation of the rights of others interested in the property. If defendants Nos. 1 and 2 merely mortgaged their own shares, there is no question of interference with the rights of others. Lastly it was argued that treating Ex. XIII as the act of strangers to the family, it had been adopted subsequently by the others as their act and ratified under the ordinary law of contract. The mortgagee says he did not insist on the rest of the family joining in Ex. XIII as he thought the shares of defendants Nos. 1 and 2 would suffice as security. There is no evidence that the family ever expressed a wish to join in or to adopt the action of defendants Nos. 1 and 2 as their own. There is no finding on it either and the point seems to be taken for the first time here. I think both the lower Courts were right in the conclusion they came to on this point which is raised by Memorandum of Objections, one by defendant No. 3 and the other by plaintiff together with defendants Nos. 4, 5, 7 and 8.

The second appeal is dismissed with costs and the two Memorandum of Objections (which raise the some point are also dismissed with costs of defendants Nos. 1 and 2.

V. N. V. *Appeal dismissed.*

Z. K.

(9) 8 C. 826; 10 C. L. R. 603; 4 Ind. Dec. (N. S.) 533.

(10) 63 Ind. Cas. 244; 33 C. L. J. 369.

(11) (1897) A. C. 180; 66 L. J. Ch. 413; 76 L. T. 427.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 983 OF 1923.

June 1, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Mukerji.

MADHUSUDAN CHAKRAVARTI AND OTHERS—*Pro forma* DEFENDANTS NOS. 27 TO 31—APPELLANTS

versus

SATISH CHANDRA NAG AND OTHERS —PLAINTIFFS & DEFENDANTS— RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 96, O. XXII, r. 4, O. XXIII, r. 3, O. XLIII, r. 1 (m)—*Appeal—Party not interested not impleaded—Death of respondent not interested—Legal representatives, failure to bring on record, effect of—Consent-decree—Objection that all parties have not consented, how can be taken—Review—Appeal, whether lies.*

The failure of an appellant to implead as a respondent or to substitute the legal representatives of a deceased respondent persons who are not interested in the result of the appeal does not affect the maintainability of the appeal. [p. 621, col. 2]

Where a decree purports to be passed with the consent of the parties, an objection to the decree by a party who has consented to it on the ground that some other parties have not consented to the decree can be taken only by making an application for review or instituting a suit for setting aside the compromise on the basis of which the decree purports to have been passed but so long as the decree purports to have been passed, on the basis of a compromise, no appeal can be maintained against it. [p. 621, col. 2; p. 622, col. 1.]

Appeal against a decree of the Additional District Judge, Dacca, dated the 28th of November 1922, reversing that of the Subordinate Judge, Sixth Court of that District, dated the 23rd of August 1921.

Babus *Prokash Chandra Pakrashi* and *Kiran Mohan Sarkar*, for the Appellants.

Babus *Bhupendra Chandra Guha* and *Upendra Lal Roy*, for the Respondents.

JUDGMENT.

Mukerji, J.—This is an appeal prefer-

red by the defendants Nos. 27 to 31 from the decree of the learned Additional District Judge of Dacca, dated the 28th November 1922 by which he allowed the appeal of the defendant No. 1 in the suit and which appeal had been preferred against the decree passed by the learned Subordinate Judge on the 23rd August 1921.

The facts out of which this appeal arises are these. The suit was originally instituted by plaintiffs Nos. 1 and 2 against two sets of defendants: one set being the tenants and the other the *pro forma* defendants who were the co-sharers of the plaintiffs. By an order passed on the 2nd June 1921 some co-sharer defendants, namely, the defendants Nos. 27 to 31 who are the appellants in this appeal were transferred to the category of the plaintiffs. On the 9th August 1921 a petition of compromise was put in, in the suit on behalf of the plaintiffs and some of the defendants namely, defendants Nos. 1, 33,34 and 35. On the 23rd August 1921 another petition of compromise was put in as between the plaintiffs and the defendants Nos. 2 to 5, 7 to 9 and 12 to 15. The learned Subordinate Judge on the 23rd August 1921 examined one witness on behalf of the plaintiffs and then passed an order which ran in these words: "Suit be decreed on compromise against the defendants who are parties thereto and in the same terms *ex parte* against the remaining defendants. Dismissed against the minor heirs of the defendant No. 18 who are not represented properly in the suit". A decree was passed in accordance with this order of the learned Subordinate Judge and that decree purported to be a decree passed on compromise as between the plaintiffs Nos. 1 and 2 and the *proforma* defendants Nos. 27 to 31 who as I have already stated had been transferred to the category of the plaintiffs and defendants Nos. 1, 2 to 5, 7 to 9 and 12 to 15, and 33 to 35.

The defendant No. 1 preferred an appeal against this compromise decree and on his appeal the learned Additional District Judge set aside the decree passed by the learned Subordinate Judge and made certain variation to the decree passed by the latter. As against this decree of the learned Additional District Judge the present appeal has been preferred by the defendants Nos. 27 to 31.

Before dealing with the point urged in support of this appeal I must refer to two objections of a preliminary nature which have been taken on behalf of the respondents. They are to the effect that two of the defendants, *viz.*, one Kokai and one Badaruddi had died some time in the year 1923 and that no application had been made within time to bring their heirs on the record and therefore, the appeal, was not maintainable inasmuch as according to the plaintiffs' case they were joint *tort feasors* with the other defendants. The other objection is to the effect that some of the respondents were not made parties to this appeal when it was originally filed and that it was only after the period of limitation had expired that they were brought on the record as respondents in the appeal. Those objections may be disposed of with the observation that it has been proved to our satisfaction that neither the heirs of Kokai and Badaruddi nor the respondents who have been brought on the record after the period of limitation was over, are interested in the result of this appeal inasmuch as this appeal is only confined to the question of the compromise as between the plaintiffs Nos. 1 and 2 and the *pro forma* defendants Nos. 27 to 31 on the one hand and the defendant No. 1 on the other hand. The sole question in controversy now is whether in the first of the two *solenamas* mentioned above in which the defendant No. 1 was a party he had compromised the suit only with the plaintiffs Nos. 1 and 2 or with the added plaintiffs, namely, the persons who originally were defendants Nos. 27 to 31 as well. This, I think, is sufficient to dispose of the preliminary objections urged on behalf of the respondents.

As regards the appeal itself the ground urged before us is to the effect that the learned Additional District Judge had no jurisdiction to deal with the appeal which had been preferred by the defendant No. 1 before him inasmuch as that appeal was really against a compromise decree. Under s. 96 of the C. P. C. no appeal lies from a decree passed by the Court with the consent of parties. It is clear that in so far as the decree purported to be one passed by the Court with the consent of the plaintiffs on the one hand and the defendants to whom I have already referred on the other, it was a decree passed by consent and against this decree no appeal lay under the provisions of s 96 The ground upon which the appeal was based was that the appellants before us, namely, the defendants Nos.

27 to 31 were not parties to this compromise. If, as a matter of fact, the appellants were not parties to the compromise the proper course for defendant No. 1 was either to make an application for review or to institute a suit for setting aside the compromise and so long as the decree purported to have been passed on the basis of the compromise he was not entitled to prefer an appeal therefrom. An appeal, of course, does lie under the provisions of O. XLIII, r. 1, subr. (*m*) from an order under r. 3 of O. XXIII, recording or refusing to record an agreement, compromise or satisfaction. The present appeal however, does not appear to have been filed against such an order. None of the grounds taken in the memorandum of appeal before the learned Additional District Judge dealt with the question of the recording of the compromise. They were all directed against the decree itself and the Court-fees payable on the memorandum of appeal were also paid on the basis of the appeal being one against the decree, and not the order. We think, therefore, that no appeal lay to the learned Additional District Judge and the decree passed by him on the footing of such an appeal not having been validly preferred before him must be set aside.

We accordingly set aside the order of the learned Additional District Judge and hold that the decree of the learned Subordinate Judge dated the 23rd August 1921 should be restored with costs in this Court as also in the Court of Appeal below against the defendants-respondents who have appealed in this appeal.

Nothing that we have said in this judgment will be taken as precluding the respondents from challenging if they are so advised the validity of this compromise decree in such regular proceedings as may lie under the law.

The Rule will be discharged. We make no order as to costs in the Rule.

Greaves, J.—I agree.

Appeal allowed;
Rule discharged.

Z. K.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 105 OF 1924.

April 27, 1925.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Maung Ba.

G. RAINEY AND ANOTHER—APPELLANTS—

versus

THE BURMA FIRE AND MARINE INSURANCE CO., LTD.—RESPONDENTS.

Contract Act (IX of 1872), s. 28—Policy of insurance—Condition that all rights under policy would be forfeited unless suit is brought within certain period after rejection of claim, validity of.

A condition in a contract which clearly and distinctly limits the period within which a suit may be brought is void by reason of the provisions of s. 28 of the Contract Act. But there is a distinction between a condition which so limits the time within which a suit may be brought to enforce a right and one which provides that after the lapse of a certain period there shall no longer be any right to enforce. A condition of the latter kind is not affected by the provisions of s 28 of the Contract Act. [p. 623, col. 2.]

A policy of insurance provided that if a claim was made and rejected and an action or suit was not commenced within three months after such rejection, all benefit under the policy would be forfeited:

Held, (1) that the meaning of the condition was that the parties contracted that after the expiry of a certain period from the date of the rejection of a claim the assured would have no right at all under the contract of insurance and that any suit brought after that date would be brought on account of a cause of action which had become non-existent, and would, therefore, not be maintainable; [*ibid.*]

(2) that the condition was not, therefore, void under the provisions of s. 28 of the Contract Act. [*ibid.*]

First appeal against a decree of the Original Side of this Court in Civil Regular No. 175 of 1923.

Mr. *Vertannes*, for the Appellants.

Mr. *Cowasjee*, for the Respondents.

JUDGMENT.—This is a suit on a policy of insurance, and the point before us is shortly this: cl. 12 of the conditions lays down that, if a claim be made and rejected, and an action or suit be not commenced within three months after such rejection, or, in case of arbitration taking place in pursuance of the 17th condition of the policy within three months after the arbitrator or arbitrators or umpire shall have made their award, "*all benefit under this policy shall be forfeited.*" The question then is whether, no suit having been brought within the period specified, the present suit is maintainable.

The question involves a consideration of s. 28 of the Indian Contract Act. This section lays down that "every agreement, by which any party thereto is restricted abso-

lutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

On the one side it is urged that this condition limits the time within which the plaintiff may enforce his rights in respect of the contract by the usual legal proceedings in the ordinary tribunals. On the other side it is argued that, by this condition, it was agreed that, after the expiry of the specified time, the plaintiff would no longer have any rights under the policy, and, therefore, no cause of action which he could bring before the Court.

It was held in *Ma Ywet* v. *Chin Mutual Life Assurance Co., Ltd.* (1), where the condition in the policy was as follows:— "No suit to recover under this policy shall be brought after one year from the death of the assured " that such a condition was clearly contrary to the provisions of s. 28, Contract Act, and, therefore, void. That case does not apply or give us any assistance in the present instance.

The matter came before the Calcutta High Court in the case of *South British Fire and Marine Insurance Co.*, v. *Brojo Nath Shaha* (2), but s. 28 of the Contract Act was not considered, and, so far as this point was concerned, it seems to have been decided on the meaning to be attached to the word "month"; but it was held that the plaintiff's suit was instituted beyond the time specified, and, therefore, it may be implied that such a condition was not considered void by reason of the provisions of s. 28. As the point was not, however, considered, the ruling gives us no assistance.

The point was expressly decided in the case of *Baroda Spinning & Weaving Co., Ltd.* v. *Satyanarayan Marine & Fire Insurance Co., Ltd.* (3). It was there held that there is a distinction between the extinction of a right and the loss of a remedy, that what the plaintiff was forbidden to do was to limit, the time within which he was to enforce his rights, that what he had done was to limit the time within which he was to have any rights to enforce, and that that condition was not void.

Now it is clearly a matter of the utmost importance to Insurance Companies that claims should be made speedily, that they should have an opportunity of investigating the facts, and obtaining evidence, and that, if claims were to be delayed, they might easily find themselves in a position to be unable to meet a fraudulent claim. There can, in our opinion, be no doubt as to what the meaning of the condition in this policy is, and that the parties distinctly contracted that, after the expiry of a certain period, plaintiff was to have no rights at all under the contract. Plaintiff willingly agrees that, in the happening of a certain event, he shall forfeit all his rights as from that date, and any suit, therefore, brought after that date, is brought on account of a cause of action which is non-existent. Conditions which clearly and distinctly limit the period within which a suit may be brought are distinctly conditions that are void by reason of the special provisions of s. 28 of the Contract Act; but there is undoubtedly a marked distinction between a condition which so limits the time within which a suit may be brought to enforce rights, and one which provides that there shall no longer be any rights to enforce.

It is argued that such a condition is, in effect, only an ingenious method of defeating the express provisions of the section, but it cannot be said that such a condition was illegal in itself. A man may contract, that on the happening of a certain event, he shall lose all his rights. It cannot be argued that such a condition must be one that limits the period within which he may seek relief in the ordinary Courts, and, in our opinion, the distinction that was drawn by the learned Judges of the Bombay High Court, though a fine one, is a distinction that can be legitimately drawn, and that there is no ground for holding that it is a void condition. We are, therefore, of opinion that the suit was rightly decided.

The decree of the Court below will be confirmed, and the appeal dismissed with costs throughout.

Z. K. *Appeal dismissed.*

(1) 11 Ind. Cas. 756; 4 Bur. L. T. 173.
(2) 2 Ind. Cas. 573; 36 C. 516; 13 C. W. N. 425.
(3) 21 Ind. Cas. 694; 38 B. 344; 15 Bom. L. R. 948.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 144 OF 1922.

May 28, 1925.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice B. B. Ghose.

BIRENDRA NATH BASU THAKUR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BASANTA KUMAR BASU THAKUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Stifling prosecution, what amounts to—Dispute between parties—Complaint, presentation of—Reference to arbitration, validity of—Award, whether binding.

The essential element in what is described as "stifling a prosecution" is the tampering with the administration of justice by a private individual. [p. 625, col. 2.]

An award was objected to by one of the parties to the reference on the ground that its consent to the reference was obtained under coercion inasmuch as at the date of the reference a complaint had been filed against that party in respect of a criminal offence and was pending in the Court of a Magistrate. It was found that the complaint was based on allegations which were obviously untenable and that the reference to arbitration was made before the accused were summoned in the criminal proceedings. It was further found that the mode adopted by the parties to obtain a settlement of the dispute out of which the criminal complaint had arisen was an eminently satisfactory one:

Held, that it could not be said that the consent of the party objecting to the award had been obtained by pressure being brought to bear upon it as the result of the criminal complaint or that the consideration for the reference was the stifling of the criminal prosecution and that consequently the award was perfectly valid. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Fourth Court, Dacca, dated the 3rd January 1922.

Babus *Jogesh Chandra Roy* and *Jatindra Nath Sanyal*, for the Appellants.

Dr. *S. C. Bysack*, Messrs. *B. Chakravarti*, *G. C. Sen* (with him Babus *Bipin Chunder Bose* and *Jitesh Chandra Guha*), for the Respondents.

JUDGMENT.

Walmsley, J.—This appeal is preferred by the plaintiffs. They are Birendra Nath and Surendra Nath, Basu Thakur, members of the Malkhanagar Basu family. The principal defendants, and most of the *pro forma* defendants belong to the same family.

The bone of contention is the Taltola *hat* and bazaar, an old established *hat* of considerable repute. It was held on land belonging to the Basu family, on the bank of the Dhaleswari River. Its site had to be changed from time to time owing to the action of the river, but all went well until the only available site was on land not in the possession of any members of the Basu family. This untoward event happened in the latter part of 1916. The site to which the *hat* had to be removed was on some land belonging to a *Mussalman* family, and held by it as *chiragi lakhiraj*. Relations were at the time strained between the plaintiffs and the principal defendants, and each side endeavoured to defeat the other. Various members of the *Mussalman* family executed eight *kobalas* in favour of the plaintiffs and others executed *nadabipatras*, while the principal defendants secured five documents of each kind. All this activity took place within the space of a few weeks. The aggregate of the shares sold and relinquished exceeds sixteen annas. One member of the *Mussalman* family, Abdul Aziz, is claimed as a vendor by both parties. He admitted execution of the *kobala* in favour of the plaintiffs on November 9, a few days later, he denied execution of a *kobala* in favour of the defendants. On December 9th, however, he appeared before the Sub-Registrar and admitted execution: a few days later he declared that the admission was untrue and had been wrung from him by improper means. Just before he did so, however, one Rohini, a servant of the plaintiffs presented a complaint before the Magistrate in which he accused thirteen persons of forging the *kobala* produced by the defendants. Among the accused were several of the principal defendants—Paresh, Gopal, Krishna and Benoy: also Kamini, son of Ananta Kumar Bose deceased. The substance of the charge was that Paresh, Gopal, Krishna and Benoy with the assistance of a stranger named Harendra Chandra De, had forged the *kobala*, and that the others had acted as attesting witnesses. The Magistrate called for evidence before issuing process. Meanwhile the defendants had taken steps before the Registrar for registration of the document executed in their favour by Aziz, and they afterwards instituted a suit against Aziz under s. 77 of the Registration Act. It does not appear when the suit was instituted, but it was decreed *ex parte* on March 21st, 1917.

The criminal charge served to bring matters to a head, and in December it was decided that the quarrel should be referred to the arbitration of one Aswini Kumar

Basu, a member of the family, and a retired Subordinate Judge. This gentleman did make an award. There is no dispute about the fact that he did so, or about the terms. The award was followed by an *ekrarnama* which was signed by some but not all of the principal defendants. The plaintiffs say that they were put in possession under the terms of the award and of the *ekrarnama* and that they shared in the *bastu puja* which was celebrated a few weeks later at the beginning of the *Bengali* year. This, however, is denied by the defendants. They say that after the arbitration possession remained unchanged, although the criminal proceedings were dropped, and that they lost no time in taking up the position, which they have taken up in defending the suit, that an arbitration made under such conditions is void.

The learned Judge has held that the submission to arbitration was inoperative because the consideration of the agreement was contrary to public policy, that the five executants of the *ekrarnama* had not authority to bind other members of the family, that the valid purchases by the plaintiffs only amounted to 1 anna 4 *gandas* share of the whole and that the plaintiffs must bring a suit for partition to get possession of that share.

For the plaintiffs it is urged that they are entitled to the share mentioned in the arbitrator's award: that if they are not entitled to that share as against all the defendants, they are, at any rate, entitled to that share as against those who made the reference to the arbitrator and those who executed the *ekrarnama*; that if their claim on the award or the *ekrarnama* is disallowed, they should have their title to a share of 6 annas declared by virtue of purchases from different members of the *Mussalman* family; and that, whatever their share may be found to be they should be given a decree for joint possession.

The first question is whether the reference to arbitration amounts to an agreement for stifling a prosecution. The Statute Law of this country on that subject is contained in s. 23 of the Contract Act, and is as follows:—"The consideration or subject of an agreement is lawful, unless..... .....the Court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void," and the illustration bearing on this sub-clause is this: "*A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void as its object is unlawful."

The essential element in what is described by English lawyers as 'stifling a prosecution' is the tampering with the administration of justice by a private individual. It is quite true that in this case, a complaint of a criminal offence was laid by the plaintiffs' servant against several of the defendants, and that after the award had been made, no steps were taken to produce the evidence for which the Magistrate had called. The defendants, however, were never brought before the Court as accused persons: on the contrary the learned Magistrate expressed grave doubts about the truth of the complaint, and directed the complainant to establish a *prima facie* case before he issued process; and he dismissed the complaint under s. 203, Cr. P. C., when the complainant said that his witnesses had been gained over. In these circumstances I do not think it can be said that a prosecution was dropped: still less do I think that there was any tampering with the administration of justice by the complainant, or that the complainant usurped the functions of the Judge.

Again, looking at the broader features of the case I should be very reluctant to hold that the institution of the complaint rendered void the reference to arbitration. On the one side the defendants had recourse to the summary provisions of the Registration Act, and afterwards to a suit under s. 77 of that Act, while the plaintiffs filed a complaint about the truth which the Magistrate was not satisfied. It would be carrying the doctrine of public policy to an absurd length to hold that the presentation of the complaint debarred the parties from restoring to the sensible method of arbitration.

As for the argument that the complaint put pressure upon the defendants, and that in consenting to arbitration they were acting upon coercion, it is abundantly clear that the complaint had no such effect. The defendants know that Abdul Aziz had expressly admitted execution of the document which was alleged to have been forged, and they had no reason to think that his later repudiation could wipe out

the effect of that admission: they knew that the Magistrate had received the complaint with scepticism, and they knew that the actual forgery was attributed to a stranger of unknown parentage without an address, while the accusations against the others were of the vaguest description. Lastly one of the defendants admits that Ananta Babu, now dead, but at the time the chief man on defendants' side, entered into the compromise with the avowed intention of repudiating it afterwards on this very ground. It is impossible to hold that the defendants were not acting with complete freedom of Will.

In my opinion, therefore, the agreement to refer the dispute to arbitration cannot be treated as void.

The plaintiffs ask for a declaration of their right to a share of 3 annas 12 *gandas*, in accordance with the award and the *ekrarnama* that followed it. It appears, however, that there was no proper submission to arbitration, such as would bind all the defendants. Ananta, Benoy, Paresh and Krishna Kumar pressed Aswini Babu to settle the dispute, and they said that they represented the absent defendants. In spite of his legal experience the arbitrator accepted these assurances, but, of course, they were not sufficient. Apart from the *ekrarnama*, and that was executed only by five of the defendants, there is no evidence on which it can be held that the defendants other than the four mentioned agreed to refer the dispute to arbitration. The plaintiffs, therefore, cannot succeed on the basis of the award against more than four of the defendants.

The award, however, was succeeded by an *ekrarnama*, executed by Ananta Kumar Basu, now dead, Joyanto Kumar Basu, Debendra Kumar Basu, Sanat Kumar Basu and Surendra Kumar Basu, (defendants Nos. 3, 5, 10 and 6). This is a formal document: the executants declared that they were satisfied that Birendra and Surendra had no title to a share of 3 annas 12 *gandas*: they promised for themselves and their co-sharers to execute an appropriate deed in regard thereto, and they also undertook, if they failed to persuade their co-sharers, to execute a deed "making up your 3 annas 12 *gandas* share * * * from our own shares alone." Their shares amounted to 4-annas, as Ananta had 1 anna 5 *gandas*, Joyanta had 15 *gandas* and the other three 2-annas between them. The *ekrarnama* cannot bind those who were not parties to it, but there is no reason why the executants should not be bound by the undertaking made for themselves.

The case for the plaintiffs is that possession to the extent of 3 annas 12 *gandas* was actually given to them. The arbitrator says that Benoy, defendant No. 14 told him so, but Benoy says this is incorrect. More important evidence is a letter written by Birendra to Ananta on *Chaitra* 21, 1323: this letter contains an assertion of possession and a suggestion that both parties should let the *hat* to one *ijaradar* for the ensuing year. On the back is an answer said by the plaintiffs to be in the writing of Bipin and signed by Ananta. A witness deposes that he took the letter, heard Ananta dictate and saw Bipin write and Ananta sign. Against this evidence there is only Joyanta's half-hearted denial. I have no doubt that the endorsement is genuine, and the only interpretation that can be put upon it is that Ananta recognised that possession had been given to the plaintiffs to the extent of 3 annas 12 *gandas*.

As the plaintiffs have expressly asked for their share to be fixed on the basis of the award or the *ekrarnama*, I do not think it necessary, after the findings are recorded, to deal with their alternative prayer for a declaration of their title on the basis of their transfers from various members of the *Mussalman* family. On that point I only wish to say that as the case was put before us the claim was for a fraction over 6-annas and not for the 10-annas mentioned in the plaint.

The remaining question is as to the form of relief to be granted to the plaintiffs. The learned Judge has held that he cannot go beyond declaring their title. Whether that view was right or not on the findings recorded by him, I need not discuss, because my findings are different. On the undertaking set out in the *ekrarnama*, supplemented by the facts that the plaintiffs were actually put in possession and that they remained in possession for a time, I think it is clear that they are entitled to a decree directing that they be put in possession to the extent of 3 annas 12 *gandas* jointly with the defendants.

The result is that the appeal is allowed in a modified form. The judgment and decree of the lower Court are set aside: the plaintiffs' title to the extent of 3 annas

12 *gandas* is declared as against the defendants, Benoy Chandra Basu (No. 14), Paresh Chandra Basu (No. 16), Krishna Kumar Basu (No. 18), the two representatives of the late Ananta Kumar Basu (Nos. 2 and 2*ka*), Joyanta Kumar Basu (No. 3), Debendra Kumar Basu (No. 5), Surendra Kumar Basu (No. 6), Sanat Kumar Basu (No. 10). Their suit is dismissed as against the other defendants except to the extent that the plaintiffs will get joint possession with them.

The plaintiffs are also entitled to recover mesne profits (to be ascertained by the lower Court hereafter) from the defendants named above for the period as claimed in the plaint that is, for the period from the 31st August 1917 up to the date of delivery of possession or until the expiry of three years from this date whichever event first occurs.

The plaintiffs will be entitled to recover their costs in both Courts from the defendants mentioned above. The defendants will bear their own costs in both Courts.

The cross-objections are dismissed but without costs.

Ghose, J.—I agree.

Appeal allowed.
Decree modified.
Cross-objections dismissed.

Z. K.

RANGOON HIGH COURT.
FULL BENCH.

CIVIL REFERENCE No. 6 OF 1925.

June 1, 1925.

Present:—Sir Sidney Robinson, KT., Chief Justice, Mr. Justice Heald and Mr. Justice Rutledge.

K. A. M. MOHIDEEN—APPLICANT

versus

BUKSHI RAM—RESPONDENT.

Rangoon Rent Act (II of 1920), s. 15—Civil Procedure Code (Act V of 1908), s. 115—Government of India Act, 1915, (5 & 6 Geo. V, Ch. 61), s. 107—Rent Controller, Rangoon, whether Court—Refusal to certify standard rent—Revision, whether competent—Interference by High Court.

Held, by the majority (*Robinson, C. J. dissenting*):—That the High Court has no jurisdiction to interfere in revision with an order passed by the Rent Controller Rangoon, refusing to grant a certificate certifying the standard rent under s. 15 of the Rangoon Rent Act. [p. 635, col. 2.]

Per *Robinson, C. J.*—The expression "appellate jurisdiction" in s. 107 of the Government of India Act does not necessarily imply that there must be some right of appeal to the High Court against the decisions of the Court whose order is sought to be revised. The expression is used merely to indicate the limits of the jurisdiction of the High Court so as to cover the largest area over which its jurisdiction extends. [p. 631, col. 1]

The Rent Controller, Rangoon, is a Court subordinate to the High Court and a refusal by him to exercise the jurisdiction conferred upon him amounts to the decision of a case within the meaning of s. 115 of the C. P. C., and it is open to the High Court, in a suitable case, to consider the correctness of that decision in the exercise of its powers of revision. In any case it is open to the High Court to revise such decision in the exercise of the general powers of superintendence conferred upon it by s. 107 of the Government of India Act. [p. 631, cols. 1 & 2]

[Case-Law referred to.]

Application for revision of the order of the Rent Controller, Rangoon.

ORDER OF REFERENCE TO A FULL BENCH.

Carr and Brown, JJ.—The petitioner applied to the Rent Controller, Rangoon, for the fixing of a standard rent for certain premises in Rangoon and the Controller rejected his application. The petitioner now asks this Court to interfere with this order of the Rent Controller in revision. Two questions arise for consideration, *firstly*, whether the proceedings of the Rent Controller are subject to the revisional jurisdiction of this Court, and, *secondly*, whether this is a case in which the revisional powers should be exercised.

The first question was considered in the case of *Mahommad Ebrahim Moola* v. *S. R. Jandass* (1). A Full Bench decided in that case that the First Judge of the Court of Small Causes when disposing of a reference under s. 18 of the Act was a Court subordinate to the High Court within the meaning of s. 115 of the C. P. C. In the course of his judgment in the case the learned Chief Judge of the Chief Court expressed an opinion that the Controller when dealing with applications under the Rangoon Rent Act was acting judicially in the exercise of a civil jurisdiction, and must be held to be subordinate to the Chief Court. But the actual question for decision before the Court was as to the powers of superintendence over the Judge of the Small Cause Court. So far, therefore, as the matter now in issue is concerned, that judgment is merely *obiter*. It was further pronounced before the constitution of this Court, and referred to the revisionary powers of the Chief Court. The question

(1) 70 Ind. Cas. 135; 11 L. B. R. 387; (1923) A. I. R. (R.) 94.

so far as it relates to Calcutta under the Calcutta Rent Act has been discussed at length in the case of *Allen Bros. & Co.* v. *Bando & Co.* (2). The decision in that case, though expressed with considerable hesitation, was that the High Court of Calcutta had revisional jurisdiction, over the Rent Controller. Under the Calcutta Act references by parties who are dissatisfied with the rent fixed by the Controller have to be made to the President of the Tribunal appointed under s. 72 of the Calcutta Improvement Act. In certain cases the orders of the President are subject to appeal to the High Court and it was held that this provided a connecting thread of authority sufficient to place the Controller under the superintendence of the High Court. If that reasoning be sound then it would appear to apply *a fortiori* to Rangoon where the reference under the Act is definitely to a Judge of a Civil Court, who as such Judge is undoubtedly subject to the Appellate Jurisdiction of this Court. But can this reasoning be applied to the powers of the Rangcon High Court? Under the provisions of s. 107 of the Government of India Act a High Court has the power of superintendence over all Courts which may be subject to its Appellate Jurisdiction. In the Letters Patent for the High Court of Calcutta it is provided that the Appellate Jurisdiction is "from the Civil Courts.....and from all other Courts esubject to its superintendence." Clause 14 of the Letters Patent of this Court confers Appellate Jurisdiction over all Civil Courts in Burma for which the Chief Court of Lower Burma or the Judicial Commissioner of Upper Burma had been a Court of Appeal, and over any other Civil Courts for which the High Court is declared to be a Court of Appeal. There is no clause corresponding to the clause in the Letters Patent for Calcutta giving this Court Appellate powers over all other Courts subject to its superintendence. The fact that a reference can be made from the orders of the Controller in certain circumstances to the First Judge of the Court of Small Causes, and that it has been held that orders passed by that Judge on such a reference are subject to the revisional jurisdiction of this Court might be held sufficient to make the Controller subject to the superintendence of this Court. But it does not seem to me possible, when the provision of cl. 14 of the Letters Patent of this Court are borne in mind, to hold that it makes the Controller subject to the Appellate Jurisdiction of the Court. He may be subject to the Appellate Jurisdiction of the First Judge of the Court of Small Causes by virtue of the powers of reference to that Judge. But the Rangoon Rent Act specifically provides that the orders passed by the Judge of the Small Causes Court on that reference are final. They are clearly not subject to appeal to this Court, and I find it difficult to hold that the fact that this Court could interfere with the orders passed by the Judge of the Small Cause Court in revision makes either the orders passed by him on the reference or the orders passed by the Controller in the first instance subject to the Appellate Jurisdiction of the Court. As we understand the judgment of Rankin, J., in the Calcutta case cited, his conclusion was based rather on the finding that the Controller was subject to the superintendence of the High Court than that it was otherwise subject to its Appellate Jurisdiction, and even so the concluding part of his judgment indicates that it was with considerable diffidence and largely in deference to previous decisions that he found that the proceedings of the Controller were subject to the revisional jurisdiction of the High Court. The Controller, no doubt, has to exercise many functions that are exercised by Civil Courts, but that does not of necessity make him a Civil Court. The Civil Courts in Burma are constituted by the Burma Courts Act, and the Rent Controller is certainly not a Civil Court under that Act. It has not been suggested that there is any special Act which makes the Rent Controller subject to the Appellate Jurisdiction of this Court, nor do we understand it to be suggested that this Court can derive its powers of revision over the proceedings of the Controller otherwise than by virtue of the provisions of s. 107 of the Government of India Act. Having regard to the wording of the Letters Patent of this Court we find it impossible to hold that this Court has any powers in revision to interfere with the actions of the Rent Controller. It is true as pointed out that there is at present no other authority with such revisional powers, and it may be that it is undesirable that

(2) 70 Ind. Cas. 371; 49 C. 931; 26 C. W. N. 845; (1923) A. I. R. (C.) 169.

there should be none. But that is a matter for the Legislature to decide. In our view the present application in revision does not lie.

The question raised is of considerable importance, and in view of the opinion expressed in *Mahommad Ebrahim Moola's case* (1), it should, I think, be referred to a Full Bench.

As regards the merits of this application, if it be held that this Court has revisional powers the Controller must be treated as a Court, and the procedure adopted by him must be in accordance with judicial principles. He clearly had to decide whether the petitioner was or was not a landlord within the meaning of s 2 of the Act. But he appears to have done so without giving the petitioner a real opportunity to prove his claim, and there is not sufficient material on the record for the forming of my decision. If this Court has jurisdiction the case does, therefore, appear to be one in which it should exercise it.

We would, therefore, refer the following question for decision by a Full Bench :—

"Has this Court jurisdiction to interfere in revision with orders passed by the Rent Controller, Rangoon, refusing to grant a certificate certifying a standard rent under s. 15 of the Rangoon Rent Act?"

Mr. *Campagnac*, for the Applicant.

Mr. *Auzam*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

Robinson, C. J.—The point referred for the decision of the Full Bench is:

"Has this Court jurisdiction to interfere in revision with orders passed by the Rent Controller, Rangoon, refusing to grant a certificate certifying the standard rent under s. 15 of the Rangoon Rent Act?"

As a matter of fact I have expressed my opinion on this question in the case of *Mahommed Ebrahim Moolla* v. *S. R. Jandass* (1).

It is said that my decision there was merely an *obiter dictum*, in that it was not necesary for the decision of the point then before the Bench which had reference to the subordination of the First Judge of the Court of Small Causes of Rangoon to the Chief Court. But in that case I held that it was necessary to consider what the provisions of the Burma Rent Act with reference to the powers and duties of the Controller and the First Judge of the Small Cause Court are.

It was, in my opinion, necessary, in order to decide the question there referred, to consider the whole scope and frame of the Act with reference to the powers given to the two Courts thereby created; and for that purpose I considered the position of the Controller and his powers and duties and I came to the conclusion that he must be held to be a Civil Court, and, in the absence of anything in the Act to the contrary, he must, therefore, be held to be a Court subordinate to this Court.

It was a decision given after full consideration, and it was in agreement with the decisions of the Calcutta High Court referred to therein.

Since that case was decided, there was another decision by the Calcutta High Court on the point in the case of *Allen Bros. & Co.* v. *Bando & Co.* (2). It was there held that the High Court has power of revising an order made by the Rent Controller of Calcutta. It is said—and it is so stated in the judgment—that the learned Judge had grave doubts on the point and that his decision was really based on a determination to follow previous decisions of the Court with which he was inclined to agree, but as to the correctness of which he was not very certain.

What the learned Judge said was: " . . . it is a question on which, though with some difficulty, I incline to the opinion that the decision of the Division Bench is right." And he concluded his judgment by saying: " . . . I have come to the conclusion that the decision of the Division Bench has all the common sense of the matter even if it may be doubted whether it has all the strict logic on its side . . . and in view of the fact that appeals from a Rent Controller's decision may come as occasion arises either to the Civil Courts of the District or, in Calcutta, to the President, I am in no way prepared to hold that an opinion which has been entertained by some four or five Judges of this Court is not the better opinion."

The learned Judge pointed out: "In my opinion the Controller, in discharging his duty under s. 15 and the President of the Tribunal in discharging his duties under s. 18, act as Courts of Justice. Whether they are Civil Courts within the meaning of any particular enactment is another question, but they are both Civil Courts in the general sense; they are authorized to decide judicially, and by

judicial methods only, between persons seeking their civil rights, *Nilmoni Singh Deo* v. *Taranath Mukerjee* (3). Such functions as they perform under ss. 15 and 18 are neither administrative nor ministerial. It is written large, both over the Act and the Rules, that the procedure to be followed is in general the procedure of a Court of Law."

With reference to the right of appeal from the orders of the Controller he stated "But, however, the right in question is denominated or defined, its existence puts the Controller in the position of a Court subordinated to another Court not simply as a matter of dignity or precedence, but in the sense that the one Court controls the other, to confirm, vary or nullify the orders of the other."

The decision referred to above was a decision of their Lordships of the Privy Council with reference to the powers of the High Court to deal in revision with orders passed by the Collector under Act X of 1859. Their Lordships said: "A question was raised with respect to the jurisdiction of the High Court to entertain this question in revision at all. Their Lordships do not think it necessary to say anything upon that point, except that they entirely agree with the view taken by the High Court of their own jurisdiction."

Further, referring to certain sections of the Act X of 1859, they said: "It must be allowed that in those sections there is a certain distinction between the Civil Courts there spoken of and the Rent Courts established by the Act, and that the Civil Courts referred to in s. 77 and the kindred sections, mean Civil Courts exercising all the powers of the Civil Courts, as distinguished from the Rent Courts, which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms; but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and whether, being a Civil Court in that sense, it does not fall within the provisions of Act VIII of 1859."

At the end of their judgment, their Lordships said: "It was not disputed that if an appeal went from the Collector to the higher Court,—to the Zillah Judge or to the High Court,—and the decree of the Collector for rent was there affirmed, it would become the decree of a Civil Court, which could not be excluded from the operation of Act VIII of 1859. Then this consequence would follow, that the act of the parties would alter the nature of the decree; as long as the decree remains the decree of the Collector, it is incapable of enforcement in any other district; but let the decree be affirmed by a Court of Appeal, and though it is between the same parties for the same subject-matter, it then becomes enforceable in another district. It is very difficult to suppose that any such result as that could possibly have been intended by the Legislature."

Again, in the case of *Balakrishna Udayar* v. *Vasudeva Aiyar* (4), their Lordships called attention to another extraordinary result and they said: "And if the appellant's contention be correct, then if the Civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie."

That is equally the case under our Act. If the Rent Controller refuses perversely or whimsically to exercise the jurisdiction conferred upon him by the Act in regard to fixing the standard rent, no reference to the Chief Judge of the Small Cause Court is possible; and if the contention before us is correct, there is no remedy available, and that is certainly a result which could not have been contemplated by the Legislature.

Their Lordships in this last-cited case, which referred to proceedings under the Religious Endowments Act XX of 1863, held: "It appears to their Lordships to be clear that in all these matters the Civil Court exercises its powers as a Court of Law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal."

They expressed the opinion that the matter adjudicated upon was a case within the meaning of s. 115 of the C. P. C.

The question then is: Is the Rent Controller exercising the jurisdiction conferred

(3) 9 C. 295; 12 C. L. R. 361; 9 I. A. 174; 5 Shome L. R. 130; 4 Sar. P. C. J. 392; 6 Ind. Jur. 547; 4 Ind. Dec. (N. S.) 846 (P. C.)

(4) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 623; 6 L. W. 501; 22 C. W. N. 50; 11 Bom, L. T. 48; 44 I. A. 261 (P. C.)

upon him by the Act acting as a Court and a Civil Court ?

In my previous judgment I have given my reasons for holding that he would act judicially in the exercise of a Civil Jurisdiction, and that he must be held to be a Civil Court. If, therefore, he exercises his jurisdiction in regard to the fixing of the standard rent, and there is a reference from his decision to the Chief Judge of the Small Cause Court, who supports his decision, an application for revision of the order of the Chief Judge of the Small Cause Court would lie to this Court; and if this Court were to reverse the order it would equally reverse the order of the Rent Controller.

Under those circumstances, it cannot possibly be said that the Rent Controller was not a Court subordinate to this Court.

It has been urged that, if the Legislature has made a serious omission in not providing the High Court with any powers of interference with orders of the Rent Controller from which no reference can be had to the First Judge of the Small Cause Court, that is no justification for this Court to assume a jurisdiction in order to avoid this serious omission. That is, no doubt, perfectly correct.

It is not for the Court to create the law. Its duty is merely to interpret and enforce it. But, if it is possible to so interpret the Rent Act as to avoid such an anomaly as is disclosed, if the contrary view be held correct, it is perfectly justifiable to do so.

In my opinion it is no straining of language or argument to hold that the Rent Controller is to be regarded as a Civil Court, subordinate, through the channel of the Chief Judge of the Small Cause Court, to this Court; and, if that decision be correct, the Rent Controller is a Court within the general superintendence which is given to all High Courts over all Courts subordinate to them.

It is, however, urged that this superintendence is only over Courts subordinate to this Court's appellate jurisdiction. I am not prepared to agree that the expression "Appellate Jurisdiction" in s. 107 of the Government of India Act necessarily implies that there must be some right of appeal. The expression is used merely to indicate the limits of the jurisdiction of the Court so as to cover the largest area over which its jurisdiction extends.

I am of opinion, therefore, that the refusal to exercise the jurisdiction conferred upon him is a case within the meaning of s. 115 of the C. P. C; that it is a decision of a Court subordinate to this Court; that, therefore, it is open to this Court, in a suitable case, to consider that decision in exercise of its powers of revision; but that, in any case, it is open to it to do so in exercise of the general powers of superintendence conferred on it by s. 107 of the Government of India Act.

I would, therefore, answer the reference in the affirmative.

Heald, J.—The question which has been referred to us for decision is whether this Court has power to revise orders of the Controller of Rents appointed for Rangoon under s. 3 of the Rangoon Rent Act, the particular order in respect of which revision is sought being an order refusing to grant a certificate certifying the standard rent under s. 15 of the Act. The reference was considered necessary because in the Full Bench case of *Mahommed Ebrahim Moolla* v. *S. R. Jandass* (1), where the question referred was whether the First Judge of the Court of Small Causes, Rangoon, when disposing of a reference under s. 18 of the Rangoon Rent Act is a Court subordinate to the High Court within the meaning of s. 115 of the C. P. C., the learned Chief Justice, after considering certain Indian cases, said, "In my opinion, therefore, so far as the Controller is concerned, it must be held that he is acting judicially in the exercise of a civil jurisdiction and that he must, therefore, be held to be a Civil Court, and in the absence of anything in the Act to the contrary, he must, therefore, be held to be a Court subordinate to this Court." The learned Judges who were dealing with the present case regarded that statement as *obiter* and doubted its correctness, but they were not prepared to disregard it and so made the present reference.

The learned Chief Justice in his answer to this reference has maintained his former opinion, but with the greatest respect I find myself unable to agree with him.

A scrutiny of the enactments giving revisional powers to this Court makes it clear from the outset that there is nothing in them which says either expressly or by direct implication that decisions of the Controller of Rents in Rangoon are subject to revision by this Court.

The revisional power of this Court over

the decisions of the Controller, if such power exists, must, therefore, be based rather on the interpretation of the enactments by the Courts than on the wording of the enactments themselves, and it is necessary to consider the cases in which that interpretation is expressed.

One of the earliest of those cases seems to be the Privy Council case of *Nilmoni Singh Deo* v. *Taranath Mukerjee* (3). In that case the Collector of a District, by whom under the special provisions of the Bengal Rent Act of 1859 suits for arrears of rents were cognizable and decrees in such suits were made, transferred decrees so made by him to the ordinary Civil Courts of other Districts for execution. It was contended in the High Court that the Act gave no power to transfer decrees and that Court was asked to set aside the transfers in revision. A question of the jurisdiction of the High Court to revise orders of the Collector was raised and the High Court said: "If the orders complained of are passed without jurisdiction, we think we have power to interfere under s. 15 of the Act of Parliament constituting this Court." That was all that the High Court said on the question of jurisdiction, and having found that the orders were passed without jurisdiction, the learned Judges proceeded to deal with them in revision, setting aside one and staying proceedings on another. An appeal was filed in the Privy Council and the same question as to the jurisdiction of the High Court was raised. All that their Lordships said on this matter was as follows: "A question was raised with respect to the jurisdiction of the High Court to entertain this question in revision at all. Their Lordships do not think it necessary to say anything upon that point except that they entirely agree with the view taken by the High Court of their own jurisdiction." It is to be noted, however, that their Lordships proceeded to find that the Collector in taking cognizance of suits under the Rent Act was a Civil Court and that, therefore, decrees made by him in such suits could be transferred to and executed by the ordinary Civil Courts under the C. P. C., and on this footing they set aside the orders of the High Court interfering with the transfers. It seems to me clear that their Lordships' decision that the High Court had jurisdiction to deal in revision with the orders of the Collector was directly connected with their finding that the Collector when taking cognizance of suits and making decrees under the special provisions of the Bengal Rent Act was a Civil Court, and that that finding was based on the special provisions of the Bengal Rent Act.

The next case is that of *Bata Kristo Pramanik* v. *A. K. Roy* (5). In that case the President of the Tribunal appointed under s. 72 of the Calcutta Improvement Act, who, under s. 18 of the Calcutta Rent Act, has power to revise orders made by the Controller of Rents at Calcutta, fixing a standard rent, had made an order for costs, but had held that he had no jurisdiction to execute it. An application for revision of his order was made to a Bench of the Calcutta High Court and that Bench revised it. No question of the jurisdiction of the High Court to deal with the President's order in revision was raised, but that Bench did say, "the learned President held, and we think rightly, that he is a Court and that the jurisdiction exercised by him under s. 18 of the Rent Act is civil jurisdiction, so that in proceedings under that section the President is a Court of Civil Jurisdiction within the meaning of s. 141 of the C. P. C."

In the case of *Kali Dassi* v. *Kanai Lal De* (6), a Bench of the Calcutta High Court was asked to revise an order of the Controller of Rents under the Calcutta Rent Act and did so, its jurisdiction not being contested.

In the case of *H. D. Chatterjee* v. *L. B. Tribedi* (7), a Bench of the same Court was again asked to revise an order of the Controller dismissing an application for the fixing of a standard rent. The circumstances of that case were that an application for revision of the Controller's order had been made under s. 18 of the Calcutta Rent Act to the President of the Tribunal, and the President had held that because the order of the Controller did not fix a standard rent and because the Act provided for revision of a decision fixing the standard rent, and not of a decision refusing to fix such rent, he had no jurisdiction to deal with the order of refusal. The learned Judges of the High Court found that the President's decision that he had no jurisdiction to revise an order of refusal was correct, and

(5) 65 Ind. Cas. 177; 23 C. W. N. 30.
(6) 64 Ind. Cas. 70; 23 C. W. N. 52.
(7) 68 Ind. Cas. 274, 26 C. W. N. 78; 49 C. 528; (1922) A. I. R. (C.) 427.

the question then arose whether or not the High Court could itself directly revise the order of the Controller. The learned Judges said that because under rules framed under s. 23 of the Calcutta Rent Act the Controller has all the powers possessed by a Civil Court for the trial of suits, and is bound to follow, as nearly as may be, the procedure laid down in the C. P. C., for the trial of regular suits, the Controller is a Court of Civil Jurisdiction. They went on to consider whether or not, on the footing that the Controller was a Court of Civil Jurisdiction, the High Court had power to revise his orders, and on the strength of certain earlier decisions of the Court and that of the Privy Council in the case cited above they held that they had power to revise the orders, not under the provision of s. 115 of the C. P C., but under s. 107 of the Government of India Act.

In the case of *Indian Engineering & Motor Co.* v. *Gladstone Wyllie & Co.* (8), the High Court of Calcutta dealt in revision with an order of the Controller of Rents, no question of its jurisdiction being raised.

The latest case on the subject is that of *Allen Bros.* v. *Bando* (2). In that case also the Controller had refused to fix a standard rent as required by s. 15 of the Act, and the question of the power of a Single Judge of the Calcutta High Court sitting on the Original Side, to revise the Controller's order was raised, a rule being issued under both s. 115 of the C. P. C. and cl. 15 (?) of the Letters Patent. The learned Judge found that because the Controller is authorised to decide judicially and by judicial methods only between persons seeking their civil rights, and because the procedure to be followed under the Calcutta Act is in general the procedure of a Court of Law, the Controller in discharging his duty under s. 15 acts as a Court of Justice and is a Civil Court in the general sense, whether or not he is a Civil Court within the meaning of any particular enactment. He held further that because the orders of the Controller are subject to revision by the President of the Tribunal, the Controller is in the position of a Court subordinated to another Court in the sense that one controls the other, to confirm, vary, nullify the orders of the other. He went on to say that by s. 107 of the Government of India Act power of superintendence is given to the High Courts over all Courts subject to their Appellate Jurisdiction and that under its Letters Patent the Calcutta High Court has appellate jurisdiction not only over the ordinary Civil Courts but also over all other Courts subject to its superintendence. He pointed out that "Courts subject to the superintendence of the High Court" means Courts which were subject to the superintendence of the Courts which the High Court superseded and Courts over which a right of superintendence or some other form of Appellate Jurisdiction has since been granted, and he said, "It remains, therefore, to consider whether the Calcutta Rent Controller, as a Court, is under the High Court in any one of the ways in which appellate jurisdiction can be exercised . . . . . As matters stand the only facts connecting him in any way with the Appellate Jurisdiction of the High Court are these: that he is, as I think, subordinated to the President, that awards of the Tribunal made under the Calcutta Improvement Act are appealable to this Court under Act XVIII of 1911; that in some cases the President may himself give decisions which are deemed to be decisions of the Tribunal: and that where the word 'Judge' as distinct from 'Court' appears in the Land Acquisition Act of 1894 the President is deemed to be the Judge." As between the Rent Controller on the one hand and the High Court on the other, the question is, is this a link or a gap? He went on to say, "An actual relationship to this Court must be established; an existing thread of connecting authority must be disclosed" and being of opinion that the learned Judges in *H.D. Chatterjee* v. *L.B. Tribedi* (7) had decided that the President was subject to the superintendence of the High Court in respect of his duties under the Calcutta Rent Act, because appeals from his decisions under the Calcutta Improvement Act lay mostly to the High Court said, "I have come to the conclusion that the decision of the Division Bench has all the common sense of the matter even if it may be doubted whether it has all the strict logic on its side." "For these reasons or perhaps I should say in these circumstances," the learned Judge decided to revise the order of the Controller, the grounds of his decision being apparently that the President was subject to the superintendence of the High Court, because in certain cases appeals from his decisions

8) 68 Ind. Cas. 907; 26 C. W. N. 102.

lay to the High Court, and that because in certain circumstances the President had power to revise certain orders of the Controller, the Controller too must be subject to the superintendence of the High Court.

The result of these cases is that where the jurisdiction of the High Court has been questioned it has been held that the High Court's revisional powers must be referred to the provisions of s. 107 of the Government of India Act, rather than to s. 115 of the Code.

It is now necessary to consider the case of the Rangoon Controller in the light of these decisions and of the local law which applies to him.

Under the Rangoon Rent Act it is the duty of the Controller to fix standard rents, and for this purpose he is given power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and so far as may be in the same manner "as is provided in the case of a Court," by the C. P. C. The Act provides that if the decision of the Controller fixing the standard rent is questioned a "reference" lies to the First Judge of the Court of Small Causes, Rangoon, that in disposing of such references the Judge shall follow, as nearly as may be, the procedure laid down in the C. P. C. "for the regular trial of suits" (not appeals), and that the Judge's decision shall be final.

The provisions of the Bengal Rent Act of 1859 were entirely different. That Act was passed "to prescribe rules for the trial of . . . . suits for the recovery of arrears of rent and of suits arising out of the distraint of property for such arrears" and s. 23 provided that the kinds of suits mentioned therein should be cognizable by Collectors and, except in the way of appeal as provided in the Act, should not be cognizable in any "other Court" or by any other officer, or in any other manner. Section 148 said, "It shall be competent to the Collector to hold *a Court* for hearing and determining suits under this Act in any place within the limits of his district." The Collector's procedure as laid down in the Act was clearly the procedure of a Civil Court. Appeals from orders passed by a Collector under this Act, "not being judgments in suits or orders passed in the course of suits and relating to the trial thereof or orders passed after decree and relating to the execution thereof" were made appealable to the Commissioner, but in "suits" an appeal from the "judgment" of the Collector lay to the Zillah Judge unless the amount or value in dispute exceeded Rs. 5,000, in which case the appeal lay to the Sudder Court. The functions and procedure of the Collector in the trial of suits under the Bengal Rent Act were thus entirely different from those of the Controller under the Rangoon Rent Act. The Collector "held Court" and tried "suits"; he had power to deliver "judgments" and make "decrees"; and an appeal lay from his "judgments" to the ordinary Civil Appellate Courts. The Controller merely fixes a standard rent at such amount as, having regard to the provisions of the Act and the circumstances of the case he deems just; he is not bound to follow any particular procedure and there is no appeal from his orders to the ordinary Civil Courts. There is merely a "reference' to the First Judge of the Court of Small Causes which is not a Court of Appeal, and the Judge deals with the reference not as an appeal but as if it were an original suit.

In these circumstances it seems clear that it does not follow that because the Collector under the Bengal Rent Act was a "Civil Court" the Controller of Rents under the Rangoon Rent Act is such a Court or is a Court at all.

The provisions of the Calcutta Rent Act also are different from those of the Rangoon Act. The duties and powers of the Controller are similar, but the provisions as to his procedure are different. Under the Calcutta Act it is laid down that in making enquiries the Controller shall follow as nearly as may be the procedure laid down in the C. P. C. for the regular trial of suits. There is no similar provision in the Rangoon Act and, as a matter of fact, the Controller in Rangoon does not follow that procedure. In view of these differences between the two Acts it seems clear that even if the Controller of Rents under the Calcutta Act must be regarded as a Civil Court, it does not follow that the Controller under the Rangoon Act is such a Court or is a Court at all.

But even if the Controller of Rents in Rangoon had to be regarded as a Court or as a Civil Court, it would not, in my opinion, follow that this Court has power to revise his orders.

The Calcutta High Court in the case of *Nilmoni Singh Deo* v. *Taranath Mukerjee*

(3) referred to revisory powers to s. 15 of the Charter Act, 1861, to which s. 107 of the Government of India Act now corresponds. That section gave the High Court "superintendence" over all Courts for the time being subject to its appellate jurisdiction, and power to call for returns, to transfer suits and appeals, to make rules of practice and procedure, to prescribe forms, and to settle tables of fees, but in view of the Privy Council's pronouncement that they entirely agreed with the view taken by the High Court of its own jurisdiction, it is not now possible to apply the rule of *ejusdem generis* to the provisions of that section or to avoid holding that the powers of superintendence given by its include power to revise orders, provided of course that the Court whose orders it is intended to revise is subject to the Appellate Jurisdiction of the High Court. Similarly in the case of *Allen Bros.* v. *Bando* (2), the learned Judge referred the revisional powers which he exercised to the provisions of s. 107 of the Government of India Act read with cl. 16 of the Calcutta Letters Patent. Section 107, as has been said, refers to Courts for the time being subject to the Appellate Jurisdiction of the High Court, and cl. 16 declares that the High Court shall be a Court of Appeal "from the Civil Courts.....and from all other Courts subject to its superintendence." On the wording of those two provisions of law and on its claim that there is no form of judicial injustice which the High Court has not power to correct, the High Court of Calcutta has founded a series of decisions to the effect that it has powers of revision if there is any existing thread of connecting authority between it and the Court whose decisions it is asked to revise, and that such a thread exists whenever it has power in any circumstances to interfere even indirectly with the orders of that Court. On this footing it has revised the orders of a Collector under the Land Acquisition Act, and it might almost claim to revise the orders of private arbitrators on the ground that an award of such arbitrators may in certain circumstances be filed in Court and become the basis of a decree from which in certain circumstances an appeal would lie to the High Court. Whether those decisions are right or wrong on the wording of the Calcutta Letters Patent, it is not for us to decide, but I do not think that they could possibly be justified on the wording of the Lett Patent of this Court, which in the corresponding clause omit any reference to Court subject to the superintendence of the High Court and refer to this Court merely as a Court of Appeal and to its jurisdiction merely as "Appellate Jurisdiction." If the words "subject to its Appellate Jurisdiction" in s. 107 of the Government of India Act are read in conjunction with the description of the Appellate Jurisdiction of this Court in cl. 14 of the Letters Patent, it seems to me impossible to hold that s. 107 confers on this Court any powers of revision in respect of any Courts for which this Court is not a Court of Appeal or over which it does not exercise Appellate Jurisdiction. I am unable to find that the Controller of Rents in Rangoon is a Court or a Civil Court or that this Court is a Court of Appeal from him as a Court, or has Appellate Jurisdiction over him or that he is a Court subject to the Appellate Jurisdiction of this Court within the meaning of s. 107 of the Government of India Act, or subordinate to this Court within the meaning of s. 115 of the Code, so as to make his decisions subject to revision by this Court and I would accordingly give a negative answer to the reference. Such an answer may amount to refusing a remedy for what is possibly a wrong, but it is only a refusal of a particular remedy, and if, as seems possible, there is a defect or omission in the wording of the Act, the primary duty of correcting the mistake lies on the Legislature and not on the High Court. Hard cases make bad law, and, in my opinion, it would certainly be bad law if we held that the orders of the Controller of Rents are directly subject to revision by this Court.

I would accordingly answer the reference as follows:—

This Court has no jurisdiction to interfere directly in revision with orders passed by the Rent Controller, Rangoon, refusing to grant a certificate certifying the standard rent under s. 15 of the Rangoon Rent Act.

Rutledge, J.—In order to answer the question referred it is necessary to decide (*a*) whether the Rent Controller under the Rangoon Rent Act, 1920, is a Court at all, and (*b*), if so, whether he is a Civil Court whose orders this Court has a power to revise.

Before considering these questions, however, it is necessary to decide whether this Full Bench of three Judges is precluded

from going into the question by reason of the decision in *Mahommed Ibrahim Moolla* v. *S. R Jandass* (1). In that case the present Chief Justice held that it was necessary to consider whether the Controller was a Civil Court. He held that he was and that he was "a Court subordinate to this Court." Though the question of reference was only whether revision lay to the Chief Court from a decision of the First Judge of the Small Cause Court when disposing of a reference under the Rangoon Rent Act, as the Chief Justice held that the further consideration was necessary to his decision, I do not consider that so far as his judgment is concerned his views on the point can be called *obiter dicta*. Macgregor, J., simply concurred. This, in my opinion, merely meant concurrence in the affirmative answer to the matter referred. Pratt, J., limited his decision expressly to the matter referred. In these circumstances it cannot be held that this Bench is precluded from going into the question by reason of the aforesaid decision.

To decide whether the Controller is a Court we must consider the powers and duties conferred or imposed on him by the Act, and the procedure which any rules made under it may have prescribed for him to allow. He is defined in s. 2 (*b*) as "the Controller of Rents appointed under this Act." By s. 3 the Local Government may by notification appoint a Controller and one or more Assistant Controllers and may invest an Assistant Controller with all or any of the powers of the Controller. Section 5 gives a landlord under certain circumstances the right to apply to the Controller to alter the standard rent. Section 10 permits a tenant who is precluded from paying his rent to the landlord for any reason, to deposit the rent as it falls due with the Controller. Section 12 forbids any plaint being received for the recovery of rent unless accompanied by the Controller's certificate of the standard rent, and by s. 14 (2) in summary proceedings for recovery of excess rent, a Magistrate shall presume until the contrary is proved that the standard rent is as certified in the certificate. By s. 15 (1) on application by a landlord or tenant the Controller shall grant a certificate certifying the standard rent of any premises leased or rented by such landlord or tenant, and by s. 15 (2) in four specified cases he may fix the standard rent at such amount as having regard to the provisions of the Act and the circumstances of the case he deems just. By s. 15 (3) the Controller before exercising any of his powers shall give notice of his intention to the landlord and tenant if any and shall duly consider any application received by him from any person interested within such period as may be prescribed in the notice. By s. 15 (4) all orders of the Collector are to be in writing and a copy to be affixed on or near to the premises and another copy given to the landlord, and by s. 15 (5) any person affected is entitled to a copy duly certified by the Controller to be correct. By s. 16 the Controller is given power to enter any premises or land between 9 A. M. and 6 P. M. Section 17 (1) gives the Controller power to require by written order any person (*a*) to furnish him with particulars as to the rent at which and the manner in which any premises were let in 1913 or subsequently and (*b*) to produce for his inspection such accounts, rent receipts, books or other documents relevant to the enquiry as may be specified in the order. I shall later refer to the provisions of s. 17 (2). Section 18 gives a reference to the First Judge of the Small Cause Court in case the Controller's decision is questioned. Section 21 forbids a prosecution under the Act without the previous sanction of the Controller. By s. 22 the Local Government may make rules to "(*a*) regulate the procedure to be followed in enquiries by the Controller under this Act; (*b*) direct that such enquiries shall be conducted so far as desirable in private." I have set out the several powers conferred and it seems clear that with the exception of s. 17 (2) and any procedure which the Local Government may have prescribed under s. 22 the powers conferred are such as might be conferred on any Executive or Administrative Public Authority such as a Customs, Income Tax, Revenue or Municipal Officer. Section 17 (2) gives the Controller power to summon and enforce the attendance of witnesses and compel the production of documents by the same means and so far as may be in the same manner *as is provided in the case of a Court* by the C. P. C., 1908. But once the witnesses appear or the documents are produced, "the manner as is provided in the case of a Court" has no further application to the enquiry so far as the Act itself is concerned. Contrast this freedom from judicial trammels with the provision in s. 23 that in disposing of

references from the decision of the Controller the Judge shall follow as nearly as may be the procedure laid down in the C. P. C., for the regular trial of suits. The only rules which I have been able to discover which the Local Government has made under s. 22 prescribing the procedure of the Controller are those published in Financial Department Notification No. 35, dated the 27th May 1920 (*Burma Gazette*, Part 1, 5th June 1920, page 473). The only one of the four rules that I need refer to is r. 3, "The Controller is empowered to award and apportion the costs of any proceedings before him among the parties thereto in such manner as he may deem just. Such costs may include (*a*) Court-fees, (*b*) Process-fees, (*c*) Witness expenses, (*d*) Advocate's fees not exceeding half the amount of the standard rent per mensem of the premises referred to in the case." If the Controller is not a Court but an Executive Public Officer under the Act, I think it will be conceded that he is not transformed into a Court by calling the fee to be paid on an application to him a "Court-fee" instead of a new coined expression like "rent application fee." While the careful omission of prescribing any other judicial procedure for the Controller's enquiries is only reconcilable with the executive as against the judicial character of his office. If we contrast the provisions of the Bengal Rent Act, 1859, with the provisions set out above as has been done already by my brother Heald, it will be seen that the Collector's procedure as laid down in the 1859 Act was clearly the procedure of a Civil Court. Consequently the decision of their Lordships of the Privy Council in *Nilmoni Singh Deo* v. *Taranath Mukerjee* (3) has no application to the present case.

With regard to the decisions of the High Court in respect of the Calcutta Rent Act it must be borne in mind that the Local Government of Bengal made a series of rules under s. 23 of the Act, which *inter alia* empowered it to make rules "regulating the procedure to be followed in enquiries by the Controller." By r. 4 it is laid down, "In making enquiries under the Act the Controller shall follow as nearly as may be the procedure laid down in the C. P. C., 1908, for the regular trial of suits." By r. 24 it is prescribed, "In all proceedings before them under the Act the Controller and the President of the Tribunal shall have all the powers possessed by a Civil Court for the trial of suits." As we have seen there is no rule in any way analogous to either of these rules applying to the Controller in Rangoon. And instead of being endowed with *all* the powers of a Civil Court he is endowed under s. 17 (2) with *one* power and that a subsidiary one. This difference is so vital that those two rules may form a sufficient basis for the decisions of the Calcutta High Court. But the absence of these two rules here renders the Calcutta decisions wholly inapplicable to Rangoon.

I am, therefore, of opinion that the Controller is not a Court but an Executive and Administrative Officer appointed by the Local Government under the provisions of the Rangoon Rent Act. That being so I must answer the question referred in the negative. For the purposes of this judgment the second question whether if he is a Court is he a Civil Court whose orders this Court can revise does not arise. If, however, there had been *indicia* of judicial character in the functions of the Controller which I have held are lacking, I would still hesitate to hold that this Court had revisional powers over his orders. To give such powers there must, in my opinion, be given directly or indirectly the right of appeal to superintendence. It is a growing practice of the Legislature to set up public authorities with executive and judicial or *quasi*-judicial functions. This Court has not been given that wide and powerful control which the King's Bench Division possesses over public authorities by way of *mandamus* and *certiorari*. If by a wide interpretation of its revisional powers, the proceedings of all these bodies become subject to this Court's revision, I fear that the proper discharge of the duties of the Court as expressly laid upon it would suffer. I am not seriously impressed by the argument that a subject may suffer a wrong without redress if the public authority fails to do its duty. The subject has always open to him the remedy of moving the authorities executive superior who has the power in this case of admonishing him or if need be removing him.

The only difference I have in answering this reference arises from my coming to a different conclusion to that of the Chief Justice whose opinion at all times carries great weight.

But for these reasons above given, my answer to the question referred is in the negative.

Z. K. *Answered in negative.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1167 OF 1922.

April 2, 1925.

Present:—Mr. Justice Phillips.

VAYYAPRATH KUNNATH PACKI—

PLAINTIFF—APPELLANT

versus

VAYYAPRATH KUNNATH MAHAMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Tarwad—Karnavan, *powers of—Suit by junior member in respect of* tarwad *property, maintainability of.*

A *karnavan* is the controlling authority of a Malabar *tarwad* and all the powers of management are vested in him. Unless the *karnavan* himself is disabled from suing to recover possession of or obtain other reliefs regarding the *tarwad* property a junior member is not entitled to sue on behalf of the *tarwad* for a relief claimable by the *tarwad* in respect of the *tarwad* property. [p. 638, col. 2.]

Cheria Pangi Achan v. *Unnalachan*, 38 Ind. Cas. 513; 32 M. L. J. 323; (1917) M. W. N. 185; 5 L. W. 392; 21 M. L. T. 329, *Raja of Arakal* v. *Churia Kanhi Kannan*, 31 Ind. Cas. 482; 29 M. L. J. 632 and *Ottaprakal Thazath Soopi* v. *Charichai Pallikal Marriyamma*, 55 Ind. Cas. 760; 43 M. 393; 38 M. L. J. 207; 11 L. W. 200; (1920) M. W. N. 279; 27 M. L. T. 169, relied on.

Second appeal against a decree of the Court of the Subordinate Judge, Tellicherry, in A. S. No. 216 of 1921 (A. S. No. 602 of 1920, District Court, North Malabar), preferred against that of the Court of the District Munsif, Tellicherry, in O. S. No. 692 of 1918.

Mr. *K. P. M. Menon*, for the Appellant.

Mr. *P. Govinda Menon*, for the Respondents.

JUDGMENT.—The main question for determination in this appeal is, whether a junior member of a Malabar *tarwad* can sue on behalf of the *tarwad*, even when there is a *karnavan* in existence, who can bring the suit. The powers of a *karnavan* have been considered on many occasions and it has always been held that he is the controlling authority of the *tarwad* and that all the powers of management are vested in him. In fact over sixty years ago it was held by Mr. Holloway, with regard to a *karnavan*: "A Malabar family speaks through its head, the *karnavan* and, in Courts of Justice except in antagonism to that head, can speak in no other way". That principle has been upheld in *Vasudevan* v. *Sankaran* (1) and what is practically the same principle has been laid down later in *Ottaprakal Thazath Soopi* v. *Charichai Pallikal Marriyamma* (2), adopting a decision in S. A. No. 959 of 1917 [*Katherkutti Haji* v. *Kundan Menon*] in which it was held that "only under very special circumstances could the Anandravan of the *tarwad* maintain a suit for redemption of a *kanom* granted by their *karnavan*, as such a suit would amount to an act of interference in the *karnavan's* management of *tarwad* affairs". In *Cheria Pangi Achan* v. *Unnalachan* (3), it was held by Sadasiva Iyer, J., that "unless the *karnavan* himself is disabled from suing to recover passession of or obtain other relief regarding the *tarwad* property, an Anandravan cannot be allowed to sue on behalf of the *tarwad* for the relief claimable by the *tarwad* in respect of the *tarwad* property". We find the same principle in *Rajah of Arakal* v. *Churia Kunhi Kannan* (4). Acting on this principle the lower Courts have held that the appellant has no right of suit and accordingly dismissed it. There is one authority which would appear to support the appellant and that is *Anantan* v. *Sankaran* (5). It is a very brief judgment and does not discuss the principle at all. The material portion of the judgment runs as follows:—"The *karnavan* is included as a defendant in the suit, and, as he has failed to sue till the period of 12 years has almost expired, we are of opinion that the suit by the junior members cannot be validly objected to". If this be taken as a broad proposition of law that in all circumstances the junior member will be entitled to sue when the *karnavan* has failed to do so, it seems to be opposed to all the prior and subsequent decisions which deny such a right of suit to Anandravan unless there are special circumstances which justify his bringing such a suit. But if we look to the facts of this case we find that the two members of the *tarwad* whose actions were impeached were defendants and all the other members of the *tarwad* were plaintiffs. Applying the facts to the judgment, the case does come within the principle mentioned above

(1) 20 M. 129; 7 M. L. J. 102; 7 Ind. Dec. (N. S.) 90.
(2) 55 Ind. Cas. 760; 43 M. 393; 38 M. L. J. 207; 11 L. W. 200; (1920) M. W. N 279; 27 M. L. T. 169.
(3) 38 Ind. Cas. 513; 32 M. L. J. 323; (1917) M. W. N. 185; 5 L. W. 392; 21 M. L. T. 329.
(4) 31 Ind. Cas. 482; 29 M. L. J. 632.
(5) 14 M. 101; 5 Ind. Dec. (N. S.) 72.

that an Anandravan may be permitted to sue when the *karnavan* has disabled himself from bringing such a suit. In this case the *karnavan* had through his agent, another member of the *tarwad*, made an alienation which was sought to be set aside. It would have been difficult for him to have brought the suit to set aside his own transaction, and in that view this case is perfectly consistent with the other cases that I have mentioned above and I think that the decision must be read in the light of these facts. There appears to be no other authority opposed to the cases I have cited.

On the facts of the present case the appellant has nothing particular in his favour. The *karnavan* who made the alienation is dead. He was succeeded by another and he is also dead, and very recently the first defendant has become the *karnavan*. In the plaint it is not alleged that the plaintiff consulted the first defendant or that the first defendant was neglecting the interests of the *tarwad*. In fact no allegation of misconduct is made against him. It is only here in second appeal that it is said for the first time that the first defendant was acting in collusion with the alienee. The suit was brought by the plaintiff nine months before the claim would have become barred and inasmuch as the first defendant had only recently assumed office, there is nothing to show that the plaintiff believed that he would not take action if approached in the matter. I think it would be undesirable to extend the right of an Anandravan to bring a suit on behalf of the *tarwad*, for it would lead to multiplicity of litigation and there would be no finality whatever. The cases cited have laid down the restrictions which should be imposed on such suits and I entirely agree. In that view the plaintiff has not disclosed any cause of action, that is to say, he is not entitled to bring such a suit and the decree of the lower Court is right.

It is unnecessary to consider the other point on which the plaintiff's suit has been dismissed, namely, that of limitation. The second appeal must be dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 565 OF 1924.

May 11, 1925.

Present :—Mr. Justice Heald and Mr. Justice Rutledge.

MA PAN—APPELLANT

versus

MAUNG NEU—RESPONDENT.

Burma Courts Act (XI of 1922), ss. 2, 11—Civil Procedure Code (Act V of 1908), s. 102—Rent-suit, whether land suit—Value not exceeding Rs. 500—Appeal, second, whether lies.

A suit for the recovery of rent is ordinarily a suit on a contract for an ascertained sum, and no question of title to the property in respect of which the rent is claimed necessarily arises in such a suit. The right to receive rent is not in any strict sense a right or interest in immoveable property, and a suit for rent cannot, therefore, be regarded as a suit relating to immoveable property. [p. 642, col. 1.]

A suit for the recovery of rent of land is not a "land suit" within the meaning of s. 2 of the Burma Courts Act, and if the value of such a suit does not exceed Rs. 500 no second appeal is competent under s. 11 of the Act. [*ibid.*]

Appeal against a decree of the District Court, Tharawaddy, in Civil Appeal No. 101 of 1924.

Mr. *Bomanji*, for the Appellant.

JUDGMENT.

Heald, J.—Appellant sued respondent, whom she alleged to be her tenant, to recover 200 baskets of paddy or its value Rs. 400 as rent of certain paddy lands

Respondent denied that he was appellant's tenant. He said that his brother-in-law, Maung Kala, was her tenant, and that he had merely introduced Maung Kala to her.

The Trial Court found that respondent was the tenant, but the Appellate Court found that it was Maung Kala who was the tenant.

Appellant attempted to file a second appeal, but the Registry of this Court noted that no appeal lay as the suit, was an "unclassed suit," not exceeding Rs. 500 in value.

Appellant's learned Advocate contended that a second appeal lay because the suit was one for rent of agricultural land, and was, therefore, a "land suit," so the matter was put before a Judge.

The learned Judge, before whom the matter came, said that in his view a suit for rent is not a land suit, but he fixed a date for hearing appellant's Advocate.

After that hearing he recorded that the Advocate had cited rulings to the effect that a suit for rent of land is a "land suit,"

but that he disagreed with those rulings. He said that the question was an important one, as it affects a very numerous class of suits, and he directed that the appeal be heard before a Bench.

We have accordingly now heard the appeal as a Bench.

Unfortunately there was no appearance for the respondents, and the only rulings which appellant's Advocate cited before us were those which he cited before the Single Judge, namely, the cases of *Shibu Haldar* v. *Gupi Sundari Dasya* (1), *Ma Dun* v. *Ma Pa U* (2) and *Kaung Hla Pru* v *San Paw* (3). A reference to the first of these cases shows that the decision was irrelevant for the purposes of this case because it proceeded on special provisions of the Bengal Tenancy Act. The second was also irrelevant because it was a suit for a declaration in respect of standing crops, and not for rent. The third was a decision of a Single Judge of the late Chief Court, who noted that no authority on the point in issue was cited on either side and who, after referring to the second case mentioned above, said without giving any reasons for his opinion that he thought that a right to rent of land was a right or interest in immoveable property, and that, therefore, a second appeal lay. That decision, for what it is worth, is in appellant's favour.

The law regulating such second appeal so far as this Court is concerned is contained in s. 102 of the C. P. C., which says that "no second appeal shall lie in any suit of the nature cognisable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees," and in s. 11 of the Burma Courts Act, which says: "In addition to the second appeals permissible under s. 100 of the C. P. C., 1908, a second appeal shall lie to the High Court from an appellate decree of a Court subordinate thereto on any ground which would be a good ground of appeal if the decree had been passed in an original suit, whenever the decree of the Appellate Court varies or reverses otherwise than as to costs the decree of the Court below; provided that no such second appeal shall lie:—

(*a*) in the case of a small cause, unless the value of the cause exceeds five hundred rupees, or

(*b*) in the case of an unclassed suit, unless the value of the suit exceeds five hundred rupees or the suit is of the nature described in s. 13, sub-s. (1), of the Burma Laws Act, 1898."

The Burma Courts Act divides suits into three classes which were presumably intended to be mutually exclusive, namely, "land suits," "small causes" and "unclassed suits," a "land suit" being defined as a suit relating to immoveable propery or to any right or interest in immoveable property; a "small cause" as "a suit of the nature cognisable by a Court of Small Causes under the Provincial Small Cause Courts Act, 1887": and an "unclassed suit" as "a suit which is neither a land suit nor a small cause."

It seems clear that if the present suit is a "small cause" that is a suit of the nature cognisable by Courts of Small Causes, then it is not a "land suit," and, if so, since its value does not exceed Rs. 500, there would be no second appeal.

The question which arises under s. 11 of the Burma Courts Act is thus similar to that which arises under s. 102 of the Code, namely, whether or not the particular suit before the Court is of the nature cognisable by Courts of Small Causes, since, if it is, there will be second appeal under either the Code or the Act, unless the value exceeds Rs. 500.

That specitic question was considered by a Full Bench of the High Court of Madras in the case of *Soundaram Ayyar* v. *Sennia Naicken* (4), and four out of the five Judges were of opinion that a suit for the recovery of rent of lands is a suit of the nature cognisable by Courts of Small Causes, and decided that in respect of such suits no second appeal lies unless the value exceeds Rs. 500. It was assumed for the purposes of the reference to the Full Bench that the notification required by cl. 8 of the Second Schedule of the Provincial Small Cause Courts Act had been issued for all subordinate Courts in the Madras Presidency and the reference was decided mainly on a consideration of the wording of that clause, and of s. 15 of the Act. Section, 15 says: "(1) A Court of Small Causes shall not take cognisance of the suits specified in the Second Schedule as suits excepted from the cognisance of a

(1) 24 C. 449; 2 C. W. N. 169; 12 Ind. Dec. (N. S.) 967.
(2) 2 L. B. R. 124.
(3) 3 L. B. R. 90.
(4) 23 M. 547; 10 M. L. J. 329; 8 Ind. Dec. (N. S.) 785.

Court of Small Causes. (2) Subject to the exceptions specified in that Schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognisable by a Court of Small Causes." Clause 8 of the Second Schedule includes among "suits excepted from those cognisable by Court of Small Causes" a suit for the recovery of rent, other than house-rent, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto.

It seems clear that there is nothing in the nature of a rent suit as such which prevents it from being cognisable by Courts of Small Causes since suits for house rent are always so cognisable if within the pecuniary limits of the Court's jurisdiction. Suits for rent of lands are also cognisable by Courts of Small Causes subject to the condition that the Judge of the Court has been specially empowered. It can hardly be contended that the action of Local Government in empowering a particular Judge of a Small Cause Court to exercise jurisdiction in respect of suits for rent of land alters the "nature" of such suits, and, unless it does, it would seem to follow that such suits are always "suits of the nature cognisable by Courts of Small Causes." That, at any rate, was the view of the Madras High Court, and one of the learned Judges added a further consideration, namely, that "it would be strange if the Legislature, when enacting the C. P. C., regarded rent-suits as being of such a character as to be suitable for second apeals, and yet when enacting the Small Cause Courts Act regarded them as suits which might by notification of the Local Government be made triabie by a Court of Small Causes in which case not even a first appeal in regard to them would be allowed."

A Bench of two Judges of the Calcutta High Court has, however, taken a different view. In the case of *Sahodora Mudiali* v. *Sarbosobha Dasi* (5), which was a suit for rent of lands, it was objected that no second appeal lay because such suits are of the nature cognisable by Courts of Small Causes, and the Madras Full Bench case was cited. One of the learned Judges said, "Article 8 of the Second Schedule of the Provincial Small Cause Courts Act expressly exempts suits for rent other than house-rent from the cognisance of Small Cause Courts unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto. But the majority of the Judges constituting the above Full Bench of the Madras High Court, were of opinion that a suit for rent is of the nature of a suit cognisable by the Small Cause Court. It appears that by a notification the Madras Government has vested all subordinate Judges and District Munsifs within the Presidency, with jurisdiction to try on their Small Cause Court side all suits for rent falling within the pecuniary limits of their special jurisdiction. No such notification has been issued by the Local Government in this Presidency and so far as this Court is concerned second appeals in suits for rent (other than house-rent) although the value thereof does not exceed Rs. 500, have always been entertained. I accordingly overrule the preliminary objection." The other learned Judge said, "All civil suits, the value of which does not exceed Rs. 500, are cognisable by Courts of Small Causes, subject to the exceptions contained in the Second Schedule of the Provincial Small Cause Courts Act, and to the provisions of any special Act. Suits for rent, other than house-rent, are included in the Second Schedule of the Provincial Small Cause Courts Act. But the Local Government has authority to vest Judges of Small Cause Courts with powers to try rent-suits. No notification has been made vesting Small Cause Court Judges in Bengal in general, or the Judge of the first instance in this particular case, with such powers. I am, therefore, of opinion that this appeal is not incompetent."

It appears, therefore, that the learned Judges in Calcutta regarded cl. 8 of the Second Schedule as excepting suits for rent (other than house-rent) from the cognisance of Courts of Small Causes with an exception to that exception in the case of Small Cause Courts where the Judges had been specially empowered to exercise jurisdiction in respect of such suits, while the Full Bench of Madras, looking at the "nature" of the suit, regarded cl. 8 rather as a restriction on the cognisance of such suits by particular Small Cause Courts than as a declaration that suits were

(5) 27 Ind. Cas. 258; 42 C. 638; 20 C. L. J. 494; 19 C. W. N. 1030.

not of the nature cognisable by Courts of Small Causes.

I think it possible that the learned Judges in the Madras case over-emphasised the meaning of the word "nature." It is true that that was the particular word used by the Legislature, but it is possible that it meant no more than "kind," and, if the word "kind" be substituted for it, their arguments will carry somewhat less weight.

On the other hand the learned Judges in the Calcutta case seem to have given scant consideration to the matter, and to have been influenced, perhaps unduly, by the feeling, natural enough in matters of procedure in an old established Court like Calcutta, that whatever is is right.

On the wording of the enactments it may be difficult to come to a definite conclusion, but, on general principles, I am in favour of the view taken in Madras, and so clearly was the learned Judge of this Court who referred the matter to this Bench. A rent-suit is ordinarily a suit on contract for an ascertained sum, and no question of title to the property necessarily arises. Rent is not in any strict sense a right or interest in immoveable property, and I doubt whether a suit for rent ought to be regarded as a suit relating to immoveable property. If such a suit is a "small cause" within the meaning of s. 2 of the Burma Courts Act, and, if the classes of suits defined in that section were intended to be mutually exclusive, then it seems clear that rent-suits were not intended to be regarded as "land suit." Suits for rent of lands are certainly triable by Small Cause Courts in which the Judge is specially empowered, and, if they are so tried, there is no provision for any appeal. It is true that the only Court in Burma in which the Judge was so empowered was the Small Cause Court, Rangoon, but it seems unlikely, as the learned Judge said in the Madras case, that it was the intention of the Legislature that there should be no appeal in such a case if it was tried in a Court of Small Causes, and two appeals if it was tried in the ordinary Court in which the Judge did not need to be specially empowered.

I would, therefore, hold that a suit for rent of land is not a "land suit" within the meaning of s. 2 of the Burma Courts Act, and that, therefore, if the value does not exceed Rs. 500, no second appeal lies under s. 11 of that Act.

I would accordingly dismiss the appeal in this case, because the value does not exceed Rs. 500.

Appellant's learned Advocate asks us to treat his memorandum of appeal as an application for revision if we hold that no appeal lies, but in my opinion the grounds which are alleged in the memorandum of appeal are not such as would be good grounds for revision, and I see no reason to deal with the case in the manner suggested.

I would dismiss the appeal.

Rutledge, J.—I concur.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 250 OF 1925.

June 11, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

DWARKA NATH DUTTA—PLAINTIFF—APPELLANT

versus

CHANDRA MOHUN ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Union Board—Meeting—Quorum, what constitutes—Members present but not taking part in meeting, position of—Appeal—Question of fact, whether can be raised for first time.

A question of fact which has not been raised in the Court of first instance ought not to be allowed to be raised for the first time in appeal [p. 613, col. 2.]

Where a member of a body after joining a meeting of that body does not want to remain a member of the meeting, the easiest and usual course for him is to leave the place of meeting. Merely taking no active part in the meeting does not make him absent from the meeting when, as a matter of fact, he is there. Many members may join in a meeting and refrain from voting or taking any active part in it, but for the purposes of a quorum such persons cannot be regarded as absent from the meeting. If the number fixed for a quorum is actually present, the meeting is perfectly valid and the proceedings of the meeting cannot be questioned on the ground that some of the members present took no part in the business of the meeting. [p. 644, col. 1.]

Appeal against a decree of the Officiating Subordinate Judge, First Court, Tipperah, dated the 11th of December 1924, reversing that of the Munsif, Fifth Court, at Comilla, dated the 18th August 1924.

Babu *Sasadhar Roy (Sr.)*, for the Appellant.

Babu *Bhagirath Chandra Das*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the plaintiff and arises under the following circumstances: it appears that the Mainamati Union Board had to elect a President of the Union. The Circle Officer fixed the 28th of March 1925 as the date of election and the Cutchery of the Maharaja of Hill Tipperah at Manamati was originally fixed as the place of election and the time fixed was 9 o'clock in the morning. It appears that altogether six of the voters were present when the meeting was held. The plaintiff obtained three votes and was declared to have been duly elected. It appears that the Magistrate of the District was moved and he on the 3rd April 1924 declared election as invalid and a fresh election was made in which defendant No. 1 was elected as the President of the Union. The plaintiff then brought this suit on the 5th of April of that year for a declaration that the election was duly held and that he was duly elected as the President and was entitled to exercise the function of that office. The plaintiff asked for an *ad interim* injunction restraining defendant No. 1 from exercising the function of the President. The injunction was granted. The defendants appeared and contested the suit mainly on the ground that the election of the plaintiff was invalid because there was no quorum according to law when the election took place. It was also contended that the order of the Magistrate was binding upon the parties.

The learned Munsif decreed the plaintiff's suit and granted all the reliefs prayed for. Defendant No. 1 appealed to the District Court and it was contended before the learned Subordinate Judge as it appears from the judgment that the election was invalid on the ground, first, that the time and place of the meeting were changed and, therefore, the meeting at the place where it took place and at the time when it took place was invalid on account of that change. The second ground which was argued in appeal appears to be that there was no quorum for a valid meeting. The learned Subordinate Judge has given effect to both the contentions of the defendants and reversed the judgment of the Munsif and dismissed the suit.

The present appeal, as I have already stated, is by the plaintiff. The first contention which was urged by the learned Vakil for the plaintiff-appellant was that the question as to the change of place and time of the meeting was not raised either in the written statement or in the Court of first instance and that, therefore, the learned Subordinate Judge ought not to have allowed that question to be raised in appeal. It was further contended that there was no substance in this objection raised by the defendants. It was nextly contended that upon the findings arrived at by the learned Munsif and also by the learned Subordinate Judge there was a quorum when the election took place. Therefore, the learned Subordinate Judge was in error in holding that the election was invalid for want of a quorum.

It appears to us that the contentions of the learned Vakil for the appellant are well-founded. The question as to whether there was any change either of the place or of the time of the meeting was a question of fact. When it was not raised and made a ground of complaint by the defendant in the Court of first instance the learned Subordinate Judge ought not to have allowed that question to be raised for the first time in appeal. Moreover it appears to us that there was no substance in the defendants' objection as to the change of time and place of the meeting. It was not contended for less established that there was any voter who was misled or in any way prevented from attending the meeting. In fact what appears to have taken place was that the meeting instead of being held in the Cutcherry apparently with the concurrence of all persons present was held at the inspection bunglow which was close to the Maharaja's Cutcherry. In fact it was within the sight of the Cutcherry. The meeting was postponed till 9-30 A. M. at the request of the defendants or of their friends. The postponement that was asked for by the defendants or their friends was for a longer time in order, they said, to enable their friends to appear at the election. The Circle Officer who was in charge of the election waited for half an hour and then the meeting was held. Therefore, it appears to us that this objection should not have been allowed to be raised. It also appears to us that there is no substance in this objection raised by the defendants.

Then as to the second point, namely, whether there was a quorum present at the meeting. The learned Subordinate Judge found that the defendants Nos. 1 and 2, and 4 other persons were present at the meeting,

But in one place of his judgment the learned Subordinate Judge says this "A person may be said to be present at a meeting when he willingly joins in it or takes any part in its proceedings. Can it be said that the defendants Nos. 1 and 2 willingly joined the meeting or took any part in it". It is somewhat difficult to understand what really the learned Subordinate Judge meant. It is quite clear that defendants Nos. 1 and 2 and another person were all present at the meeting. The fact that they did not vote at the meeting would not make them any the less person present at the meeting. What the learned Subordinate Judge really means when he says that the defendants were not willingly present at the meeting is difficult to follow. All that appears is that the defendants did not like to record their votes. That simply cannot make the persons who were present at the meeting as absent from it. It is hardly necessary to point out that at a meeting many members who join the meeting refrain from voting or taking any active part in it such persons cannot be said to be persons absent from the meeting. We think, therefore, upon the findings the defendants Nos. 1 and 2 and other voters were all present at the meeting. There was a sufficient quorum, because the number fixed for a quorum is five and as a matter of fact six persons were present at the meeting. I might point out that if a person after joining a meeting does not want to be a member of it the easiest and usual course for him is to leave the place. Simply, taking no active part in the meeting does not make him absent from the meeting, when as a matter of fact he was there.

We think, therefore, the judgment of the learned Subordinate Judge cannot be supported and upon the findings we hold that the meeting at which the plaintiff was elected as President was a perfectly valid proceeding and the election was valid. The result, therefore, is that we restore the judgment of the Trial Court with costs of this Court and of the lower Appellate Court.

Cuming, J.—I agree.

Z. K. *Appeal allowed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 174 OF 1924.

May 25, 1925.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Maung Ba.

Musammat HALIMA BEE BEE—APPELLANT

versus

Musammat KHAIRUNNISSA BEE BEE—RESPONDENT.

Registration Act (XVI of 1908), ss. 32, 33, 38—Presentation by unauthorized person—Admission of execution before officer not competent to accept presentation, effect of—Registration, validity of—Pardanashin *lady, transfer by—Burden of proof.*

A person taking a conveyance of property from a *pardanashin* lady must show that the lady had advice and fully understood the terms and conditions of the conveyance and the results flowing from her actions. [p. 645, col. 2.]

A Registrar or Sub-Registrar has no jurisdiction to register a document unless he is moved to do so by a person who has executed or claims under the document, or by the representative or assign of such person or by an agent of such person, representative or assign duly authorized by a power-of-attorney executed and authenticated in the manner prescribed in s. 33 of the Registration Act. [p. 646, col. 1.]

The object of this provision is to make it difficult for persons to commit fraud by means of registration under the Act and it is the duty of the Courts not to allow the imperative provisions of the Act to be defeated. [*ibid.*]

Where a document is presented for registration by a person who is not authorized to do so, the defect cannot be cured by the executant's admission of execution made before an officer to whom a commission has been issued under s. 38 of the Registration Act, but who has no jurisdiction to accept the document for registration. [p. 646, col. 2.]

Appeal against a decree of the Original Side of this Court in Civil Regular No. 248 of 1923.

Mr. *Tun Byu*, for the Appellant.

Mr. *Po Han*, for the Respondent.

JUDGMENT.—The facts of this case are simple and are not open to any real doubt.

The defendant was the aunt of the plaintiff. She was one ef three widows who were the sole heirs to the husband's estate. By consent the widows appointed a *Punchayet* to administer the estate and divide the results between the widows. It was again mutually agreed that the three houses of which the estate principally consisted should be purchased by the widows each taking a house. The defendant under this agreement was to take the house in suit for Rs. 9,000. She had to deposit Rs. 1,000 as earnest-money. She had apparently no means and borrowed this Rs. 1,000 from plaintiff's husband. Nothing was thereafter done for two years, and then the *Punchayet*

called upon the widows to pay up the balance of the purchase-price and take over the houses. To raise the Rs. 8,000 the defendant agreed to take over from the estate a debt of Rs 4,000 due to a Chetty. The Chetty agreed to this being done on condition that defendant executed a mortgage on the property on its being conveyed to her. She had some Rs. 2,000 due to her from the other parts of the estate which was already in the hands of the *Punchayet*. She raised Rs. 2,000 as a further loan from plaintiff's husband. On the 20th November 1919 she received a conveyance of the house from the administratices, and, on the same day, she executed a mortgage in favour of the Chetty. On the following day she executed a conveyance of this property subject to the mortgage to the plaintiff in consideration of Rs. 5,000. That document was presented for registration by Mr. S. Dhar who is described as the Advocate of the plaintiff.

As to how this conveyance to plaintiff came to be executed, we have the evidence of Mr. Abdul Rahman who was the Chairman of the *Punchayet* and apparently, a man of position who was trusted by all parties. He says that plaintiff's husband came to him and asked him to have the house conveyed to him as he had supplied the earnest-money already paid and that he would lose it if the Committee sold the house by public auction as they threatened to do if defendant did not pay up the purchase-price. He replied that he would consult the defendant and he says he told her of this, and that if the house was sold to plaintiff it would remain in the family. It was apparently assumed that defendant would never be able to pay off the debt due to the Chetty, and that the house would eventually be attached and brought to sale and would pass out of the family. The plaintiff had lived with the defendant ever since childhood until she married, and even after her marriage she used to stay with defendant and the relationship between them was more that of a mother and daughter than that of an aunt and niece.

Abdul Rahman states that defendant agreed and that in consequence this conveyance was drawn up in plaintiff's favour. The defendant, however, on the other hand, merely alleges that it was suggested to her that she should put the house in somebody else's name. She says that Abdul Rahman and Akbar Khan the paintiff's husband both came to her after the death of her brother, and that Abdul Rahman said "take the house. I said I would take the house." Then they said "where is the money. I said that the Chetty would give the money. Abdul Rahman advised me to keep the house in some body else's name. Akbar Khan then told me to keep it in his wife's name remarking that he would not play false with me. He further said that he had Rs. 2,000 lying idle with him and told me to take it. He added that I could get other moneys from him and that it was not necessary to get money from others. I used to get money from Akbar Khan whenever I wanted a loan since then." The position is no doubt unsatisfactory. While there is no reason to believe that this was a deliberate plot to cheat the old woman out of a very valuable property, it is, at the same time, necessary to bear in mind that she was a *purdanashin* lady and that her sole adviser her brother Abdul Razak had died four or five days before the notice was issued by the Committee calling upon the widows to make good the sales of the houses. It may be that she was upset by her brother's sudden death and had no one to advise her. She trusted plaintiff's husband, and she was able to see there was very little hope of her being able to save enough money out of the rents obtained from the house to pay off the Chetty's debt; and it is possible, therefore, that she agreed to sell the house to plaintiff on the terms set out in the deed coupled with verbal terms that they would maintain her so long as she lived. That there were some such terms appears from the postscript to the letter, Ex 3, but, at the same time, it is necessary that plaintiff should show that defendant had advice and fully understood all the terms and conditions of the conveyance and the results flowing from her action. That house is now worth between Rs. 30,000 and Rs. 40,000 and the plaintiff would have obtained it for about Rs. 10,000. Although the plaintiff has apparently carried out the promise to support the old lady it does not establish why it was necessary to go through the farce of conveying the property to the defendant one day and her conveying it to the plaintiff on the following day. It may have been to avoid the necessity of selling the house by public auction The only object of that would be to enable the plaintiff to get the property at a very small figure —far smaller than would have been realised

had the property been sold by public-auction. The greater portion of the Chetty's debt has been paid off. It is admitted that plaintiff's husband advanced Rs. 1,700 over and above the Rs. 3,000 which had been already advanced for the purchase of the house. It is also admitted that he paid defendant money every month and that she could raise from him any other money she wanted. However, there is another point which is fatal to the plaintiff's case. The plaintiff can acquire no title to this property without a registered deed of conveyance. The conveyance was presented for registration by Mr. S. Dhar. There is no question that he had no such power-of-attorney and the presentation by him was by an unauthorised person.

It was held by their Lordships of the Privy Council in *Jambu Parshad* v. *Muhammad Nawab Aftab Ali Khan* (1) that a Registrar or Sub-Registrar has no jurisdiction to register a document unless he is moved to do so by a person who has executed or claims under it or by the representative or assign of such person, or by an agent of such person, representative or assign duly authorised by a power-of-attorney executed and authenticated in the manner prescribed by s. 33 of the Act.

It is pointed out that the object of these provisions is to make it difficult for persons to commit fraud by means of registration under the Act and that it is the duty of the Courts in India not to allow the imperative provisions of the Act to be defeated. That decision was distinguished in a later decision by their Lordships in the case of *Bharat Indu* v. *Muhammed Hamid Ali Khan* (2). In this case a servant of the executant brought a document to the Sub-Registrar saying that the executant was ill and could not come himself. The Sub-Registrar then went to the residence of the executant and read over to him the contents of the document. The executant admitted execution and completion and asked that after registration the documeut should be given to the person named in it. It was registered, and it was held that the executant was the person who really presented the document and was so treated by the Sub-Registrar, and that the document was, therefore, duly registered and authenticated. In the present case, what happened was that, on presentation by Mr. S. Dhar, the Sub-Registrar issued a Commission under s. 38 of the Act to M ang Chan Mya the head clerk of the office for the purpose of enquiring whether the document had been executed by the defendant, and the head clerk having gone to the defendant reported that she had admitted exe·ution and also admitted the receipt of the consideration as stated in the document. In this case it will be noticed that the person who went to the executant was a person with no jurisdiction to receive presentation, and the case is on all fours with the decision of the Allahabad High Court in *Khalil uddin Ahmed* v. *Banni Bibi* (3) where it was held that the mere admission of the executant before an officer who had no jurisdiction to accept the document for registration was no compliance with the requirements of the Act. As regards presentation with that decision we agree. In the present case it cannot be held that this conveyance was duly presented for registration and that, all that followed thereafter was invalid with the result that the document has not been duly registered. If this defect was brought to notice in the lower Court steps might have been taken to obtain re-registration under the provisions of s. 23 (*a*) which has been incorporated in the Act in order to give an opportunity for overcoming such mistakes, but that provision has not been taken advantage of and, as matters stand, we must, therefore, hold that this conveyance, not being legally registered, is of no validity and does not convey a title to the premises, and that plaintiff is not entitled to the declaration of the title that she seeks or to possession. We are unable to agree with the learned Judge in the Court below that this is merely a technical objection taken at the very last moment. It was taken as soon as the document was produced.

It is admitted that these findings cannot be contested, but we are asked to allow the appellant to amend the prayers in the plaint by adding prayers for the execution and registration of a fresh conveyance, or for the refund of the money advanced on the failure of consideration.

As regards ths first prayer, it would be necessary to allow an amendment of the

(1) 28 Ind. Cas. 422; 37 A. 49; 19 C. W. N. 282; 13 A. L. J. 129; 17 M. L. T. 148; 21 C. L. J. 218; 2 L. W. 277; 28 M. L. J. 577; 17 Bom. L. R. 413; (1915) M. W. N. 502; 42 I. A. 22 (P. C.).

(2) 58 Ind. Cas. 386; 42 A. 487; 18 A. L. J. 717; 39 M. L. J. 41; (1920) M. W. N. 413; 28 M. L. T. 98; 25 C. W. N. 73; 22 Bom. L. R. 1362; 47 I. A. 177; 13 L. W. 4; 2 U. P. L. R. (P. C.) 179 (P. C.).

(3) 17 Ind. Cas. 274; 35 A. 34; 10 A. L. J. 440.

plaint, an amendment which is in direct conflict with the allegations contained in the plaint. It is said that plaintiff need not have produced or proved the conveyance because execution was admitted. Consideration was denied. We can find no sufficient reason to allow at this stage any amendment in that direction.

As regards an amendment by adding an alternative claim for refund of the money paid, we can see no particular advantage, seeing that the evidence has not beeen gone into in the manner in which it would have to be gone into if such a claim is advanced, and, having regard to all the facts and circumstances of the case, we do not consider that it would be of any advantage to either party. There would practically be a re-trial of the case and seeing that the present position is due to plaintiff's own action, we see no reason to allow the amendment, it being open to plaintiff if so advised to bring suit for the recovery of the money which it is said that defendant is ready and willing to pay.

For these reasons we accept the appeal, we reverse the finding of the Court below and we dismiss the plaintiff's suit with costs throughout.

Z. K. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 20 OF 1925.

July 23, 1925.

Present :—Mr. Simpson, A. J. C.

MAKHDOOM BAKHSH SINGH—APPLICANT

versus

GANGA PRASAD—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Remedy, other, open to party—Revision, whether competent.

Where an applicant possesses any other remedy the High Court will not interfere in revision.

Muhammad Akbar Ali v. *Saiyid Tahir Husain*, 2 Ind. Cas. 284; 12 O. C. 109, followed.

Revision from an order of the Subordinate Judge, Partabgarh, dated the 3rd November 1924.

Mr. *Ali Zaheer*, for the Applicant.

Messrs. *Girja Saran Lal* and *Hyder Husain* for Mr. *Radha Krishna*, for the Opposite Party.

ORDER.—This is an application for revision. A preliminary objection is taken that the applicant possesses a remedy under s. 73 of the C. P C. to bring a suit. It was held by a Judge of this Court in *Muhammad Akbar Ali* v. *Saiyid Tahir Hussain* (1) that where an applicant possesses any other remedy this Court will not take up his case in revision. Following that decision I dismiss this application with costs.

G. H. *Application dismissed.*

(1) 2 Ind. Cas. 284; 12 O. C. 109.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 35 OF 1924.

May 13, 1925.

Present:—Mr. Justice Heald and Mr. Justice Rutledge.

V. S. T. THAMSUNDASEEN—APPLICANT

versus

S. M. A. R. R. M. CHETTY FIRM AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Amount or value of subject-matter, determination of—Interest accruing due between date of filing of suit and passing of decree, whether can be included.

Where interest is claimed in the plaint on the suit amount, such interest as accrues during the period between the filing of the suit and the passing of the decree is part of the subject-matter of the suit and the amount of such interest can be regarded as part of the amount or value of the subject-matter of the suit in the Court of first instance within the meaning of s. 110 of the C. P. C. [p. 649, col. 1.]

Mr. *B. K. B. Naidu*, for the Applicant.

Messrs. *Anklesaria* and *J. K. Munshi*, for the Respondents.

JUDGMENT.—The 1st respondent, the S. M. A. R. R. M. Chetty Firm, sued the present applicant, V. S. T. Thamsundaseen (Thamsoo Thaseem) with others alleged to be his partners, as well as the second respondent and the Burma Railways Company, Limited, to recover from applicant and his partners and the 2nd respondent Rs. 9,965 5 0 with interest at the rate of Re 1 per cent. per mensem from the date of the institution of the suit to the date of realisation, and for certain ancillary reliefs.

The suit was instituted on the Original Side of the Chief Court of Lower Burma on the 13th of October 1920 and was dis-

missed by that Court on the 5th of July 1922.

The plaintiffs in the suit appealed and a Bench of this Court gave them a decree against the present applicant for the full amount in suit together with interest at Rs. 12 per cent. per annum from the institution of the suit to the date of the decree, and further interest at a lower rate from the date of the decree to the date of realisation and with costs.

Applicant has now asked for leave to appeal to His Majesty in Council, and the question arises whether or not the amount or value of the subject-matter of the suit in the Court of first instance was ten thousand rupees or upwards.

Applicant's learned Advocate admits that the suit and the appeal were actually valued at Rs. 9,965-5 0 but he contends that, because interest was claimed in the plaint, the claim to interest was part of the subject-matter of the suit and, therefore, such interest at any rate as accrued between the institution of the suit and the date of the decree ought to be regarded as part of the subject-matter of the suit in the Court of first instance, and for the purposes of valuation under s. 110 of the Code ought to be added to the principal sum of Rs. 9,965-5 0 which was claimed.

If such interest can be added, then the amount or value of the subject-matter of the suit will be Rs. 10,000 or upwards.

The learned Advocate admits that he has not been able to find any authority which expressly warrants such addition. He has referred us to three decisions, namely, the cases of *Moti Chand* v. *Ganga Prasad Singh* (1), *Dalgleish* v. *Damodar Narain Choudhry* (2) and *Maung Thwe* v. *A. L. A. R. Chetty Firm* (3).

In the first of these cases the applicant for leave had obtained a decree in the Trial Court for Rs. 9,496, which included interest up to the date of the decree and for further interest up to the date of realisation. It was contended that interest which had accrued after the date of the decree could be taken into consideration for the purposes of the rules regarding leave to appeal, as being part of the subject-matter of the suit in the Trial Court. Their Lordships of the Privy Council said that "the amount or value of the subject-matter of the suit in the Court of first instance, construing that in the manner most favourable to the proposed appellant" (that is including the interest up to the date of the decree) "was at the outside the amount for which he recovered his decree, which was below Rs. 10 000," and they held that leave had been rightly refused. That decision clearly does not authorise the inclusion of interest from the date of institution to that of the decree, but on the other hand it does not reject the claim that such interest may be included.

In the second case cited the property in suit was valued at Rs. 5,4t0 but there was a claim for over Rs. 30,000 as mesne profits. A Bench of the High Court at Calcutta held that the plaintiffs in the suit, who were the applicants for leave to appeal to the Privy Council, were entitled to include their claim for mesne profits for the purpose of showing that the value of the matter in dispute reached the statutory amount of Rs 10,000. It is to be noted, however, that most of the mesne profits claimed in that case must have accrued before the suit was instituted, so that that decision cannot be regarded as an authority for the proposition that mesne profits (or interest) accruing between the institution of the suit and the decree can be included.

In the third case the learned Judges said that the value of the suit in the Court of first instance is the amount claimed, together with *at most* interest which had accrued due up to the date of the decree. The effect of this *dictum* is clearly similar to that of the Privy Council in the Allahabad case. It does not authorise the inclusion of the interest, but it does not prohibit it.

The two Indian rulings cited were considered in the case of *Subramania Aiyar* v. *Sellammal* (4), in which it was said that mesne profits subsequent to the date of the suit cannot be included in the subject-matter of the suit. But in that case the question which arose was not whether mesne profits for the period between the institution of the suit and the date of the decree could be included, but whether those mesne profits and further mesne profits accruing after the date of the decree

(1) 24 A. 174; 6 C. W. N. 562; 29 I A. 40, 4 Bom. L. R. 156; 8 Sar. P. C. J. 247 (P. C.).

(2) 33 C. 1286.

(3) 68 Ind. Cas. 690; 11 L. B. R. 335; (1923) A. I. R. (R.) 71.

(4) 31 Ind. Cas. 296; 39 M. 843; 2 L. W. 1057; 18 M. L. T. 450; (1915) M. W. N. 441; 30 M. L. J. 317.

could be included, and there was no decision as to whether or not in a case where the mesne profits in question were profits up to the date of the decree only, those profits could be included. It may be noted that one of the learned Judges in that case said that he was unable to draw any distinction between interest and mesne profits in respect of claims to include them in the subject-matter of the suit and we agree that in this respect interest and mesne profits are on the same footing.

The position, so far as the authorities are concerned, seems to be that there is no decision to the effect that interest (or mesne profits) from the date of institution to that of decree cannot be considered as being part of the subject-matter of the suit, while there are two decisions, one of them a judgment of the Privy Council, which contemplate, though they do not actually authorise, the inclusion of such interest as part of the subject-matter.

In the absence of any authoritative decision on the subject we are bound to decide the matter for ourselves, and we do not think that we shall be straining any principle of law or reason if we hold that where interest is claimed in the plaint, such interest as accrues during the period between the filing of the suit and the decree is part of the subject-matter of the suit and that the amount of such interest can be regarded as part of the amount or value of the subject-matter of the suit in the Court of first instance within the meaning of s. 110 of the C. P. C.

We hold that the subject-matter or the present suit in the Court of first instance, being Rs. 9,965-5 *plus* interest at 12 per cent. per annum for nearly two years, is over Rs. 10,000 and that the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is over Rs. 10,000, and as the decree appealed from reverses the decision of the Court below, we find that the applicant is entitled to the leave for which he applies.

We accordingly grant applicant a certificate that the case fulfils the requirements of s. 110 of the Code, and allow him the costs of this hearing Advocate's fee to be five gold *mohurs*.

Z. K. *Certificate granted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 580 OF 1923.

July 23, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

RAJENDRA NATH CHATTERJEE AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOHESHATA DEBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 20, 22—Appeal—Party not interested in result of appeal, whether can be impleaded by Court—Cross-objections against party not impleaded as respondent, whether can be maintained—Landlord and tenant—Construction of document—Lease—Permanent tenancy—Covenant restricting transfer, effect of.

Rule 22 of O. XLI of the C. P. C. does not contemplate the filing of cross-objections against a person who is not a party to the appeal. [p. 650, col. 2.]

A defendant against whom a suit is dismissed and who is not made a party to the appeal preferred by the other defendants against the decree passed against them, is not interested in the result of the appeal within the meaning of r. 20 of O. XLI of the C. P. C., and cannot, therefore, be impleaded as a respondent under that rule. [p. 651, col. 1.]

Rule 20 of O. XLI of the C. P. C. contemplates a person being made a party to the appeal at the time of the hearing of the appeal, inasmuch as the Court must be in full possession of the facts, so that it may be in a position to say whether or not any person is interested in the result of the appeal. The rule does not contemplate that a person should be made a party to an appeal simply in order to enable one of the respondents to prefer a cross-objection against him. [*ibid.*]

Where a permanent tenancy at a fixed rate of rent is created but there is a clause in the lease that the tenant would have no right to alienate his interest in the land held under the lease, the covenant restricting the transferability of the tenant's interest is inoperative in the absence of a clause for re-entry in the event of a breach of the covenant. [p. 651, col. 2.]

Appeal against a decree of the Subordinate Judge, Hooghly, dated the 31st October 1922, modifying that of the Munsif, Third Court at Serampur, dated the 17th August 1921.

Dr. *Jadu Nath Kanjilal* and Babu *Jagat Chandra Bose*, for the Appellants.

Dr. *Dwarka Nath Mitra* and Babu *Kanai Dhan Dutt*, for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiff sued for *khas* possession of 4 *bighas* of land on the ground that the tenant who transferred them had no transferable interest in them and the transferees were mere trespassers.

The plaintiff's case was that the defendant No. 3, Haridas Ghose, held an under-

raiyati under her in respect of the land in suit and had no transferable interest in it. The defendant No. 3 executed two mortgages in respect of these lands, one in favour of defendant No. 7 and the other in favour of defendant No. 8. Their united mortgages covered the whole of the lands in suit. Both these persons sued on their mortgages and obtained decrees and purchased the lands. Hence the plaintiff contended that the defendant No. 3, the original *raiyat*, had abandoned the lands and that she was entitled to re-entry. The defendant's case was that the plaintiff was not a *raiyat* but a tenure-holder, that he was a *raiyat* at a fixed rate of rent and further that the entire holding had not been purchased by defendants Nos. 7 and 8 but that $2\frac{1}{2}$ *cottahs* of this holding was still in the possession of the original *raiyat* Haridas Ghose and, therefore, there had been no abandonment.

The Court of first instance held that the plaintiff was a tenure-holder and the defendant was an occupancy *raiyat* and for reasons which I need not detail he held that the plaintiff was not entitled to *khas* possession as against defendant No. 3, but that he was entitled to *khas* possession against defendants Nos. 1, 2, 4, 5, 6, 7 and 8. The suit was decreed in the Court of first instance on the 18th of August and on the 31st of August defendants Nos. 7 and 8 appealed to the District Court. The sole respondent in that appeal was the plaintiff. Defendant No. 3 was not a party to the appeal. On the 30th September the plaintiff filed certain cross-objection against defendant No. 3 who was not a party to the appeal and also along with this cross-objection filed an application asking the Court to make defendant No. 3 a party to the appeal and this was done on the 18th of April 1922. The lower Appellate Court held that defendant No. 3 was only an ordinary occupancy *raiyat* and was not as he claimed a *raiyat* at fixed rate and had no transferable interest in the property. He further held that defendant No. 3 had abandoned the holding and that, therefore, the plaintiff was entitled to eject defendants Nos. 7 and 8 who were only trespassers. He, therefore, rejected the appeal of defendants Nos. 7 and 8 and decreed what he described as the cross-appeal of the plaintiffs. The result being that the whole of the plaintiff's suit was decreed and it was held that she was entitled to *khas* possession of the entire plot by ousting all the defendants therefrom

Defendants Nos 3, 7 and 8 have appealed to this Court. The learned Advocate who has appeared for the appellants contends first of all that so far as defendant No. 3 is concerned the cross-objection must be held to be barred by limitation and further that defendant No. 3 not being a party to the appeal it was not open to the plaintiff to make a cross-objection against him. Some discussion ensued whether this was a cross-objection or a cross appeal. It is perfectly clear, I think, from all the circumstances in the case that the parties intended it to be cross-objection. Obviously if it was a cross-appeal there would be no object in filing an application asking the Court to make defendant No. 3 a party, because clearly defendant No. 3 would have been made a party by a cross-appeal being filed against him. Therefore, I think it is quite clear that this was a cross-objection. Now O. XLI, r, 22 provides that "Any respondent though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal" and sub-cl. (3) of the rule provides that unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his Pleader of having received a copy thereof the Appellate Court shall cause a copy to be served on such party of his Pleader at the expense of the respondent. It, therefore, seems to me quite evident that the Code does not contemplate filing of cross-objection against a person who is not a party to the appeal, and it is quite clear that the plaintiff herself realized this difficulty, because she made an application that defendant No. 3 should be added as a respondent to the appeal and this application was granted by the lower Appellate Court on the 18th of April in spite of the strenuous objection of defendant No. 3. Now, the only rule under which defendant No. 3 could have been added as a party to the appeal is r. 20 of O. XLI which runs as follows:—"Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hear-

ing to a future day to be fixed by the Court and direct that such person be made a respondent". The order of the learned Subordinate Judge making defendant No. 3 respondent to the appeal is clearly wrong. In the first place defendant No. 3 was not a person who was in the least interested in the result of the appeal. The suit had been dismissed against him and it was quite immaterial to him what happened in the appeal. Secondly, the rule contemplates a person being made a party to the appeal at the time of the hearing of the appeal, obviously because it contemplates that the Court must be in full possession of the facts so that it may be in a position to say whether or not any person is interested in the result of the appeal. I do not think for one moment that the Code contemplates that a person should be made a party to an appeal simply in order to enable one of the respondents to prefer a cross-objection against him, I am, therefore, of opinion that it was not open to the lower Appellate Court to make defendant No. 3 a party to the appeal simply for the purpose of allowing the plaintiff to make a cross-objection against him.

The second contention of the learned Advocate is that on a construction of the *patta*, Ex. A, it is quite clear that defendant No. 3 was a *raiyat* at fixed rate. The *patta*, Ex. A, has been placed before me. On reading the *patta* there is no doubt but that it purports to grant a tenancy at a fixed rate of rent in perpetuity. The document begins by saying "A permanent lease in favour of Haridas Ghose" and states as follows "As you have prayed to me for a document in the form of a permanent lease I grant this written deed of lease in accordance with your aforesaid prayer, and this deed of lease is to the effect that you will pay me the said rent annually in *kists* as stated in the Schedule given below and shall receive proper receipts for the same" The document further states "There will be no increase or decrease over and above or below the rent that is fixed now only in due payment of the fixed rent you will be in possession of the said land by cultivating the same from generation to generation". These terms are clearly those of a permanent tenancy at a fixed rate of rent. There is, however, in the lease the following clause "you will have no right to sell your right in the land held under the lease." From this the respondent has argued that the lease does not contain all the elements necessary to constitute a permanent tenancy because there is a restriction on transferability. Apparently this is the clause in the lease which weighed with the lower Appellate Court in holding that the lease was not a permanent lease at a fixed rate of rent. But the learned Judge in the Court below apparently ignored the fact that there was no re-entry clause in the event of the breach of this particular covenant in the lease and in the absence of this re-entry clause this particular covenant restricting the transferability of the land is inoperative.

The result is, therefore, that the appeal must succeed and the plaintiff's suit is entirely dismissed with costs both here and in all the Courts.

Chakravarti, J.—I agree.

M. B. *Appeal allowed.*

Z. K.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 20 OF 1925

AND

CIVIL MISCELLANEOUS PETITION No. 183 OF 1925.

March 12, 1925.

Present:—Mr. Justice Wallace.

Sri PARAMAHAMSA SRIRANGA NARAYANA JEER SWAMIGAL—PETITIONER

versus

Sri PARAMAHAMSA AHOBILA JEER SWAMIGAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, rr. 1, 2—Temple—Suit to restrain defendant from interfering with usages of temple—Temporary injunction, whether can be granted—Order based on opinion of Judge, validity of.

It is undesirable for an Appellate Court in an appeal from an interlocutory order to decide that the plaintiff has no cause of action. [p. 653, col. 1.]

Judicial matters cannot be decided on the private opinion of the Judge, nor can such opinion be substituted for a decision on evidence, even though the taking of that evidence may involve much time and trouble. [p 653, cols. 1 & 2.]

Where an act of the defendant which the plaintiff seeks to restrain by an *interim* injunction is alleged to be an innovation on the established usages of an institution, the proper course for the Court to adopt is to maintain the *status quo ante* until the disposal of the suit. [p 653, col. 1.]

The head of the Thengalai *Mutt* at Srirangam brought a suit against the *Jeer* of the Ahobilam *Mutt*

restraining the latter from bringing into the temple at Srirangam certain paraphernalia and emblems pertaining to his office bearing *vadagalai namams* when entering the temple for purposes of worship, on the ground that such entry was opposed to the usage of the temple which was exclusively *Thengalai* in character and was offensive to the worshippers and that the plaintiff's own position and sanctity were likely to suffer in the eyes of the ordinary worshippers by defendant's action. The Trial Court on the application of the plaintiff granted a temporary injunction restraining the defendant from committing the acts complained of during the pendency of the suit. On appeal, the lower Appellate Court dissolved the injunction on the ground that in its opinion the introduction of the *jeer's* paraphernalia with *vadagalai namams* into the temple for a short time could not alter the ritual of the temple or go counter to its usage. On revision:

Held, that the order of the lower Appellate Court being based upon the opinion of that Court and not upon a judicial consideration of the case, was not a judicial order and must, therefore, be set aside with a direction that the appeal against the order of the Trial Court should be re-heard. [p. 653, col. 2.]

C. R. P. No. 20 of 1925.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the judgment and order of the Court of the Subordinate Judge, Trichinopoly, in C. M. A. No. 4 of 1924, preferred against that of the Court of the District Munsif, Srirangam, in I. A. No. 1328 of 1924, in O. S. No. 430 of 1924.

C. M. P. No. 183 of 1925.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an injunction restraining the 1st respondent herein, from carrying or causing to be carried any of his paraphernalia and reciting or causing to be recited any religious texts, by the *vadagalais* during his visit to the Srirangam Temple and restraining the other respondents from carrying any of the above said paraphernalia or reciting any religious texts during the 1st respondent's visit to the Srirangam Temple.

Messrs. *T. R. Ramachandra Iyer* and *R. Purashothama Iyengar*, for the Petitioner.

Mr. *Nugent Grant*, for the Respondents.

JUDGMENT.—This revision petition is against the order of the Subordinate Judge of Trichinopoly cancelling a temporary injunction granted by the District Munsif, Srirangam, in O. S. No. 430 of 1924 on his file. The plaint in that suit was filed by the head of the Tengalai *mutt* at Srirangam and the principal defendant is the *jeer* of the Ahobila *mutt*: the other defendants are the trustees of the Srirangam Temple. The general relief claimed in the plaint is that the *jeer* of Ahobila *mutt* should be restrained from bringing into the Srirangam Temple certain paraphernalia and emblems pertaining to his office some of which bear the *vadagalai namam*, when he proposes to enter the temple for the purpose of worship. The trustees are made parties because they have by a resolution permitted him to enter accompanied by these emblems The plaintiff's contentionsas I read the plaint are mainly two. First, that such entry involving the introduction of *vadagalai namams* is opposed to usage and tradition and is offensive and the worshippers in the plaint temple which is claimed to be exclusively Tengalai, is a sacrilege to the deity, and this is, therefore, a breach of trust by the trustees whose duty it is to preserve and not to destroy the essential customs and usages of the temple which they have in trust, and secondly, that by according to the head of the Ahobila *mutt* honours which are not permitted and are not claimed by the plaintiff himself, the plaintiff's own position and sanctity are likely to suffer in the eyes of the ordinary worshippers. Pending the trial the District Munsif granted the injunction sought for. The Subordinate Judge has reversed that order, and the plaintiff comes up in this revision petition against the Subordinate Judge's order.

The plaintiff is bound to show that the lower Court has exercised its jurisdiction irregularly or illegally. His main point is that the Subordinate Judge has not at all considered his cause of action based on a breach of trust by the trustees, but has only regarded his contention about his personal humiliation.

The extent of the plaintiff's authority to control the ritual in the temple, the validity of his claim that the temple is exclusively *Tengali* and other matters are challenged and these matters have not been so far gone into by the lower Courts. The Subordinate Judge professed to base his order on the assumption that the plaintiff's statements of fact in the plaint were correct, "that he fills the capacities he claims and that the *jeer* and trustees will be introducing an innovation when the former is allowed to enter the outer gates of the temple with his paraphernalia." Then he goes on to lay down correctly that if the trustees make alterations in the ritual or decide questions of respect to visitors

etc., which affect the religious sanctity of the temple, they cannot in law do this if it amounts to a breach of their trust. He goes on to consider whether it is a reasonable contention that the resolution of the trustees is subversive of the Tengalai character of the trust; but in considering that question, he does not at any stage consider more than whether the plaintiff's personal grievance is well-founded, and whether the grievance gives plaintiff any cause of action. He finds that this grievance is imaginary and sentimental and that it is no ground for a civil action. I would here emphasise the undesirability of the lower Court in appeal from an interlocutory order laying down that a plaintiff has no cause of action. He goes on casually to remark that it is difficult to see how the introduction of the *jeer's* paraphernalia with *vadagalai namams* into the temple for a short time could alter the ritual of the temple or go counter to its usages. Now clearly it is not a matter which can be decided merely on the opinion of the Judge. It is the chief issue in the suit to be decided on the evidence. The Subordinate Judge merely dismissed this claim as an ebullition of sectarian hatred. That may or may not be so, but it cannot be decided merely by the Judge's own personal feelings that the entry of the *jeer* with his paraphernalia into the temple could not have "the far reaching effect of affecting the character of the temple as a Tengalai institution." I do not find in his order any consideration from a judicial point of view, of the question whether or not the plaintiff's contention that the trustees have committed a breach of trust is so unreasonable as to be refused a judicial hearing. The Subordinate Judge assumes that it is an innovation on the established usage. In such a case, in the matter of an interlocutory order, I should have thought the proper course was to maintain the *status quo* until the disposal of the suit. The assumption may, of course, be a wrong one but the Subordinate Judge has not looked at the case from that point of view. His order in effect is:—Granted that this is an innovation, my private impression is that it will not affect the character of the temple and, therefore, I dismiss the plaintiff's petition. This is not a judicial order or a proper exercise of jurisdiction. Judicial matters cannot be decided on the private opinions of the Judge nor can that opinion be substituted for a decision on evidence, even though the taking of that evidence may involve much time and trouble.

It is urged for the 1st defendant, the *jeer*, that the lower Court did not think it worthwhile enlarging on this part of the case, because the suit so far as it is founded on an alleged breach of trust is not maintainable because no sanction has been obtained under s. 92 of the C. P. C. There is nothing in the Subordinate Judge's order to indicate that, and so far as this Court is concerned, I do not think it proper at this stage to go into the question whether s. 92 applies. I understand there is an issue on this very point, and it is certainly not a matter concluded against plaintiff by authority. It may be advisable I merely throw out the suggestion that the Trying Court should dispose first of this issue as to whether the suit so far as the relief based on the breach of trust is concerned is maintainable.

I am of opinion for reasons given, that the lower Court has not exercised its jurisdiction regularly and that the order under revision cannot be supported and must be set aside. The appeal against the District Munsif's order will have to be re-heard and I, therefore, allow the petition and direct the appeal against the District Munsif's order to be re-heard by the District Judge, to whom I hereby transfer the appeal for hearing. The injunction order passed by the District Munsif is thus restored pending the re-hearing of the appeal. The petitioner will get his costs in this petition from the 1st defendant and the other parties will bear their own costs.

V. N. V.
Z. K.

Order set aside: Case remanded.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 124 OF 1924.

May 4, 1925.

Present:—Mr. Justice Heald and Mr. Justice Chari.

MAUNG PO SAN AND OTHERS—APPELLANTS

versus

MAUNG PO THET—RESPONDENT.

Buddhist Law, Burmese—Inheritance—Death of one parent—Re-marriage of surviving parent—Child of first marriage, whether entitled to share in jointly acquired property of parent and step-parent.

What the Burmese Buddhist Law regards in its rules for partition is the family rather than the individual and so long as the family subsists, all who are members of it are regarded as being entitled to partition of its property on its dissolution. Where after the death of one of the parents a child of the first marriage does not take a share either on the re-marriage or on the death of the surviving parent, he is entitled to share in the estate of the step-parent, and in such part of that estate as can be regarded as jointly acquired property of the marriage of the parent and step-parent, his share as against his parent's step-children is one-half. The estate in which such child shares is the family estate as it stands on the death of the step-parent. [p. 651, col. 2; p. 655, col. 2.]

Second appeal against a decree of the District Court, Toungoo, in Civil Appeal No. 726 of 1923.

Mr. *Lambert Junior*, for the Appellants.

Mr. *Campagnac*, for the Respondent.

JUDGMENT.

Heald, J.—Respondent, who gives his age as 46, is a son of Shwe Baw and is first wife, Ma Shwe Me who died 45 years ago. After Ma Shwe Me's death, Shwe Baw married a second wife, Ma I, whom he subsequently divorced. He then married a third wife Ma Te, a widow with three children, two of whom are the first and second appellants, the third having died and left three children who were defendants in the suit but have not joined in the appeal. Shwe Baw died 28 years ago leaving respondent, who would then be at least 18 years of age, and Ma Te and her children surviving him. Ma Te died two years ago.

Respondent sued Ma Te's children and their representatives to recover a one-half share of certain properties which he alleged to be jointly acquired property of the marriage of Shwe Baw and Ma Te, and he joined the third and fourth appellants as being purchasers from the first and second appellants of a plot of paddy land which stood in Ma Te's name and which he alleged to form part of the jointly acquired property.

The defence, so far as appellants are concerned, was that respondent had received his share on his father's death, that the property was not the jointly acquired property of the marriage of Shwe Baw and Ma Te, that respondent was not entitled to mesne profits, that his claim, which came into existence at the death of Shwe Baw years 28 ago was time barred, and that even if he was entitled to claim, the amount paid by them for the funeral of Ma Te must be taken into consideration.

The lower Courts found that it was not proved that respondent received a share on his father's death, that the estate in which respondent was entitled to share consisted of the plot of paddy land which was worth Rs. 3,780 a house-site worth Rs. 200, four buffaloes worth Rs 170 and two bullocks worth Rs. 120, that respondent was entitled to half the value of that estate, less Rs. 200 paid by the first and second appellants for Ma Te's funeral expenses, and that he was also entitled to mesne profits for two years on his share of the land. A decree was accordingly passed in respondent's favour for half the paddy land, or its value Rs. 1,890, together with Rs. 690 as representing half the value of the other property and mesne profits.

Appellants allege in appeal that respondent's claim was time-barred, that in any case he could not be entitled to any property which was acquired after the death of his father, and that he could not under Burmese Buddhist Law be entitled to half the estate.

I may say at once that I am satisfied that there is no basis for the first of these grounds of appeal. What the Burmese Buddhist Law regards in its rules for partition is the family rather than the individual and so long as the family subsists, all who are members of it are regarded as being entitled to partition of its property on its dissolution. On the death of a parent the *auratha* becomes entitled in his own right to one fourth of the family estate because he takes the place of the deceased parent in the family, but I do not think that the old law contemplated his being entitled to take away his share and leave the family. On the contrary I think that he was intended to remain in the family as one of its heads, a special share in the family property being segregated for him in consideration of his doing so. On the surviving parent's re-marriage, either the old family might be regarded as continuing or a new family might be regarded as being instituted. The *auratha* was entitled, if he chose to regard the old family as dissolved, to take away the share in its property which had been segregated for him. If he was not old enough to separate, his share was to be segregated for him in the property of the new family, *vide* the Dhammathats cited in *Maung Shwe Ywet* v. *Maung Tun Shein* (1). On the death of the surviving

(1) 66 Ind. Cas. 538; 11 L. B. R. 199.

parent the *auratha*, whose share had been segregated because he was not old enough to separate is entitled to claim that share from the step parent and the children, jointly apparently, are entitled to claim three-fourths of so much as remains of the property which their parent brought to the second marriage, *vide* the authorities cited in *Ma Nyein* v. *Ma Tha Gaung* (2). Further, on the death of the step-parent, the children of the first marriage have a fresh right to claim a share of the jointly acquired property of the marriage of their parent and the step-parent, *vide*, the Dhammathats cited in s. 253 of the Digest and s. 9 of the X Book of Manugye, and if there are no children of the marriage, but are step-children on both sides, as in this case, the estate is to be divided equally between them.

It is suggested that if the *auratha* on the death of a parent or on the re-marriage of the surviving parent, or the children on the death of the surviving parent have taken their shares, then they have no further interest in the estate, and that, if, as was suggested in the case of *Maung Pan On* v. *Maung Tun Tha* (3), the shares to which they are entitled vest in them and become their property, then they must be regarded as having taken those shares in spite of the fact that they may have lost them subsequently by operation of the Law of Limitation, and can have no further interest in the estate.

I have no doubt that under the old law joint-living, that is a continuance in the family, was necessary for a continuence of rights in the family property, and that a child who took his share and separated himself from the family was regarded as having no further interest in the family property Manussika and Dyajja in dealing with the right to partition between children and the step-parent on the death of the parent make the right of the children of the first marriage to share in the property of the second marriage dependent on their having assisted in the acquisition of that property, that is not having left the family, and Vannana says that if the children of the first marriage have taken their share on their parent's remarriage they have no interest in the property of the second marriage, while the Dhammathats cited in s. 214 of the Digest enunciate a similar principle. But it has been held in many cases and very recently by the Privy Council in *Maung Due* v. *Khoo Haung Shein* (4) that the requirement of a joint-living is now relaxed and that in the absence of actual separation from the family the right of inheritance subsists It would seem to follow that even if the *auratha* has taken his share on the death of a parent or on the re-marriage of the surviving parent, he is still entitled to claim a share on the death of the surviviug parent or on the death of the step-parent unless separation is proved or is to be presumed, but it is unnecessary to go so far as that in this case. So far as this case is concerned, since respondent has not taken a share either on the re-marriage or on the death of the surviving parent, it seems certain that he would be regarded by Burmese Buddhist Law as being entitled to share in the estate of the step-parent, and there can be no doubt that in such part of that estate, as can be regarded as jointly acquired property of the marriage of the parent and step-parent, his share as against his parent's step-children is one-half.

As for the suggestion that respondent could have no interest in property acquired by the step-mother after the death of his father, it seems clear that the estate in which he shares is the family estate as it stands on the death of his step-parent. In so much of that estate as can fairly be regarded as the joint family property of the marriage of his father and the step-mother, his share is one-half, and I see no reason to believe that any of the property in which he has been given that share ought to be regarded otherwise than as the property of that marriage. As for the mesne profits, in view of the decision in the case of *Pan On* v. *Mauny Tun Tha* (3) I do not see how they could have been refused.

I would, therefore, confirm the decrees of the lower Courts and dismiss the appeal with costs.

Chari, J.—I concur.

Z. K. *Decree confirmed.*

(2) 60 Ind. Cas. 7; 3 U. B. R. (1920) 237.
(3) 67 Ind. Cas. 769; 11 L. B. R. 292.
(4) 84 Ind. Cas. 899; 3 R 29; 47 M. L. J. 853; (1925) A. I. R. (P. C.) 29; 3 Bur. L. J. 340; (1925) M. W. N. 23; 29 C. W. N. 824 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1937 OF 1922.

July 14, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

ADHAR CHANDRA MONDAL
EXECUTOR TO THE ESTATE OF LATE JATADHARI PATRA—PLAINTIFF—APPELLANT

versus

Sheikh ABDUL RAHAMAN *alias* *Sheikh* ABDUL RAHIM MONDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Death of raiyat*—Recognition by landlord of some heirs of deceased tenant, effect of—Suit for rent against recorded tenants, whether maintainable.*

On the death of a *raiyat* it is the duty of the landlord to recognize all the heirs of the deceased tenant as representing the whole body of the tenants. It is, however, also the duty of the heirs of the *raiyat* to appear before the landlord and get themselves recorded as tenants in the place of the deceased tenant. It is usual that on the death of a Muhammadan *raiyat* only the sons who are in possession of the holding, seek recognition from the landlord as the representatives of the deceased *raiyat*, the daughters having married into different families and having left the village not caring to possess their shares of the holding and to make themselves liable for the rent thereof. In such a case the landlord is entitled to record as his tenants those who take possession of the holding and apply to be recorded as representing the deceased *raiyat*. If the heirs who have been so recorded and who are in possession go on paying rent as the only recorded *raiyats* it does not lie in their mouth afterwards to turn round and set up the rights of the female heirs who have never been in possession and have never cared to apply before the landlord for recognition as the heirs of the deceased tenant. Such a recognition by the landlord only of the heirs in possession does not in any way affect the rights of the absent heirs, but until such heirs assert their rights, the *raiyats* who have paid rent after such recognition cannot refuse to pay the rent which they have agreed to pay on the ground that certain other heirs of the deceased *raiyat* have not been recognized as the tenants of the holding. [p. 657, col. 1]

Appeal against a decree of the Subordinate Judge, Bankura, dated the 20th of June 1922, reversing that of the Munsif, First Court at Vishnupore, dated the 6th of January 1922.

Babu *Panchanon Ghose*, for the Appellant.

Babu *Bijoy Kumar Bhattacharjee*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the plaintiffs and arises out of a suit brought by them, for recovery of arrears of rent for the year 1324 to 1327 *B. S.* at the rate of Rs. 48 2-1. The facts shortly stated are these:—It appears that the *jote* for which the rent is sued for, originally stood in the name of Khetuboddya who died many years ago, how long ago we do not know. The defendant No. 1 is the son of Aizaddy who is the son of Khetuboddya. The other defendants are also the other heirs of the original tenant except one. The defence of the defendant No. 1, who alone contested the suit, was that the suit was not maintainable under the provisions of ss. 15 and 16 of the Bengal Tenancy Act: and that the suit was bad for defect of parties, because Namuda, a daughter of the original tenant, was not a party. He also contended that the rent payable was not at the rate of Rs. 48-2-1 but was Rs. 46-2-7. Lastly the defendant claimed abatement of the rent.

The Court of first instance found on all the issues in favour of the plaintiffs. As regards absence of Namuda one of the daughters of the original tenant, the Court of the first instance found that she was not a necessary party and in the result gave a decree to the plaintiffs at the rate of rent claimed by them. On appeal by the defendant No. 1 the learned Subordinate Judge, it appears, agreed with the First Court as regards the points other than that of defect of parties. But on the ground that Namuda was not a party to the suit, he dismissed it altogether. The learned Subordinate Judge however does not deal with the findings of the learned Munsif on this question. Apparently he accepted the findings of the Court of first instance. The learned Munsif held that Namuda was not in possession of the *jote*, although the contesting defendant asserted that she was one of the tenants in possession as an heiress of the original tenant. The learned Munsif further found that the defendants who have been sued for rent, were paying rent to the landlords and obtaining *dakhilas* for themselves and that Namuda was not one of them.

The plaintiffs have now preferred this appeal against the judgment and decree of the Subordinate Judge dismissing their suit on the ground that Namuda was not a party and, therefore, the suit was not maintainable against the other defendants.

The learned Vakil for the appellant contended that the conflict of authorities pointed out by the learned Subordinate Judge does not arise here upon the find-

ings of the learned Munsif. It was contended that the learned Munsif found not only that Namuda was not in possession, but also that all along the rent was being paid by the defendants, who have been joined in this suit as tenants defendants and obtained *dakhilas* and that Namuda was not one of them. The learned Vakil, therefore, contended that upon this finding it ought to have been held that the landlords had recognised the defendants who were paying rent to them and obtaining *dakhilas* for payment of such rent as the heirs of the original tenant. We think that this contention is right. On the death of a *raiyat* it is no doubt the duty of the landlord to recognise all the heirs of the deceased tenant as representing the whole body of the tenants ; it cannot be said that it is not also the duty of the heirs after the death of a *raiyat* to appear before the landlord and get themselves recorded as tenants in the place of their deceased ancestor. It is not unusual in this country, that on the death of a Muhammadan *raiyat* only the sons who are in possession of the *jote*, seek for recognition from the landlord as the representatives of the deceased *raiyat*, in the *jote* when the daughters of the *raiyat* who have been married to different families, have left perhaps the village and do not care to possess their shares of the *jote* and make themselves liable for the rent thereof. In such a case the landlord is entitled to record as his tenants those who take possession of the *jote* and apply to be recorded as representing the deceased *raiyat* when that is done, it is done at the instances both of the landlord and the heirs of the *raiyat* who take possession of the land and appear before the landlord for recognition as representatives of the deceased *jotedars*. And if the heirs who have been so recorded and who are in possession, go on paying rent as the only recorded *raiyats*, it does not lie in their mouth afterwards to turn round and set up the rights, as in this case, of a sister who has never been in possession and never so far as this record goes, cared to apply before the landlord for recognition as one of the heirs. We do not know for how long this state of things in the present case, has been going on. It appears to us that this plea raised by the defendant No. 1 was nothing but an attempt to evade payment of the rent which he was justly liable to pay for the *jote* which was in his possession. We think, therefore, the findings, in the present case, amount to this that on the death of Khetaboddya one does not know how long ago, the defendants who have been sued for rent were recorded in the *sherista* of the landlord as representing the deceased *raiyat*. It is true that such a recognition by a landlord only of the heirs in possession does not in any way affect the rights of the absent heirs. But until such heir asserts her rights, we think that when with the consent of the heirs in possession the landlord records them as the *raiyats* in possession representing the *jote*, the *raiyats* who have paid rent after such recognition, cannot after years of such payment turn round and set up the right of the absent heir of the deceased *raiyat*.

We think, therefore, that the judgment and the decree of the learned Munsif were correct and ought to be restored. This appeal is allowed and the judgment and the decree of the lower Appellate Court are set aside and those of the First Court are restored with costs in all the Courts.

Cuming, J.—I agree.

M. B.
Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1940 OF 1923.

August 4, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Cuming.

AMIYA PAL CHOWDHURY—PLAINTIFF—APPELLANT

versus

Srimati Rani SHARBA MANGALA DEBI—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 65—Landlord and tenant—Transfer of holding by tenant—Purchaser, whether liable to pay arrears of rent—Notice—Suit for rent—Original tenant, whether necessary party—Plaintiffs representing entire estate of landlord—Subsequent addition of parties, effect of.

Under s. 65 of the Bengal Tenancy Act the rent due in respect of a holding is a first charge on the property, and a person who purchases the holding from the tenant with notice of the charge is liable to pay the amount of the rent due to the landlord and it is not necessary in a suit by the landlord to recover such rent to implead the original tenant, who was in possession during the period in respect of which the rent became due, as a party to the suit. [p. 658, cols. 1 & 2.]

Where at the time of the institution of a suit for rent, the entire estate of the deceased landlord is represented by the plaintiffs, the mere fact that owing to certain events which have happened since the institution of the suit it becomes necessary to add certain other persons also as plaintiffs as being interested in the estate, would not render the suit as originally framed defective. [p. 658, col. 2.]

Appeal against a decree of the Subordinate Judge, Nadia, dated the 19th April 1923, affirming that of the Munsif, Second Court, at Krishnagar, dated the 15th February 1922.

Mr. *Amarendranath Bose*, (with him Babus *Hiralal Chakrabarti* and *Dwijendranath Dutta*), for the Appellant

Mr. *Brojendranath Chatterjee* and Babu *Satindra Nath Roy Chowdhury*, for the Respondent.

JUDGMENT.

Cuming, J.—This appeal arises out of a suit for rent The plaintiffs who are three in number sued as legal heirs of one Bipradas, the defendant, who is a purchaser from the original tenant one Banwari Das for the rent of the years 1324 to 1327 with cesses and interest at the rate of Rs. 135 a year. The defendant, it may be noted here, purchased by a *kobala* from Banwari in *Magh* 1325. The defence was that the defendant was not liable for rent for the year 1324 because she was not in possession and she further pleaded payments over and above those that had been credited in the plaint and also she objected to the claim for cesses and interest as excessive. The First Court held that she was not liable to pay rent for 1324 and 1326 and gave the plaintiff a proportionate decree. The plaintiff appealed to the District Court with regard to the rent for 1324 which had been disallowed by the First Court. The lower Appellate Court held that the defendant was not liable to pay rent for 1324 as she was not in possession of the tenure in 1324 and that consequently, she could not be said to represent the tenure for that year. The plaintiff has appealed to this Court with regard to the rent of 1324 and his contention is that under s. 65 of the Bengal Tenancy Act the rent is a first charge on the property and that the purchaser purchased it with notice of the charge and of his liability to pay any rent that might be due at the time he purchased. The respondent contends first of all, that the tenant from whom he purchased was a necessary party and that in his absence no rent decree could be obtained for the year 1324 and that all the landlords were not made parties to the suit at the time when it was instituted and that the landlord who was not originally made a party was added only on the 6th February 1922 and for these reasons she was not liable to pay rent for 1324. With regard to the first contention of the appellant I think that he must succeed. The rent is a first charge and the person who purchased the property must be taken to have purchased the property charged with the rent due at the time of his purchase. It is, therefore, not for this reason necessary that the tenant who was in possession in 1324 should be made a party to the suit.

With regard to the other contention of the respondent that all the landlords were not parties to the suit at the time it was instituted and that when the landlord who had not been originally made a party was made a party subsequently, the claim for rent for 1324 was barred, it will appear that the suit was originally instituted by three persons, Manmatha Pal Chowdhury, Amiya Pal Chowdhury and Lilabati Roy as executors of the estate of the deceased Bipradas. At this time these persons fully represented the estate of the deceased and Ranjit the other son was not a necessary party. Subsequently, it appears that the Will for some reason or other was revoked and this being done, Ranjit was added as a party and the suit was prosecuted by the legal heirs of Bipradas in place of the executors. It is, however, quite clear that at the time of the institution of the suit the estate was properly represented by the executors and, therefore, no question arises as to all the landlords not being parties to the suit. So far as can be seen the whole of the estate of Bipradas was properly represented during whole of the suit.

The appellant is entitled to a decree for 1324 against the tenure only and he is not entitled to any personal decree against the defendant. The decree of the lower Appellate Court will, therefore, be modified to this extent that it is ordered that the appellant is entitled to rent cesses and interest for the year 1324 in addition to what has already been decreed this portion of his claim is concerned the decree will be one against the tenure only and not a personal decree against the defendant.

The appellant will be entitled to his costs in this and in the lower Appellate

Court and proportionate costs in the First Court.

Greaves, J.—I agree.

M. B. *Appeal allowed.*
Z. K. *Decree modified.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 240 OF 1923.
September 11, 1924.
Present:—Mr. Justice Jackson.
SUNDARAPPIER AND OTHERS—
DEFENDANTS NOS. 4 TO 6—PETITIONERS
versus
KRISHNASWAMY IYER AND ANOTHER—
PLAINTIFF AND DEFENDANT No. 3—
RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 43-A—Suit to recover moveable property taken forcible possession of by defendant—Jurisdiction of Small Cause Court.

A suit by a plaintiff to recover the value of certain sovereigns delivered by him to the first defendant and alleged to have been illegally, forcibly and fraudulently wrested from the latter by the second defendant with knowledge of plaintiff's title in them, and without any legal title or valid claim thereto falls within the purview of Art. 43-A of Sch. II to the Provincial Small Cause Courts Act and is, therefore, excluded from the jurisdiction of a Small Cause Court.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of Small Causes at Tanjore, in S. C. S. No. 140 of 1921.

Mr. *N. S. Srinivasa Iyer*, for the Appellants.

Mr. *A. C. Sampath Iyengar*, for the Respondents.

JUDGMENT.—This revision petition comes very late and though the case was decided *ex parte*, I should not ordinarily interfere; but it appears to me that the Special Small Cause Judge has clutched jurisdiction in contravention of Art. 43-A of Second Schedule to the Provincial Small Cause Courts Act. The plaint sets forth that the plaintiff delivered 9 sovereigns to the 1st defendant and 2nd defendant being perfectly aware of the fact, illegally, forcibly, and fraudulently, having no legal title or valid claim to be in possession of the same, wrested them from 1st defendant. This amounts to an offence under Ch. XVII of the Indian Penal Code.

The Court finds that it was not incumbent on the plaintiff to prefer a criminal complaint and he could not have figured as a complainant. Why he could not is not explained. In the circumstances the order of the lower Court must be held to have been passed without jurisdiction and I reverse it.

One Vakil's fee is allowed in this and Civil Revision Petition No. 241 of 1923.

This case having been posted again this day for being spoken to the Court delivered the following

JUDGMENT.—The plaint may be returned and the plaintiff is directed to present the plaint, if so advised, in the proper Court.

V. N. V. *Petition allowed.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 53 OF 1924.
April 27, 1925.
Present:—Mr. Justice Heald and Mr. Justice Rutledge.
MAUNG SHWE HPU AND OTHERS—
APPELLANTS
versus
U MIN NYUN—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 15—Reference to arbitration—Misconduct—Private enquiry made by arbitrators—Award, validity of.

A Court must not be over-ready to set aside an award unless it finds that there has been something radically wrong and vicious in the proceeding of the arbitrators. [p. 660, col. 1.]

The question of the misconduct of an arbitrator is a question of fact in each case which must be ascertained from the facts of the proceeding itself. [*ibid.*]

The mere fact that the arbitrators have made private enquiries concerning the dispute referred to their decision does not amount to misconduct on the part of the arbitrators so as to vitiate the award, unless they have, as the result of their enquiries, rejected the evidence regularly taken before them. [p. 660, col. 2.]

Miscellaneous appeal against a decree of the District Court, Myaungmya, in Civil Regular No. 24 of 1923.

Mr. *Kyaw Myint*, for the Appellants.

Mr. *Ba Thein*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the District Judge of Myaungmya refusing to file an award made in an arbitration without the intervention of the Court, on the ground of misconduct on the part of the arbitrators. The alleged misconduct is that after receiving the statement of the parties and such evidence as the parties produced before them, they made

enquiries from the villagers with regard to the lands without the presence of the parties. The learned Judge has relied on three decisions reported in unofficial reports and holds that, "a trial before arbitrators should be conducted in the same manner as nearly as circumstances will permit as trials before a Judge." We are unable to accept this *dictum*, as if adopted, it would inevitably lead to the great majority of the awards of arbitrators being upset for failure to observe the highly technical web of procedure and rules of evidence which surrounds judicial procedure. As Lord Halsbury observes in *Andrews* v. *Mitchell* (1) "We must not insist upon a too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their decisions." We may bear in mind the remark of Cockburn, L. C. J., in *In re Hopper* (2): "I would observe that we must not be over-ready to set aside awards where the parties have agreed to abide by the decision of a Tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceeding." Misconduct is, in our opinion, a question of fact in each case which must be ascertained from the facts of the proceedings themselves.

From Ex. G which is a rough memorandum of the proceedings of the arbitrators it seems that the first plaintiff, San Hpu, the defendant, and the Headman, San Tha, were examined. Then Ex. G goes on: "It still needs to hold an enquiry from the local people who should know and also the witnesses produced by the plaintiff and defendant are yet to be examined." This passage does not indicate whether the arbitrators contemplated holding the enquiry among the local people in the presence of the parties which would be perfectly regular or in their absence which might be quite irregular. The only reference to this enquiry in the award is in the passage: "The statement of witness U Shan Tha . . . . . is in agreement with what was elicited by the enquiry made from the villagers of Shwegon. Moreover, it tallies with the statement of the plaintiffs and the defendant." One of the arbitrators, Ko Ba, states in his evidence: "The three of us made enquiries in the village separately relating to the paddy lands in suit. We did not make use of the information thus obtained because San Tha's statement tallied with that information. Even if they differed we would have acted upon San Tha's statement." This is all the evidence of alleged misconduct and we are of opinion that it completely fails to establish anything of the kind as it does not indicate that the arbitrators acted upon the result of their enquiries to the rejection of the evidence regularly taken before them. We may observe that if the arbitrators had found that the villagers' statements differed from the evidence produced before them, it would have been open to them to have called such of the villagers as they thought fit to give evidence before them.

From the record it seems clear that defendant submitted the matter in dispute to the three arbitrators by Ex. A and that after the first meeting though he had due notice he declined to attend or produce further evidence. And he now seeks to upset the award upon technical grounds without showing that the arbitrators have acted unfairly to him or contrary to natural justice. For these reasons we reverse the judgment and decree of the District Court and direct that the award be filed and that judgment be pronounced according to the award. The appellants will have costs of the appeal and in the District Court.

Z. K. *Appeal allowed.*

(1) (1905) A. C. 78 at p. 80; 74 L. J. K. B. 333; 91 L. T. 537.

(2) (1867) 8 B. & S. 100; 36 L. J. Q. B. 97; 2 Q. B. 367; 15 L. T. 566; 15 W. R. 443.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 43 OF 1923.

August 10, 1925.

Present:—Mr. Justice Phillips.

RAVIPATI RAMIAH—PLAINTIFF—APPELLANT

versus

RAVIPATTI LAKSHMI NARAYANA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV, O. II, r. 1—Res judicata—*Suit for possession as reversioner of last male owner—Subsequent suit as heir of another person, maintainability of.*

Under O. II, r. 1 of the C. P. C., a plaintiff ought

to frame his suit so as to include all titles on which he is entitled to the relief he claims. [p. 661, col. 2.]

Where a plaintiff's suit for possession of certain property as reversioner to the last male owner is dismissed, a second suit for possession of the same property against the same defendant on the strength of his title as heir of another person is barred by virtue of Expl. IV to s. 11 of the C.P.C., since he ought to have pleaded both the titles in the first suit. [*ibid.*]

Where a question of right or title has been adjudicated upon in a suit, the bar of the judgment cannot be avoided by suing on a new form of claim or on a ground of relief which might have been, but was not raised or determined, in the former suit. [p. 662, col. 1.]

Govinda Menokki v. *Govinda Kurup*, 52 Ind. Cas. 735; 10 L. W. 170; (1919) M. W. N. 677, *Naina Muhammad Rowther* v. *Abdul Rahaman Rowther*, 72 Ind. Cas. 207; 46 M. 135; (1922) M. W. N. 845; 17 L.W. 188; 32 M. L. T. 82; (1923) A. I. R. (M.) 257 and *Fateh Singh* v. *Jagannath Baksh Singh*, 91 Ind. Cas. 280; 48 M. L. J. 64; (1925) A. I. R. (P. C.) 55; 2 O. W. N. 25; 12 O. L. J. 117; L. R. 6 A. (P. C.) 59; 27 O. C. 334; 27 Bom. L. R. 725; 29 C. W. N. 749; 47 A. 158; 23 A. L. J. 739; 22 L. W. 58 (P. C.), relied on.

Second appeal against a decree of the District Court, Guntur, in A. S. No. 262 of 1921, preferred against a decree of the Court of the District Munsif, Narasaraopet, in O. S. No. 1326 of 1919.

Mr. *Ch. Raghava Rao*, for the Appellant.

Mr. *B. Jagannadha Das*, for the Respondent.

JUDGMENT.—The plaintiff-appellant brought a suit to recover certain property alleging that he was the reversionary heir of one Venkanna. The property had been in the possession of Narasimma a female relation of Venkanna and, according to plaintiff, her possession was under license from him. He, therefore, sued to recover the property from the defendants, who were in possession after Narasimma's death. The suit was dismissed. The present suit was brought to recover the same property from the same defendants on the ground that the plaintiff was the heir of Narasimma who had been in possession of the property. The lower Courts have found that, this suit is barred under s. 11, Expl. IV, of the C. P. C., and the Court of first instance relies on the decision in *Govinda Menokki* v. *Govinda Kurup* (1) for its decision. That case appears to be very much in point as also a very recent case reported as *Naina Muhammad Rowther* v. *Abdul Rahaman Rowther* (2). There are also cases *Masilamania Pillai* v. *Thiruvengadam Pillai* (3) and *Gariya Rangaswamy Patrudu* v. *Mojji Appalaswamy* (4), which all support the lower Court's decision and there is also a very recent pronouncement of the Privy Council reported as *Fateh Singh* v. *Jagannath Baksh Singh* (5), which is authority to the same effect.

The learned Vakil for the appellant is constrained to rely mainly on cases which were decided under the C. P. C. of 1859, *viz.*, *Nousha Begum* v. *Umrao Begum* (6) and the dissenting judgment of Garth, C. J., in *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (7). These judgments, however, whether they were under the then existing Code correct or not, appear to be in conflict with the very early case of the Privy Council in *Woomatara Dibea* v. *Kristokaminee Dossee* (8). It seems to me here that the plaintiff at the time of bringing his first suit possessed, as he alleges, title as reversioner to Venkanna and also as heir to Narasimma. He sued on his title as absolute owner alleging that the defendants had trespassed upon the property. His cause of action was his absolute right to the property which had been infringed by the trespass of the defendants. Whether his title came to him in one way or in another it appears to me to be immaterial, for it would give him no different right as against the defendants or in respect of the alleged act of trespass, and I think that, under s. 11, Expl. IV, he certainly might have put forward both his titles to the property and I think that he also ought to have done so. In deciding whether he ought to have done so, the provisions of O. II, r. 1 are relevant. That rule says:—"Every suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them." Therefore, when the plaintiff brought his first suit he should have framed it as far as practicable as to afford ground for final decision in order to prevent further litigation. There is no inconsistency between the two

(1) 52 Ind. Cas. 735; 10 L. W. 170; (1919) M. W. N. 677.

(2) 72 Ind. Cas. 207; 46 M. 135; (1922) M. W. N. 845; 17 L. W. 188; 32 M. L. T. 82; (1923) A. I. R. (M.) 257.

(3) 31 M. 385.

(4) 34 Ind. Cas. 456; (1916) 1 M. W. N. 286.

(5) 91 Ind. Cas. 280; 48 M. L. J. 64; (1925) A. I. R. (P. C.) 55; 2 O. W. N. 25; 12 O. L. J. 117; L. R. 6 A. (P. C.) 50; 27 O. C. 334; 27 Bom. L. R. 725; 29 C. W. N. 749; 47 A. 158; 23 A. L. J. 739; 22 L. W. 58 (P. C.).

(6) 7 N. W. P. H. C. R. 60

(7) 2 C. 152; 1 Ind. Dec. (N. S.) 393.

(8) 11 B. L. R. 158; 18 W. R. 163.

pleas set up by him and it would not have been inconvenient to try them together. Since, therefore, r. 1 says that every suit shall be framed so as to afford ground for final decision, I think under Expl. IV the suit ought to be so framed if possible and the plaintiff ought to have framed his first suit so as to include both the titles which he has now set up in separate suits. Reliance is placed by the appellant on *Ramaswami Ayyar* v. *Vythinatha Ayyar* (9) but, so far as the facts of the case are concerned, they do not help him for they relate to a case where two different mortgages were sued on, but certain observations are relied on which I do not think really help the appellant. It is suggested that the words "subjects in dispute", in O. II. r. 1, really mean cause of action and cause of action alone, but the observation in *Ramaswami Ayyar* v. *Vythinatha Ayyar* (9) is as follows:

"The expression 'subjects in dispute' means the cause of action or the subject-matter of litigation, that is, the right which one party claims as against the other." Here the only right claimed by the plaintiff as against the defendants is the right of possession as owner, and, consequently, the "subject in dispute" is the same in both the suits. Again a quotation from Scotland, C. J.'s judgment in *Chinniya Mudali* v. *Venkatachella Pillai* (10) appears at page 767*: "I take it to be also clear, as a general rule, both on principle and authority, that when a question of right or title has been adjudicated upon in a suit, the bar of the judgment cannot be avoided by suing on a new form of claim or on a ground of relief which might have been, but was not, raised or determined in the former suit". That appears to be applicable to the facts of the present case The plaintiff brought his first suit on title. He brought the second suit on the same title, merely alleging different facts as the basis of that title; in fact this second suit is simply a new form of his claim as against the defendants. I do not think it is necessary to refer at length to the cases in this Court cited by appellant. *Allunni* v. *Kunjusha* (11) and *Mangalathammal* v. *Veerappa Goundan* (12) which can be distinguished on their facts. Following *Muhammad Rowther* v. *Abdul Rahaman Rowther* (2), I must hold that the lower Appellate Court was right and dismiss the second appeal with costs.

V. N. V.

Appeal dismissed.

(9) 26 M. 760; 13 M. L. J. 448.
(10) 3 M. H. C. R. 320.
(11) 7 M. 254; 8 Ind. Jur. 135; 2 Ind. Dec. (N. S.) 768.
(12) 52 Ind. Cas. 813; (1919) M W. N. 287.

*Pages of 26 M.—[*Ed.*]

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1203 OF 1923.

June 4, 1925.

Present:—Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

ABBAS SHEIKH AND OTHERS—DEFENDANTS—APPELLANTS

versus

NEYAMATENNESSA BIBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 49—Ejectment—Under-raiyat*—Denial of landlord's title—Notice to quit, whether necessary.*

Where in a suit for ejectment the plaintiff alleges that the defendant holds under an under-*raiyati* settlement the defendant cannot be ejected except in accordance with the provisions of s. 49 of the Bengal Tenancy Act. The mere fact that the defendant has denied the plaintiff's title will not entitle the latter to eject the former without complying with the provisions of s. 49. [p. 663, col. 1.]

Appeal against a decree of the District Judge, Murshidabad, dated the 18th January 1923, reversing that of the Munsif, Lalbagh, dated the 20th December 1921.

Babu *Urukram Das Chakravarty*, for the Appellants.

Babu *Rupendra Kumar Mitra*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants against the decision of the District Judge of Murshidabad reversing the decision of the Munsif of Lalbagh. The suit out of which this appeal arises was one for declaration of title and for *khas* possession on the ground that the defendants had denied the plaintiffs' title and possession. The defence put forward by the defendants was that the plaintiffs held the property *benami* for them. The First Court dismissed the suit holding that the transaction was a *benami* one and the plaintiffs were the *benamidars* of the defendants. The second Court set aside this finding and the suit was decreed with costs.

The point raised before us on behalf of the appellants is that in view of the statement contained in the plaint the decree for

ejectment should not have been passed. Now, in para. 4 of the plaint the plaintiffs made the following allegations that the defendant took an under-*raiyati* settlement of the half share of Mobarak Hossain of the land described in schedule *ka* at an annual rent of 3 *bighas* 14 *aris* of *thika* paddy and by that right came into possession and paid the *thika* paddy for the year 1324. As I have already stated the appellants say that after the statement by the plaintiffs in the plaint they cannot deny now that the appellants are *karfa* tenants and it is said that accordingly they cannot be ejected in the manner in which the lower Appellate Court has decreed the suit. Under the provisions of s. 49 of the Bengal Tenancy Act an under-*raiyat* shall not be liable to be ejected by his landlord, except (*a*) on the expiration of the term of a written lease; (*b*) when holding otherwise than under a written lease, at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord. This being so I think the contention of the appellants is correct and the decree for *khas* possession passed by the learned Subordinate Judge is incorrect.

It was urged before us on behalf of the respondents in reliance on a case of *Sutyabhama Dassee* v. *Krishna Chunder Chatterjee* (1) that despite the provisions of s. 49 as the defendants had denied the plaintiffs' title they were liable to be ejected. At the time when this decision was given there was no such provision such as is now to be found in s. 49 of the Bengal Tenancy Act.

In the circumstances, therefore, we think that the learned Judge was wrong in passing a decree for *khas* possession but we think that if the appellants rely as they do upon the statement of the plaintiffs contained in para. 4 of the plaint they must accept this as a whole and this being so, they are clearly liable for rent at the rate stated in that paragraph and in para. 7 of the plaint.

The result is that the appeal succeeds to this extent that there will be no decree for *khas* possession. We declare that the defendents are *karfa* tenants under the plaintiffs. There will be a further decree in favour of the plaintiffs against the defendants for the sum of Rs. 148 being the rent claimed in the suit. The order for costs in both the Courts below will stand. We make no order as to costs in this Court.

M. B.
Z. K.

Appeal partly allowed.

(1) 6 C. 55; 6 C. L. R. 375; 3 Ind. Dec. (N. S.) 36.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 53 OF 1924.
May 18, 1925.

Present :—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Brown.

MA SEIN BYE—APPELLANT
versus
S. R. M. M. R. M. CHETTY FIRM—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Transfer of Property Act (IV of 1882), s. 59—Mortgage by deposit of title-deeds—Memorandum of terms—Registration, whether necessary—Succession Act (X of 1865), s. 269—Executor, powers of, to dispose of property of deceased—Direction in Will to discontinue business—Mortgage by executor to raise money for purposes of business, validity of.

An equitable mortgage may be created by the mere deposit of title-deeds and without any writing being executed between the parties. Where, however, a writing is executed between the parties and is the sole repository of the terms of the bargain between the parties, the transaction can be proved only by proof of the writing and the writing would in such a case require to be registered under the provisions of s. 17 of the Registration Act. Where, however, an equitable mortgage is created by the deposit of title-deeds and a written memorandum of the terms of the deposit is subsequently obtained as a separate transaction altogether, the memorandum does not create the mortgage which has already come into existence and does not, therefore, require registration. [p. 665, cols 1 & 2]

An equitable mortgage to secure the re-payment of a sum of money lent on a promissory-note was completed simultaneously with the execution of the promissory note by handing over the title-deeds of certain property to the creditor. Some days afterwards a memorandum was drawn up which stated as follows :—"I beg to deposit with you the undermentioned securities and request you to hold the same or any other securities which I may from time to time deposit with you to my order subject to your lien thereon for any loan granted to us. You are hereby authorized to sell the said securities or any of them in any way which you may consider expedient" :

Held, that the equitable mortgage having been created before the memorandum was drawn up the memorandum did not constitute the bargain between the parties and did not require registration. [p. 665, col. 2.]

The power of an executor or administrator under s. 269 of the Succession Act to dispose of the property of the deceased is unqualified. [p. 665, col. 2.]

Where a testator in his Will directed that his share in a certain partnership business should be realized and that the partnership should not be continued so far as he was concerned, but the executors continued

the partnership business and in order to raise money for that purpose created an equitable mortgage over a portion of the estate of the deceased :

Held, that the mortgage was valid and was binding on the estate. [p. 666, col. 1.]

First appeal against a decree of the Original Side of this Court, in Civil Regular No. 28 of 1923.

Mr. *N. N. Burjorjee*, for the Appellant.

Mr. *Cowasjee*, for the Respondent.

JUDGMENT.—Two suits were brought by the plaintiff Chettiar Firm to recover moneys due on two promissory-notes secured by equitable mortgage by deposit of title-deeds. The two cases were heard together, the evidence being the same, and a decree was passed in favour of the plaintiffs in both cases. The first suit was on a promissory-note for Rs. 40,000 executed by one Teo Khoo Tee. Certain title-deeds were deposited at the same time as security with intent to create an equitable mortgage. There has been no appeal against the decree with reference to that promissory-note. The other suit, which was similar, was based on a promissory-note for Rs. 30,000. Originally, the defendants were the widow and children of Teo Khoo Tee, and his brother, who was his partner in the business, carried on under the style of Ban Aun & Co.

At the first hearing before issues were fixed Counsel for the plaintiff stated that he desired a decree against the executors of Teo Khoo Tee's Will only, and Counsel for defendants Nos. 2, 3, 4, and 5, who are the children of Teo Khoo Tee, argued that their names might be struck off the record and this was done. The suits then proceeded against defendants Nos. 1, 6 and 7, the son of Teo Khoo Tee's Chinese wife, the residuary legatee under the Will, his widow Ma Sein Bye, who is now the sole appellant, and his brother. Defendants Nos. 1 and 7 have not appeared or taken any part in the suits.

Teo Khoo Tee was trading in partnership with his brother the seventh defendant. He left a Will. Some seven or eight months after his death Ma Sein Bye, by the aid of *Lugyis*, had this Will opened and its contents were explained. The Will directs the executors to realize his share in the partnership and out of that share to pay certain legacies. He further devised the house No. 87, Tsitkai Maung Khine Street, which is the subject of the equitable mortgage in this appeal, to a minor son by his Chinese wife, who was the fifth defendant. There is no doubt, therefore, that Ma Sein Bye was fully aware that the testator's direction was that his share in the partnership should be realized and that the partnership should not be continued so far as he was concerned.

It is in evidence that after Teo Khoo Tee's death the Chettiar, being anxious for his money, went and interviewed the seventh defendant who was then carrying on the partnership business, and Ma Sein Bye and the adult children who were in Rangoon, and was informed that he need not be in fear for his money, and that the business would be continued as before, that it was continued, and that Rs. 10,000 was paid and the title-deeds of one of the houses deposited as security were returned. The takings of the partnership were paid in to the account with the Chettiar. The first defendant then came from China and became the manager of the business, his uncle, the seventh defendant going to China. Some two and-a-half years after Teo Khoo Tee's death it was desired to raise Rs. 30,000 from the Chettiar and the promissory-note in suit was executed.

It is in evidence that the title-deeds of No. 87, Tsitkai Maung Khine Street, Rangoon, were handed over to the Chettiar for him to verify the title, and that the next morning the 23rd May 1921, the Chettiar, who was satisfied with the title, advanced the money. The promissory-note, Ex. K, was executed by the first defendant on behalf of Ban Aun & Co., and the title-deeds were handed over as security with intent to create an equitable mortgage.

It is also in evidence that that evening the Chettiar's agent ordered a clerk to draw out a memorandum, Ex. L, and get it signed. This he did and took it the next day to the first defendant who executed it.

There are two points for decision in this case. The first is as to whether this memorandum, Ex. L, constitutes the contract of equitable mortgage between the parties. If it does, it being not registered cannot be given in evidence and being the sole evidence of the equitable mortgage the equitable mortgage would, therefore, fail. The next point raised is that the action of the executors in continuing the business and in borrowing this money for the business and granting an equitable mortgage is wrongful and, therefore, although

they themselves may be personally liable, the estate cannot be made liable.

As to the first point, the law is set out in a decision by their Lordships of the Privy Council in the case of *Subramonian* v. *Lutchman* (1). Their Lordships quote with approval the *dictum* of Couch, C. J. in *Kedarnath Dutt* v. *Sham Lall Khettry* (2): "The rule with regard to writing is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created and would come within s. 17 of the Registration Act". They further refer to the case of *Pranjivandas Jagjivandas Mehta* v. *Chan Ma Phee* (3) where it was laid down by their Lordships as follows:— "The law upon this subject is beyond any doubt: (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title: (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of security." The words of Lord Cairns in the case of *Shaw* v. *Foster* (4) are also quoted: "Although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the document by which alone you must be governed." There can, therefore, be no question that, if this document, Ex. L, was given simultaneously with the execution of the promissory-note and the handing over of the title-deeds and was intended by the parties to be the only repository and appropriate evidence of their agreement, that memorandum would create the equitable mortgage and it would come within s. 17 of the Registration Act. We cannot go beyond it except to supply such facts as to which the document is silent. In *Subramonian* v. *Lutchman* (1), their Lordships then proceeded to consider the evidence which they held showed that the whole transaction was completed at one and the same time; and they then referred to the memorandum and held that its wording showed that it was a bargain between the parties and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered, it ought to have been rejected. That document states, "We hand you herewith title-deeds relating to . . . . . Please hold these as security against advances made to us. We also hand you . . . . . Please hold these as further security against advances made to us." Turning now to Ex. L, we find that it is in very similar terms. It says, "I beg to deposit with you the under mentioned securities and request you to hold the same or any other securities which I may from time to time deposit with you to my order subject to your lien thereon for any loan granted to us etc., etc." It further sets out, "You are hereby authorised to sell the said securities or any of them in any way you may consider expedient." It would be very difficult to distinguish this from the document executed in *Subramania's case* (1) and, if the transaction was all one and this document was executed simultaneously with the deposit of title-deeds, it would undoubtedly be the bargain between the parties by which alone the equitable mortgage could be proved.

Coming now to the evidence, the plaint sets out the execution of the promissory-note and then proceeds that "at the same time, as agreed between the parties the said defendant deposited the title-deeds

(1) 71 Ind. Cas. 659; 1 R. 66; (1923) A. I. R. (P. C.) 50; 44 M. L. J. 602; 32 M. L. T. 184; 25 Bom. L. R. 582; 2 Bur. L. J. 25; 38 C. L. J. 41; 18 L. W. 446; (1923) M. W. N. 762; 28 C. W. N. 1; 50 C. 338; 50 I. A. 77 (P. C.).

(2) 11 B. L. R. 405; 20 W. R. 150.

(3) 35 Ind Cas. 190; 43 I. A. 122; (1916) 1 M W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R. 664; 20 M. L. T. 242; 9 Bur. L. T. 125; 43 C. 895; 21 C. L. J. 314; 8 L. B. R. 458 (P. C.).

(4) (1872) 5 H. L. 321; 42 L. J. Ch. 49; 27 L. T 281; 20 W. R. 907.

relating to house No. 87 in Tsitkai Maung Khine Street, Rangoon.....with intent to create a security thereon in respect of the said loan in favour of the plaintiff firm. The said agreement and the title-deeds are herewith filed and marked B, C. C,-1 and C-2." Exhibit L was filed with the plaint and was marked B. It is urged that this clear statement in the plaint points to the fact that Ex. L was executed simultaneously as part of one and the same transaction with the promissory note and the deposit of title-deeds. And it is urged that the oral evidence was dictated by the fact that in the written statement the agreement was pleaded and it was submitted that no valid mortgage was created for want of registration of the said agreement. Exhibit L bears date on the stamp the 28th of some month in 1919, and it is urged that the Chettiar got a number of these printed forms stamped for the purpose of using them always on such occasions and it was, therefore, eminently probable that this document was executed simultaneously and formed the bargain between the parties. Making all allowance for this argument we have to decide whether the oral evidence for the plaintiff is to be believed. There is no evidence to rebut it; there could not well be, for the 1st defendant has never appeared. The learned Judge in the Court below had the witness before him and he held that he told a plain straightforward story which was not broken in cross-examination. He was satisfied that the witness was speaking the truth. He is in a much better position to decide that question than we, as a Court of Appeal, are, and we see no reason to differ from his finding. Further, as is recorded in the judgment, this point was not argued. The judgment says, "With regard to Issue No. 8 it has not been contended that Ex. L is a document constituting the bargain between the parties;" and we have no doubt that this technical point is only pressed now, because it is the only hope of succeeding in this appeal. We, therefore, agree with the Court below that Ex. L did not form, and was not intended to form, the bargain between the parties. Accepting the evidence, the equitable mortgage was completed by the handing over of documents on the morning of the 23rd May with intent to create thereby an equitable mortgage to secure re-payment of the sum of money lent on the promissory-note. The subsequent taking of a memorandum did not create a mortgage which was already in existence.

The only other question is whether the executors by acting in the manner they did can bind the estate. The Chettiar did not know there was a Will. We have been referred to the English Law on the subject. But it would appear that the Indian Law as regards immoveable property is different. That is contained in s. 269 of the Indian Succession Act which lays down that, "An executor or administrator has power to dispose of the property of the deceased, either wholly or in part in such manner as he may think fit." That power is unqualified and embodies the law, in England as to personalty. Illustration B to the section lays down. "The executor, in the exercise of his discretion, mortgages a part of the immoveable estate of the deceased. The mortgage is valid." And where the executors borrowed money to discharge debts incurred by them in the administration of the estate and gave a bond for re-payment, and at the same time mortgaged all their right, title and interest in certain real estate as further security giving power to sell on default made to the mortgagee, it was held that the executors had that power and that the conveyance made in exercise of the power given is valid and operative to transfer the property to the purchaser [*Seale* v. *Brown* (5).] That being so,—and this point not having been raised before,—we are of opinion that the decision of the Court below was correct and the decree passed must be confirmed. The appeal will stand rejected with costs throughout.

Z. K. *Appeal dismissed.*

(5) 1 A. 710; 3 Ind. Jur. 72; 1 Ind. Dec. (N. S.) 496.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO 10 OF 1924.

March 27, 1925.

Present:—Mr. Justice Odgers.

LOMADA PEDDA SUBBAYYA—

DEFENDANT No. 1—APPELLANT

versus

SATHIPALLI RAYAMMA AND OTHERS—

PLAINTIFFS NOS. 1 AND 3 AND DEFENDANTS NOS. 2 TO 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105,

O. XLI, r. 23—Jurisdiction declined by Trial Court —Appeal—Remand—Incidental decision of question relating to nature of property in suit, whether binding —Inam—Devadayam *land, whether alienable.*

Where in order to determine the question whether a Trial Court which has declined jurisdiction in a case has or has not jurisdiction to try the case, an Appellate Court gives an incidental decision on the nature of the property which is the subject-matter of the suit and holding that the suit is triable by the lower Court remands the suit to that Court for decision on the merits, the only question which must be taken to have been finally decided by the Appellate Court is the question of jurisdiction and the decision with regard to the nature of the property cannot be treated as final so as not to be open to question in an appeal against the decree finally passed by the Trial Court. [p. 668, cols. 1 & 2.]

Devadayam lands granted for the performance of a definite service, for instance, to chant hymns in a temple, are inalienable. [p. 668, col. 2.]

Second appeal against a decree of the Court of the Temporary Subordinate Judge, Cuddappah, in A. S. No. 38 of 1923, (A S. No. 156 of 1922, on the file of the District Court, Cuddappah), preferred against the decree of the Court of the District Munsif, Proddattur, in O. S. No. 633 of 1920.

Mr. *K. Y. Adiga*, for the Appellant.

Mr. *V. C. Seshachariar*, for the Respondent.

JUDGMENT.—This is a case of some little difficulty as the meterials appear to me to be somewhat slender. The plaintiffs sued for certain *inam* lands claiming under the 5th defendant. The first defendant was in possession of these lands under a lease from defendants Nos. 3 and 4. When the case was first tried, the first District Munsif held that he had no jurisdiction to try the suit as the matter fell within the purview of s. 21 of Madras Act III of 1895. Thiswas on the first issue as to "whether the lands in dispute are service *inams*, and whether this Court has no jurisdiction to entertain a suit with respect to the same." The learned District Judge considered both these points and found that the lands in question were service *inams* governed by Madras Act III of 1895; and as the plaintiffs in the suit did not rely on any right to an office or its emoluments, the Civil Court had jurisdiction to entertain the suit, and remanded the suit to the District Munsif for disposal according to law. On the suit coming on again before the District Munsif he observed that the suit *inams* were village service *inams* covered by Madras Act III of 1895 and that they were granted to the *inamdar* for reciting Saddulu on the occasion of the festival of the village goddess. The District Munsif came to the conclusion that the alienation in favour of the plaintiffs was void and not enforceable under s. 5 of Act III of 1895 which was the subject of the second issue. In the judgment under appeal the learned Subordinate Judge has held disagreeing with the District Judge remanding the suit that they were village service *inams*. He thought the lands were not attached to any temple and that the *inamdar* could in no sense be called a temple servant, but he held that the lands were *devadayam* permanent hereditary *inams* and were alienable. He, therefore, decreed in favour of the plaintiffs.

On second appeal the first point taken is that the Subordinate Judge had no jurisdiction to review the finding of the District Judge in his order of remand as to the character of those *inams*. As has been seen, the character of the *inams* and the jurisdiction of the Court to entertain the suit are made the subject of the same issue, *viz.*, the first. It is said that the plaintiffs had the opportunity to appeal against so much of the finding of the District Judge as determines the character of the *inams* and that not having done so, they are now concluded by that finding, it being a finding on a preliminary point. This, I think, it is; and *Balwant Ramchandra Natu* v. *Secretary of State* (1), *Subbalakshmamma* v. *Venkatarayadu* (2) and *Latchumammal* v. *Gengammal* (3) may be referred to as authorities for the position taken up. I think, however, that what the Subordinate Judge really intended to do and the important part of his remand order is the finding as to jurisdiction and I think that the case reported as *Ramaswami Goundan* v. *Kalaivasal Marudai Reddi* (4) is authority for this position. The preliminary point was really whether the Court had jurisdiction to entertain the suit. That stood in *limine* and that is what I think was intended to be found by the Subordinate Judge. Therefore, I think the first point for the appellant must fail.

The second point is that the lands are hereditary village service *inams* and so

(1) 32 B. 432; 10 Bom. L. R. 531.
(2) 2 Ind. Cas. 525; 32 M. 318; 5 M. L. T. 75.
(3) 7 Ind. Cas. 858; 34 M. 72; 8 M. L. T. 233; (1910) M. W. N. 692.
(4) 84 Ind. Cas. 622; 19 L. W. 377; 46 M. L. J. 198; (1924) M. W. N. 241; (1924) A. I. R. (M.) 469; 47 M. 453.

alienable. I am not at present prepared to say that this service of reciting hymns can be said to be a village service. The District Judge in his order of remand does observe that the Asadi is a village servant of considerable importance. The *Inam* Register, Ex. B, regards this land as a permanent *inam* for the service of telling Suddalu in the festival of Gramadevata at Kallur "now rendered" and it is confirmed under r. 3 of the Board's Standing Orders which refers to an *inam* for religious or charitable objects. The village Register, Ex. A, refers to the *inam* as *deradayam* granted for chanting hymns at the time of the festival of the village deity. I find some difficulty in saying that a person who performs a service of this character falls within the purview of s. 3, sub-s. 1 of Madras Act III of 1895 although of course the list given is not exhaustive. Mr. V. C. Seshachari for the plaintiffs does not contend that the lands are *deradayam*. His contention is that they are the personal *inams* of the holder of this office; and apparently his argument is that he is entitled to do what he likes with them. The matter is not free from doubt. But I have the finding of the Subordinate Judge and to a certain extent I have the support of the *Inam* Register as to the character of this *inam* and I do not see any sufficient reason to hold that they are clearly not *devadayam inams* in spite of Mr. Adiga's contention that they not only fall under s. 3 of Madras Act III of 1895 but under Standing Order 55 of the Board's Standing Orders as temple service *inams*.

The third point taken is that the Subordinate Judge is wrong in holding that, even if these lands are *devadayam*, they are heritable. I take it that *prima facie* they are not. The only reason given by the Subordinate Judge as to why these lands are heritable is that there have been certain alienations of them which were not objected to either by the villagers or by Government. The alienations set out are that the lands were given to the 5th defendant by his meternal grand-father, by Ex. C in 1908 and the defendants Nos. 3 and 4 gave a long lease of the lands under Exs. C and F in 1911 and 1916. It does not seem to me that this is a conclusive reason for holding that lands which are granted for the performance of a definite service are alienable. There is the Full Bench case reported as *Neti Anjaneyalu* v. *Sri Vinayopal Rice Mill Ltd.* (5) against the view taken by the Subordinate Judge. That was an *inam* for service in a temple and what little evidence there is in the present case is that of P. W. No. 1 who says that the *inams* were given for chanting hymns in temples. It was held in the above case that alienation of such lands is opposed to public policy and the nature of the interest affected. The authorities were all considered at some length and the Standing Order 54 of the Board of Revenue which is referred to as probably relating to the *inams* under discussion by the Subordinate Judge is noticed in the judgment of the Ex-Chief Justice. My opinion, therefore, is that the learned Subordinate Judge is wrong on this point. I think the lands are probably rightly classed as *deradayam inams* and I think that being such, they are under the authority of the Full Bench ruling inalienable. The decree of the Subordinate Judge must, therefore, be set aside and the suit dismissed with costs throughout.

V. N. V. *Appeal allowed.*

Z. K.

(5) 70 Ind. Cas. 166; 45 M. 620; 15 L. W. 513; 42 M. L. J. 477; 30 M. L. T. 255; (1922) M. W. N. 307; (1922) A. I. R. (M.) 197.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 885 OF 1923.

June 1, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

MANIRADDI MOLLA—DEFENDANT No. 1—APPELLANT

versus

AMBICA CHARAN KARMAKAR—PLAINTIFF AND ANOTHER—DEFENDANT No. 2—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 85 (1)—Landlord and tenant—Raiyat—*Under*-raiyati *lease—Suit to recover rent—Under*-raiyat *impleaded as party to suit—Consent of landlord—Presumption.*

The mere fact that in a suit to recover rent from the *raiyat* the landlord also impleads as a defendant a person who alleges himself to be an under-*raiyat* does not imply that the landlord has consented to any under-*raiyati* lease which the *raiyat* may have granted to the under-*raiyat* but which would not be valid under the provisions of s. 85 (1) of the Bengal Tenancy Act without the consent of the landlord.

Appeal against a decree of the Officiating Subordinate Judge, Khulna, dated the

23rd November 1922, reversing that of the Munsif First Court, at Bagerhat, dated the 3rd June 1921.

Dr. *Jadu Nath Kanjilal* and Babu *Purna Chandra Chandra*, for the Appellant.

Babus *Brojo Lal Chakravarti*, and *Mukunda Behari Mullick*, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by defendant No. 1 against a decision of the Subordinate Judge, Khulna reversing a decision of the Munsif of the First Court of Bagerhat.

The facts are as follows: The plaintiff is a *taluqdar* and under him was a *raiyat* named Felu. In execution of a decree obtained by the plaintiff in a rent suit brought against Felu the plaintiff on the 19th August 1907 purchased the *raiyati*. He then proceeded to let out the land to defendant No. 3. Defendant No. 3 by a document Ex. B purported to create an under-*raiyati* in defendant No. 1 in March 1908. It is admitted that this document is inadmissible in evidence and that it is not valid as against the landlord. A rent suit was brought by the plaintiff against defendants Nos. 3 and 1 and in execution of the decree which he obtained therein the plaintiff purchased the holding on the 23rd April 1919 and this suit for *khas* possession was subsequently brought. The First Court held that as no notice under the Bengal Tenancy Act was served upon the defendant No. 1, the interest of defendant No. 1 had not been determined. The Second Court held that defendant No. 3 was the tenant of the plaintiff and that the decree which the First Court had held as a money-decree was a rent decree. The learned Subordinate Judge further held that Ex. B was invalid and that defendant No. 1 could claim no interest and that no notice was necessary before he could be ejected. Against this, the defendant No. 1 has preferred the present appeal and what is argued before us is that although Ex. B is invalid some interest has been created in defendant No. 1 by reason of the grant by defendant No. 3 and it is further contended that this interest so created is binding on the landlord and that he cannot eject the defendant No. 1, the appellant without giving him notice under the provisions of the Bengal Tenancy Act and it is further suggested that the landlord, the plaintiff, in fact, recognised the interest of defendant No. 1 by making him a party in the rent suit. Now, the provisions of s. 85, sub-s. (1) of the Bengal Tenancy Act provide that if a *raiyat* sublets otherwise than by a registered instrument the sub-lease is not valid against the landlord unless this is made with the landlord's consent. Exhibit B is not binding on the landlord but it is said that the landlord's consent must be implied from the fact that defendant No. 1 was made a party in the rent suit and some reliance is placed on the fact that the plaintiff in his evidence stated that he knew that defendant No. 3 had sued defendant No. 1 for rent. How this last fact has any bearing on the matter it is difficult to see and in so far as the appellant relies on the fact that defendant No. 1 was made a party in the rent suit I do not see that consent of the landlord can be inferred from this fact. Defendant No. 1 was merely a *pro forma* defendant and I understand that no relief was claimed against him.

Under the circumstances, it is impossible to imply, as we are asked to do, any consent by the landlord to any interest which defendant No. 3 created in defendant No. 1. The matter is concluded by the provisions of s. 85, sub-s. (1) of the Bengal Tenancy Act and there was clearly no consent by the landlord to the letting by defendant No. 3 to defendant No. 1.

In the circumstances, the appeal fails and is dismissed with costs.

Ghose, J.—I agree.

M. B. *Appeal dismissed.*

Z. K.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 1924 AND 1925 OF 1922.

May 11, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

CHENGTU SARKAR—PLAINTIFF—APPELLANT

versus

JAHERUDDIN MONDAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Kabuliyat—*Attornment*—*Title of landlord, whether can be questioned*—*Burden of proof.*

When either through ignorance of the title of the landlord or by fraud in the matter of the execution of a *kabuliyat*, a tenant attorns to a landlord he is not altogether estopped from showing that the landlord

had no title when the *kabuliyat* was executed or attornment was made by payment of rent. The burden of establishing the landlord's want of title, however, lies upon the tenant. [p. 671, col. 1.]

Appeals against the decrees of the Officiating Subordinate Judge, Pabna and Bogra, dated the 1st May 1922, affirming that of the Munsif, Second Court at Bogra, dated the 28th May 1921.

Dr. *Jadunath Kanjilal* and Babu *Hemendra Chandra Sen*, for the Appellant.

Babus *Jatindra Mohan Choudhury* and *Bansori Lal Sarkar*, for Babu *Mohini Mohan Chakravarti*, for the Respondents.

JUDGMENT.

Chakravarti, J.—These are two appeals by the plaintiff who brought two suits for rent for two holdings against different defendants. Both the suits were, by consent of parties, tried together by the Court below and governed by one and the same judgment. The facts shortly stated are these. The plaintiff alleged that one Jadav granted a *darputni* of 4-annas share in the year 1315. On the death of Jadav, his son granted to the plaintiff a *darputni* of the remaining 12-annas by a *potta* dated the 24th *Falgoon* 1324. It is further alleged that the defendant Jaharuddin Mondal and another defendants in one of the suits executed a *kabuliyat* in favour of the plaintiff acknowledging the plaintiff to be the landlord of the 16 annas. The defendants in both the suits have, since the plaintiff became the owner of the 16 annas of the property, paid him rent. It appears that one Ananda Chaki brought a 4-annas share of the *putni* to sale as having belonged to one Mohi Pal and that the plaintiff in order to safeguard his interest took a conveyance of that 4 annas share from the son of Ananda Chaki. The defendants so far as Suit No. 97 is concerned pleaded that the plaintiff had not 16 annas of the *putni* and that the *kabuliyat* executed by them was taken by fraud and that it was executed in ignorance of the true facts stated as to the *putni*. Then in the other suit the defendants pleaded non-liability to the plaintiff.

Both the Courts below have given a decree to the plaintiff for 8-annas share of rent, but dismissed the suit with reference to the other 8-annas share. It was argued in second appeal by the plaintiff that some of the defendants having executed a *kabuliyat* in favour of the plaintiff for the 16 annas share and having paid him rent after the execution of the *kabuliyat* and that the defendants in the other suit having also attorned to the plaintiff and having admitted title to the 16-annas of the property, they were estopped from questioning the title of the plaintiff.

If was also argued on behalf of the plaintiff-appellant that assuming that the defendants were entitled to raise the question as to the plaintiff's title, the onus was upon them to show that the plaintiff had not the 16-annas of the title in himself. It appears that both the Courts below took the view that the onus was upon the defendants to show that the plaintiff had not the 16 annas of the title. The lower Appellate Court after finding that Jadav had 8-annas share took up the question as to the plaintiff's title to the other 8 annas share.

The plaintiff's case as regards the 4 annas share which originally belonged to one Krishna Kinkar was that Jadav had acquired a title by adverse possession against the defendants. Evidence was adduced on both sides and the lower Appellate Court came to the conclusion that the plaintiff had failed to prove that Jadav acquired a title by adverse possession as against the defendants. It appears, therefore, that so far as these 4-annas share is concerned the finding being, upon the evidence adduced by both parties, a question of fact it cannot be challenged in second appeal. Therefore, so far as these 4 annas share is concerned, want of title in the plaintiff has been established.

As regards the other 4-annas share which belonged to Mohipal, it appears upon the facts proved in the case that Mohipal was a member of the Mitakshara family. He dealt with the whole 16 annas of the property by way of mortgage and that the mortgagee after enforcing the mortgage by a suit brought the property to sale and purchased it himself, and the son of the purchaser has sold the property to the plaintiff. Therefore, so far as this share is concerned the plaintiff has established his title

The lower Appellate Court dismissed the plaintiff's claim as regards this 4 annas share in the view that as Mohipal was one of the members of a Mitakshara family it was difficult in this case to ascertain what right he had in the property and the plaintiff cannot succeed in the suit. We think the learned Subordinate Judge is

in error here. The onus we must remember is upon the defendants to show that there was a want of title in the plaintiff. In certain circumstances one of the members of a Mitakshara family can make a valid transfer and it cannot be said that in no conceivable circumstances it is possible. Moreover for aught we know Mohipal might have acquired a title to it as a co-sharer by partition or otherwise. Therefore, it appears to us that the defendants have failed to show that the plaintiff had no title to this 4-annas share which he bought from the son of Ananda. We cannot shut our eyes to the fact, that as a matter of fact, the defendants do not say that any of the other alleged co-sharers of Mohipal had claimed any rent from them or had realized any rent from them and it appears that the claim for rent of the period in suit would be now hopelessly barred. Therefore, we think that so far as his share is concerned the defendants ought to pay rent to the plaintiff on the ground that they had admitted his title by attorning to him as regards his share.

It is unnecessary to discuss the question as to whether the onus was rightly placed upon the defendants by the Courts below. It cannot be doubted that when either through ignorance of title of the plaintiff or by fraud in the matter of execution of the *kabuliyat* the tenants attorned to the plaintiff, then according to the authorities of this Court, the defendants are not altogether estopped but can show that the plaintiff had no title either when the *kabuliyat* was executed or attornment was made by payment of rent. But it is shown in this case that the defendants were not placed in possession of the lands at the time either when the *kabuliyat* was executed or the defendants attorned. In the present case the defendants were already in possession of the holding.

In the view that we have expressed of the questions raised in this appeal it appears to us that the plaintiff is entitled to a decree to the extent of 12-annas share and the decrees of the Court below are varied to that extent. The plaintiff's suit as regards the 4-annas share fails and is dismissed.

In the circumstances we make no order as to costs.

Cuming, J.—I agree.

Appeal allowed.
Decree modified.

Z. K.

MADRAS HIGH COURT.

CIVIL APPEAL No. 192 OF 1922.
January 20, 1925.
Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

PACHIAPPA CHETTY—DEFENDANT—APPELLANT
versus
SIVAKAMI AMMAL—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 10—Trusts Act (II of 1882), s. 5—Funds entrusted to relation to carry on money-lending business for benefit of owner—Trust, whether created—Mortgage securities acquired with trust funds—Registered deed, whether necessary to create trust—Change in purpose of trust—Suit by beneficiary for account of trust funds—Limitation.

P and his brother, who were carrying on a money-lending business, purchased a house and gave it to their brother-in-law, *S*, to live in, free of rent, and transferred their funds to him and got him to transact their business on their behalf in his own name keeping separate account for the same. *S* was to render accounts and hand over the moneys and profits when demanded. *P*'s brother subsequently divided off from him and obtained from *S* his half share in those moneys and in the house, but *S* continued to act for *P* till the latter's death. Just before his death, *P* instructed *S* to continue the business as before and hold the moneys for the benefit of his wife and daughter. *S* also died shortly after and just before his death he told his son, the defendant, to continue the arrangement and pay the monies to the ladies when wanted. The properties originally entrusted to *S* consisted of bonds and notes but had subsequently been converted into mortgage-bonds in the name of *S* or his son the defendant. In a suit brought by *P*'s daughter, after her mother's death, against the son of *S* for an account of all monies belonging to her father which the defendant had collected and had not hitherto accounted for and for payment over :

Held, (1) that *S* was an express trustee in whom moneys had been vested by plaintiff's father for the specific purpose of carrying on his money-lending business, improving the estate and handing over the capital and profits to him on demand ; [p. 674, col. 1.]

(2) that it was open to the plaintiff's father to change the purpose of the trust into a similar one in favour of his wife and daughter ; [p. 674, col. 2.]

(3) that s. 10 of the Limitation Act was, therefore, applicable to the case ; [*ibid.*]

(4) that as it was not shown that at the time the funds were vested in *S* any portion of them consisted of mortgage securities, no registered instrument was required to create a trust and that it was immaterial that subsequently mortgage-bonds were taken in the name of *S* or the defendant. [*ibid.*]

Bhurabhai v. *Bai Rukmani*, 32 B. 394; 10 Bom. L. R. 540, relied on.

Per *Phillips, J.*—There being no immoveable property at the time of the entrustment, no registered instrument of transfer would be necessary; and the property would vest in *S* by the mere transfer of possession coupled with the intention of the parties that such delivery of possession should vest the property. The subsequent direction by *P* that the property should be held for the benefit of his wife and daughter was

merely an alteration of the purpose of the trust; in both cases the property would have been held for a specific purpose. [p. 673, col. 1.]

The word "vesting" in s. 10 of the Limitation Act means merely "properly having control of the property." *Ibid.*]

Kishtappa Chetty v. *Lakshmi Ammal*, 72 Ind. Cas. 842; 11 M. L. J. 431 at p. 443; 17 L. W. 467; (1923) M. W. N. 284; 32 M. L. T. 217; (1923) A. I. R. (M.) 578, relied on.

Appeal against a decree of the Court of the Subordinate Judge, Vellore, in O. S. No. 41 of 1921.

Mr. *A. Krishnaswami Iyer*, for the Appellant.

Mr. *T. M. Krishnaswami Iyer*, for the Respondent.

JUDGMENT.

Phillips, J.—The plaintiff in this case is the daughter of one Ponnambala Chetty who with his brother, Periambala Chetty formed an undivided family. They carried on money-lending dealings and entrusted those dealings to their brother-in-law Sadayappa Chetty, the father of the present defendant. Sadayappa Chetty continued those dealings for sometime and maintained accounts for the monies in his hands. In 1906 the brothers Ponnambala Chetty and Periambala Chetty effected a partition and the latter removed his share of the property from the hands of Sadayappa Chetty who, however, continued to deal with the property of Ponnambala Chetty until the latter's death in February 1912, and even after that date remained in possession of all his property. The plaintiff now alleges that Sadayappa Chetty held all these properties in trust for her and has brought this suit against his son, the defendant for an account. These facts are not disputed; but it is contended that the plaintiff's suit for an account is barred by limitation. The Subordinate Judge has, however, found that s. 10 of the Limitation Act is applicable to this case, and has given a decree. In appeal we are only concerned with the question of limitation; it being contended for the appellant that s. 10 is not applicable because the property of Ponnambala Chetty had not become vested for any specific purpose either in Sadayappa Chetty or in the defendant. The main point relied on in appeal is that the property never became vested in Sadayappa Chetty for any specific purpose; and it is contended that as the property consisted of promissory-notes, bonds and mortgage-deeds, the provisions of s. 5 of the Trust Act were not complied with, and no valid trust has been created. It is in evidence that shortly before his death Ponnambala Chetty directed Sadayappa Chetty to hold his property for the benefit of his wife and daughter; and there seems to be no reason to disbelieve the oral evidence on this point, for, many witnesses speak to the fact and the discrepancies in their evidence are merely on matters of detail which is due to the fact that the witnesses are deposing to events which took place nine years ago. It is also alleged that when Sadayappa Chetty died in December 1912 he informed the plaintiff and her mother that his son would continue to hold the property on their behalf. The arguments in appeal have been confined to the entrustment alleged to have been made by Ponnambala Chetty shortly before his death, and it is contended that, as some of the property consisted of mortgages which were immoveable property, no valid transfer was effected as there was no registered instrument of transfer and consequently, the property did not vest in Sadayappa Chetty, and *a fortiori* did not vest in him for any specific purpose. This argument, however, ignores the pleadings in the suit. The plaintiff alleged that the properties vested in Sadayappa Chetty and after him in his son, the defendant, and were held in trust for her. The defendant admitting that the properties vested in him contended that the properties vested in him absolutely and that the plaintiff had no interest therein. This contention of the defendant has been found against and this finding is not disputed in appeal. It was, therefore, the case of both parties that the properties actually vested in the defendant. Consequently no evidence was let in as to the manner in which such vesting was effected, and consequently it hardly lies with the defendant now to plead that the plaintiff has not proved an effective transfer of the properties.

Apart from this, the whole of the appellant's argument has been confined to the period dating from Ponnambala Chetty's death; but it is in evidence and it is not disputed now that the property entrusted to Sadayappa Chetty was entrusted to him many years before Ponnambala Chetty died; the alleged trust being at the time one for the benefit of Ponnambala Chetty himself. The bulk of the property originally entrusted was presumably money and, possibly promissory-notes and bonds; there is no evidence at all that at that time any

mortgages existed. The transfer of the money and bonds, therefore, could be effected by delivery; and if it was the intention of the parties that Sadayappa Chetty should hold the property as a separate fund to be accounted for by him to Ponnambala Chetty, undoubtedly an express trust would be created. There being no immoveable property, so far as it appears from the record, no registered instrument of transfer would be necessary; and the property would vest in Sadayappa Chetty by the mere transfer of possession coupled with the intention of the parties that such delivery of possession should vest the property in Sadayappa Chetty. The subsequent direction by Ponnambala Chetty that the property should be held for the benefit of his wife and daughter was merely an alteration of the purpose of the trust; in both cases the property would have been held for a specific purpose. In this view of the case, undoubtedly an express trust within the meaning of s. 10 of the Limitation Act was created and, consequently, the plaintiff's present suit cannot be barred by limitation. I do not, therefore, think it necessary to ascertain in this whether the mortgage-deeds had become vested in Sadayappa Chetty inasmuch as there is nothing to show that, when the entrustment was made, any immoveable properties, such as mortgages, were transferred. Their existence now can be explained by the fact that Sadayappa Chetty dealing with the monies of Ponnambala Chetty converted some of those monies into mortgages; and, if the money vested in him, the proceeds thereof would similarly vest. Even if it were necessary to prove vesting, it is possible that the view taken by the learned Chief Justice in *Kistappa Chetty* v. *Lakshmi Ammal* (1), that the word 'vesting' means merely "properly having control of the property" would be sufficient to dispose of the case; but, as I am of the opinion that the parties did not go to trial on this question of vesting, the defendant having admitted that the property vested in him, it is unnecessary to further discuss this question; and I need not refer to the various authorities, English and Indian, which have been referred to in the course of the argument, an argument which was largely beside the point with reference to the pleadings in the case.

(1) 72 Ind. Cas. 842; 44 M. L. J. 431 at p. 443; 17 L. W. 467; (1923) M. W. N. 284; 32 M. L. T. 217; (1923) A. I. R. (M.) 578.

The appeal, therefore, fails and dismissed with costs.

Krishnan, J.—The defendant, the appellant in this appeal, is the husband of the plaintiff. The plaintiff sues him for an account and for payment over of the moneys which she alleges her father Ponnambala Chetty entrusted to his brother-in-law Sadayappa Chetty defendant's father which on his death passed into the hands of the defendant. Defendant denied the entrustment and pleaded that pro-notes and mortgage-bonds in his name were his own property and raised several legal pleas and further contended that the suit was barred by limitation. In answer to the last plea plaintiff contended that her case fell within s. 10 of the Limitation Act and no limitation applied to it. The Subordinate Judge overruling the defendant's pleas passed a decree in plaintiff's favour and the defendant has appealed to us.

The only point raised in the appeal is the one of limitation, the learned Vakil for the appellant expressly stating that he gave up all other points. The question we have to decide is thus confined to whether s. 10 applies on the facts of this case. It is clear from the evidence that Ponnambala Chetty and his brother who were carrying on a money-lending business in Thiruvannamalai but living in a small village near by, being apprehensive of the safety of their property purchased a house in Thiruvannamalai, and gave it to their brother-in-law Sadayappa Chetty to live in, free of rent, and transferred their funds to him and got him to transact their business on their behalf in his own name keeping separate account for the same. He was to render accounts and hand over the moneys and profits when demanded. Ponnambala's brother subsequently divided off from him and obtained from Sadayappa his half share in those moneys and in the house. But Sadayappa continued to act for Ponnambala till the latter's death in 1912. There is a body of evidence which there is no reason to discredit that just before his death early in 1912 Ponnambala instructed Sadayappa to continue the business as before and hold the moneys for the benefit of his wife and daughter, the plaintiff, Sadayappa agreed to it and acted accordingly. Sadayappa also died at the end of the year 1912 and it is in evidence that just before his death he told his son the defendant to continue the arrangement and

pay the ladies the monies of plaintiff's father when wanted. Plaintiff's mother brought a suit against her son-in-law the defendant and got a decree for the transfer to her of a number of pro notes and bonds standing in the defendant's name but found to have been taken with her husband's money. Plaintiff has brought this suit after her mother's death for an account of all moneys belonging to her father which the defendant collected and had not hitherto accounted for and for payment over.

On these facts the plaintiff contends that Sadayappa was an express trustee in whom moneys were vested by her father for the specific purpose of carrying on his money-lending business, improving the estate and handing over the capital and profits to him on demand, a purpose which afterwards changed by her father into a similar one in favour of herself and her mother; she, therefore, pleads s. 10 applies. The defendant pleads that there is no proof that any funds of the plaintiff's father were vested in his father and even if so vested he says they were not vested for any specific purpose and s. 10 could not apply. According to him his father was only an agent of the plaintiff's father and as such an agency came to an end with his death in 1912 the suit is barred by limitation.

Although the evidence on the point is somewhat meagre as to what actually took place when Sadayappa was installed in the newly purchased house in Thiruvannamalai there is evidence to show that the funds of the plaintiff's father's money-lending business were thereafter kept by Sadayappa and were lent out by him on bonds and mortgages taken either in his own name or in the name of his son the defendant. Exhibit KKK the account produced and the other documents referred to by the Subordinate Judge in his judgment prove this. It is true that some bonds were taken in Ponnambala's name and Ponnambala at times sent *chits* to Sadayappa for loans to be given to borrowers. But these circumstances do not interfere with the inference that Sadayappa was made a trustee and was not a mere agent. If he was only an agent he would not have taken bonds in his own and in his son's name for moneys got from Ponnambala. The near relationship of the parties, the fact that Sadayappa dealt with Ponnambala's moneys as if they were his own and took bonds in his and in his son's name for such moneys when lent; the fact that he kept a separate account for these funds, the evidence as to what took place at Ponnambala's and Sadayappa's deaths all point to the fact that Sadayappa was not a mere agent but was in reality a trustee. There is no force in the argument that the properties were never properly vested in the defendant's father by Ponnambala. In fact the defendant's case in the lower Court was not merely that the properties were vested in his father and after his death in him but that they were actually his own properties. The plea now taken that the properties were not vested in his father is not consistent with that position. The funds were all apparently in the shape of moneys which had only to be handed over to the defendant's father with the intention of passing the property to him to vest them in him. If there were any pro-notes or bonds in Ponnambala's name at the time which required endorsement or assignment in writing to transfer, they were evidently subsequently realized and converted into moneys and taken by Sadayappa as no such notes or bonds exist now. Such taking with Ponnambala's consent would vest those funds in Sadayappa. The contention that a registered instrument was required to create a trust with reference to immoveable property like a mortgage interest is of no avail here as it is not shown that at the time the funds were vested in Sadayappa any portion of them consisted of mortgage securities. The mortgage-bonds that now exist were taken in defendant's name by his father for moneys lent out by him which were already vested in him though they were originally part of Ponnambala's estate. I have no doubt that Ponnambala's money was legally vested in Sadayappa in trust. The evidence also shows that the specific purpose of the trust was to carry on money-lending with those moneys and to increase the estate by addition of profits by way of interest and hand over when called on to Ponnambala. It was clearly open to Ponnambala, the funds being already vested in Sadayappa, to alter the propose of the trust by merely directing him to hold them for the benefit of his wife and child as he did just before his death. It seems to me that all the conditions necessary for the application of s. 10 of the Limitation Act exist in this case and the Subordinate Judge was right in overruling the plea of limitation, as under s. 10 the defendant as the

legal representative of the trustee is equally barred from pleading the Statute.

As this case turns in the facts proved here which clearly bring it within the section, it is not necessary to refer to any authorities on the exact meaning of the section. The case cited in *Krishna Pattar* v. *Lakshmi* (2) to which I was a party is clearly distinguishable as that was a case of a constructive trust. The case in *Bhuranbhai* v. *Bai Rukmani* (3) is more in point.

I agree that the appeal fails and should be dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

(2) 66 Ind. Cas. 858; 45 M. 415; (1922) M. W. N. 117; 42 M. L. J. 119; 30 M. L. T. 238; (1922) A. I. R. (M.) 57; 15 L. W. 886.

(3) 32 B. 394; 10 Bom. L. R. 540.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 282 OF 1923.

May 4, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Pearson.

Srimati JAMILA KHATUN AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

GOUR MOHAN DUTTA—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Examination of applicant on commission—Lengthy cross-examination—Refusal to answer questions—Dismissal of application—Appeal—Procedure.

On an application under s. 47 of the C. P. C. the petitioner, a lady, was examined on commission for over three hours and she then refused to answer any more questions put to her in cross-examination on the ground that her head was puzzled. The Commissioner submitted his report to the Court which passed an order that the evidence of the petitioner should be discarded altogether. The petitioner thereupon refused to produce any more evidence in support of her case and her application was dismissed. On appeal:

Held, (1) that in the circumstances of the case the evidence of the petitioner should not have been discarded;

(2) that the petitioner was justified in refusing to produce any further evidence in support of her application, inasmuch as her only remedy was to obtain an order of dismissal of her application and prefer an appeal against that order.

Appeal against an order of the District Judge, Noakhali, dated the 20th June 1923, affirming that of the Munsif, First Court, at Suhdaram, dated the 6th January 1923.

Babu *Jitendra Kumar Sen Gupta*, for the Appellants.

Babu *Gobinda Chandra De Roy*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Judge of Noakhali affirming the order of the Munsif, First Court, Noakhali, dismissing an application under s. 47 of the C. P. C. The petitioner who is the appellant was examined on commission from 9-30 A.M. till 1 P.M. She then refused to answer any more question put to her in cross-examination on the ground that her head was puzzled. The commission then closed the examination and submitted his report and the Munsif held that she deserved examplary punishment as a witness for her conduct and thought that the mere discarding of her evidence would be sufficient punishment. The learned District Judge has held and we agree with him that this order of the Munsif was wrong and the evidence should not have been discarded. He has held, however, that the Munsif was right in rejecting the application on account of what subsequently happened. At a subsequent date when the case came up for hearing the petitioner had some witnesses present but declined to examine them. The learned District Judge is of the opinion that had the evidence of the witnesses present been taken they might have established her case and that she should have examined these witnesses before appealing on the ground that her own deposition was wrongly excluded.

We are unable to agree with this view of the learned District Judge. When her own evidence, which was presumably the most important evidence on her behalf, was discarded it may well have been useless for her to proceed with the examination of the other witnesses. The only way by which she could get the wrong order rejecting her deposition set aside was by appealing against the order rejecting her application and she was well advised to have such an order passed as soon as possible.

We accordingly allow this appeal. We set aside the order of the District Judge and also the order of the Munsif rejecting the petitioner's application and the order of the Munsif dated the 6th December 1922 discarding the petitioner's evidence and direct that further enquiry be made into the matter.

The appellant will get her costs in this

and in the lower Appellate Court. We assess the hearing fee at 2 gold *mohurs*.

Z. K. *Appeal allowed.*

RANGOON HIGH COURT.

CIVIL APPEAL No. 20 OF 1924.

May 26, 1925.

Present :—Mr. Justice Heald and Mr. Justice Rutledge.

PUNUSHWAMI AND ANOTHER—APPELLANTS

versus

VEERAMUTH AND ANOTHER—RESPONDENTS.

Hindu Law -Minor—Guardian, power of to refer dispute to arbitration—Award, whether binding on minor.

Under the Hindu Law all acts of a natural guardian which the infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by the guardian. A natural guardian has, therefore, power to submit a dispute to arbitration on behalf of the minor, if the submission is for the benefit of the minor and the minor would in such a case be bound by the award made by the arbitrators on such submission. [p. 677, col. 1.]

Appeal against a decree of the District Court, Henthawaddy, in Civil Suit No. 48 of 1923.

Mr. *Bhattacharia*, for the Appellants.

Mr. *Aiyangar*, for the Respondents.

JUDGMENT.—The 1st respondent sued for the administration of the estate of his father Udaya Servai, who died about 1909. and for the recovery of his share which he alleged to be one-half, from appellants. He joined as one of the defendants his brother, the 2nd respondent, whom he alleged to be entitled to the other half of the estate. He claimed that he was within limitation because he was only two years over the age of the majority and also because he had only recently been excluded from joint enjoyment of the estate.

Appellants' defence was that two respondents were illegitimate children of Udaya Servai and that the 1st appellant being the only legitimate son was solely entitled to the estate. They also pleaded that in accordance with an award which was made on a reference to the arbitration of a *panchayat* shortly after Udaya Servai's death, they had paid and respondents had accepted Rs. 1,000 in full settlement of their claims in respect of the estate.

The 2nd appellant and the mother of the respondents are sisters. Udaya Servai lived with them both at the same time and had children by both, the 1st appellant being his son by the 2nd appellant, and the respondents being his sons by her younger sister Minachi.

The Trial Court held that both were wives and that the 1st appellant and the respondents were all three legitimate sons of Udaya Servai and as such were entitled to share equally in his estate.

Appellants allege in appeal that the 1st respondent's suit was barred by limitation, that respondents were merely illegitimate children, that even if they were legitimate their share would be one-fourth each and not one-third because there was another son who died after Udaya Servai's death, that respondents were bound by the award since Minachi, being their mother and natural guardian, had power to refer their claims to arbitration and to bind them by such reference, and that having enjoyed the benefit of the award, they are estopped from denying its validity.

The 1st respondent filed a cross-objection alleging that the 1st appellant was illegitimate, and that, therefore, he (1st respondent) was entitled to one-half and not to one-third of the estate

It is, in our opinion, proved beyond doubt that there was a reference to arbitration and an award, and, if the 1st respondent is bound by the reference and the award, he clearly has no case.

The learned Judge in the lower Court held that the reference could not bind him because be was a minor.

The case of *Temmakal* v. *Subrammal* (1) is almost exactly parallel to this case. In that case also there were two widows and two families, a minor son on one side, and two sons on the other. The mother of the one son claimed that the husband's estate ought to be divided equally between the two families, while the mother of the two claimed that it ought to be divided into three shares; of which she or her family should get two. The widows agreed to abide by the decision of a *panchayat* and they and the minor son signed a reference to arbitration. The award of the *panchayat* decided that the property should be divided into equal moieties. The mother of the two refused to accept the award, and the

(1) (1864-65) 2 M. H. C. R. 47.

other widow sued for a half share according to the award. It was contended that the award was invalid, because the minor could not be bound by the reference or by his mother's act in agreeing to it. The learned Judges said that all acts of the guardian which were such as an infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by his guardian. If that decision is still good law, it is sufficient for the disposal of the suit, since we see no reason to believe that the reference in this case was not for the benefit of the first respondent and was not an act which he might reasonably and prudently have done for himself. The case was cited in *Romon Kissen Sett* v. *Hurrololl Sett* (2) where the learned Judge said that, "the cases appear to show that a natural guardian has power to submit to arbitration," though the minor is, of course, entitled to set aside the award on coming of age on proof that it was not for his benefit, and in the cases of *Sakrappa* v. *Shivappa* (3) where a reference to arbitration was made by the father of a minor as his guardian, the award, which was impugned by the minor as unfair, was upheld on the ground that it could not be said that the agreement when it was entered into was not a fair subject of compromise of disputed and doubtful rights.

In these circumstances we hold that the award in this case was binding on the first respondent and was a bar to this suit, and we set aside the judgment and decree of the lower Court, and dismiss the suit.

The first respondent will bear the appellants' costs throughout.

Decree dismissed.

Z. K.

(2) 19 C. 334; 9 Ind. Dec. (N. S.) 667.

(3) 8 Ind. Cas. 647; 35 B. 153; 12 Bom. L. R. 984.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 653 OF 1923.

May 25, 1925.

Present :—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

GOBINDA CHANDRA CHAKRAVARTY AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

PRAKASH NATH AND OTHERS—PLAINTIFFS—RESPONDENTS

Landlord and Tenant Procedure Act (VIII of 1869), s. 27—Landlord and tenant—Suit for possession by tenant on basis of title—Denial of tenancy by landlord—Limitation.

The summary remedy provided for a tenant in s. 27 of the Landlord and Tenant Procedure Act of 1869 corresponds to that provided in s. 9 of the Specific Relief Act for all classes of persons. It has no application to a case in which the plaintiff-tenant relies upon his title and seeks to recover possession upon the strength of that title and in which the defendant denies that title. [p. 679, col. 1]

Where a tenant seeks to recover possession of a plot of land on the allegation that he is a tenant of the defendant in respect of that plot and the defendant denies such tenancy, the suit is governed by the ordinary Law of Limitation and not by s. 27 of the Landlord and Tenant Procedure Act of 1869. [*ibid.*]

Appeal against a decree of the Subordinate Judge, First Court, Sylhet, dated the 14th of December 1922, reversing that of the Munsif, Second Court at Moulvi Bazar, dated the 31st of January 1922.

Babus *Birendra Kumar De* and *Paresh Lal Shome*, for the Appellants.

Babu *Hemendra Kumar Das*, for the Respondents.

JUDGMENT.

Mukerji, J.—The only question in support of this appeal is a question of limitation.

Defendants Nos. 1 and 2 who are the appellants in this appeal contend that the plaintiffs' suit was barred by reason of the provisions contained in s. 27 of Act VIII of 1869. In order to appreciate this contention it is necessary to look into the plaint and the cases put forward on behalf of the respective parties. The plaintiffs in their plaint alleged that they were the holders of a *mourasi jote* which had descended to them from their father Ganesh Nath, that in the year 1320 corresponding to 1914 the plaintiffs' father left the village for certain purposes of his own and that the principal defendants, namely, defendants Nos. 1 to 3 taking advantage of the absence of the plaintiffs' father settled the lands of this *jote* with the other defendants, namely, defendants Nos. 4 and 5, that subsequently the principal defendants instituted a suit against the defendants Nos. 4 and 5 and obtained a decree in ejectment as against them. The plaintiffs, therefore, alleged that it was necessary for them to have a declaration of their title to the *jote* and to have a decree also for confirmation of their possession therein, when the suit was pending the decree referred to above was executed by the defendants Nos. 1 to 3 against the other defendants, and upon that on the application of the plaintiffs their plaint was amend-

ed and a prayer was included to the effect that they should be awarded a decree for *khas* possession. In the plaint two schedules of properties were given sch. (A) being the lands in respect of which the declaration of title and recovery of possession were sought for and sch. (B) being the lands which, it was alleged on behalf of the plaintiffs, had been given by them in mortgage to some third party. The plaintiffs' case was that their father, at the time of leaving the village arranged with the defendants Nos. 4 and 5 to cultivate the lands of sch. (A) in *bhag*, and that they had never abandoned the holding inasmuch as they were in possession of sch. (A) lands through the defendants Nos. 4 and 5 and of sch. (B) lands through the mortgagee who was in possession thereof.

Of the defendants defendant No. 3 did not appear nor the other defendants, namely, defendants Nos. 4 and 5, only defendants Nos. 1 and 2 entered appearance and contested the suit. Their case substantially was that the plaintiffs were not the holders of the *jote* which according to the plaintiffs comprised of the lands covered by schs. A and B and they had no *mourashi* right therein but they were the tenants in respect of the lands covered by Sch. A and also of other lands which they held in the village, that they or rather their father had as a matter of fact abandoned the tenancy without making any arrangement for payment of rent and that thereafter the principal defendants had taken *khas* possession of the holding and had settled it with the other defendants, namely, defendants Nos. 4 and 5.

The learned Munsif dismissed the suit holding that it was governed by s. 27 of Act VIII of 1869 and that inasmuch as the suit had been instituted beyond one year from the date on which the principal defendants had taken possession of the *jote*, that is to say, April 1914, the suit was barred by limitation.

On appeal preferred by the plaintiffs the learned Subordinate Judge decreed the plaintiffs' suit. His findings were that the lands of Sch. A had not been settled with defendants Nos. 4 and 5 by the plaintiffs' father as has been alleged on behalf of the plaintiffs, that the principal defendants, namely, the landlords had never taken *khas* possession of the said lands, that the plaintiffs' father did not abandon the *jote* and that, therefore, the principal defendants had no justification in law for settling the disputed lands with the defendants Nos. 4 and 5 after the plaintiffs' father had left the village with his family. The learned Subordinate Judge was of opinion that the law applicable to the case was not the one contained in s. 27 of Act VIII of 1869, but the ordinary Law of Limitation, namely, 12 years from the date of dispossession. In this view of the matter and upon those findings the learned Subordinate Judge has, decreed the plaintiff's suit, the defendants Nos. 1 and 2 have preferred this appeal.

In support of the contention put forward on behalf of the appellants reliance has been placed upon certain decisions of this Court notably the decision in the case of *Srinath Bhattacharji* v. *Ram Ratan De* (1). It is also contended on behalf of the appellants that the rulings referred to by the learned Subordinate Judge have no application whatsoever to a case like the present one.

I may say at the outset that the two cases upon which the learned Subordinate Judge relied, namely, the cases reported as *Kallida Pershad Dutt* v. *Ram Hari Chuckerbutty* (2) and *Basarut Ali* v. *Altaf Hosain* (3), are clearly distinguishable on the facts and that they have no application to a case like the present one. So far as the case of *Srinath Bhattacharji* v. *Ram Ratan De* (1) is concerned it was held in that case by Wilson and Ghose, JJ., that when the plaintiff alleged that he was the holder of a *jote* under the defendant by whom he had been forcibly dispossessed and sued for a declaration of his title and for restoration to possession; and the defendant did not question the plaintiff's tenure nor his original title, but denied the forcible dispossession and alleged that the plaintiff had relinquished the land, the suit was not one to try a question of title, but was governed by the one year's period of limitation prescribed by s. 27, Bengal Act VIII of 1869. In that case the plaintiff's title as tenant in respect of the holding from which he had been dispossessed was not questioned on behalf of the defendant. There was no question of title either raised in the suit or decided by the Court except that on the one

(1) 12 C. 606; 6 Ind. Dec. (N. S.) 412.
(2) 5 C. 317; 2 Shome L. R. 251; 2 Ind. Dec. (N. S.) 813.
(3) 14 C. 624; 7 Ind. Dec. (N. S.) 414.

hand the plaintiff alleged that he had been dispossessed by force and the defendant on the other alleged that the plaintiff had relinquished of his own accord. It is true that the dispossession was in respect of a holding to which the plaintiff claimed title, but in reality no question of title to the holding arose in the suit. The facts are entirely different from those of the present case. The plaintiff's case in the present suit was that the *jote* consisted of two plots of land described in schs. (A) and (B) to the plaint. The defendants' case was that there was no *jote* in so far as the lands mentioned in the sch. (B) were concerned, that the plaintiffs were tenants in respect of the lands covered by sch. (A) and of some other lands. The plaintiffs' *jote* right, therefore, was undoubtedly denied in the present suit. A question as to the plaintiffs' title did arise in the present suit, a distinct issue, namely, Issue No. 12 was framed and though in view of the other findings arrived at by the Munsif it was not necessary for them to go into that issue, the point was gone into by the lower Appellate Court, and decided in plaintiffs' favour. To such a case s. 27 of Act VIII of 1869 does not apply. Reference in this connection may be made amongst others to the case of *Joyunti Dasi* v. *Mahomed Ally Khan* (4) in which Mr. Justice Wilson and Mr. Justice Macpherson held that the limitation provision of s. 27 of the Bengal Act VIII of 1869 had no application to a case in which the plaintiff relied upon his title and sought to recover possession upon the strength of that title and in which the defendant denied that title. In the present case it was not possible for the plaintiffs to recover a decree for possession unless and until they had succeeded in establishing their right to the *jote*.

There is also another case to which I may refer, namely, the Full Bench decision of this Court in the case of *Tamiz-ud-din* v. *Ashrub Ali* (5) where Mr. Justice Ghose in concurrence with the other learned Judges who formed the Bench laid down that the summary remedy that was provided for a tenant in s. 27 of Bengal Act VIII of 1869 is what is to be found in s. 9 of the Specific Relief Act for all classes of persons. On no conceivable view of the facts of the present case can it be said that the suit resembles a suit under s. 9 of the Specific Relief Act for recovery of possession.

In my opinion the learned Subordinate Judge was, therefore, correct in taking the view that the law applicable was not that contained in s. 27 of Act VIII of 1869 but the general Law of Limitation, namely, 12 years from the date of dispossession.

Then, again, there is a further difficulty. The learned Subordinate Judge has distinctly found that the landlords never took *khas* possession. This finding, if correct, can only mean that even if the plaintiffs be held to have been dispossessed that dispossession was not by or at the instance of the landlords. I am, therefore, of opinion that the decision of the learned Subordinate Judge is correct and that this appeal should be dismissed with costs.

Greaves, J.—I agree.

M. B. *Appeal dismissed.*

Z. K.

(4) 9 C. 423; 4 Ind. Dec. (N. S.) 930.
(5) 31 C. 647; 8 C. W. N. 446.

RANGOON HIGH COURT.

CIVIL REVISION NO. 16 OF 1925.

June 8, 1925.

Present:—Mr. Justice Doyle.

SIVA DASS DEY—APPLICANT

versus

ASHABI AND ANOTHER—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Question of fact—Interference by High Court.

The phrase "according to law" in s. 25 of the Provincial Small Cause Courts Act does not exclude cases in which there has been a grossly erroneous decision of a question of fact. The High Court will not, however, under that section interfere in revision with questions of fact unless it can be shown that the conclusions of fact are so perverse as to lead to a conclusion that the Judge made no serious attempt to deduce them from the evidence before him or was utterly incapable of making such a deduction. [p. 680, col. 2.]

The failure of the Court to suggest an alteration in the frame of the suit does not amount to a material error of law or procedure so as to entitle the High Court to interfere with the decree in revision under s. 25 of the Provincial Small Cause Courts Act. [*ibid.*]

Revision against a decree of the Small Cause Court, Moulmein, in Civil Regular No. 723 of 1924.

Mr. *N. K. Bhattachariya*, for the Applicant.

Mr. *Thein Maung*, for the Respondents.

JUDGMENT.—Siva Dass Dey sued

Ashabi and Mohammed Sultan as legal representatives of Ma Sa for Rs. 470 in the Small Cause Court of Moulmein.

Ashabi, in her written statement, admitted the claim. The learned Judge of the Small Cause Court of Moulmein decided that the evidence had failed to establish the liability of Ma Sa, and, considering that Ashabi had admitted the claim in collusion with Siva Dass Dey, opined that whatever liability there was for the money would be the liability of Mohammed Sultan personally, and dismissed the suit against both Ashabi and Mohammed Sultan.

In revision it is urged that there should have been a decree at any rate against Ashabi; that Siva Dass Dey should have been allowed to amend his plaint so as to sue Mohammed Sultan in the alternative personally; and that the evidence went to show that the estate of Ma Sa was liable.

The Advocate for the applicant has argued that, where substantial injustice is patent on the face of the record, the High Court has power, under s. 25 of the Provincial Small Cause Courts Act, to go into the question of fact.

In *Soobramonien Chetty* v. *D. D. Coath* (1) Fox, J., held, that a High Court had no jurisdiction to interfere in any case in which the decision rested solely on facts. He again affirmed this principle in *Hurdutroy Nandalall* v. *Burma Railways Company Limited* (2). This decision was followed by Bigge, J., in *Maung Ba Kin* v. *Maung Hpaw* (3). The decision in *Soobramonien Chetty* v. *D. D. Coath* (1) was based on the decision in *Poona City Municipality* v. *Ramji* (4), where it was stated that "an error of law or procedure in the Small Cause Court confers jurisdiction upon the High Court to exercise the power committed by that section." The Judge, who laid down that principle did not, in my opinion, intend the principle to be exhaustive; indeed the sentences of his judgment, which immediately follow, make that clear and it will be noticed that he stated later on that, "The Legislative intended to confer the most ample discretion on the High Court." This view was taken in *Nathuram Shivnarayan* v. *Dhularam Hariram Marwadi* (5), where it was held that a High Court had power in exceptional cases to interfere with decisions on questions of fact. In *Turner* v. *Jogmohan Singh* (6) the Allahabad High Court, after reviewing a number of orders and judgments of the Allahabad High Court including some referred to by Mr. Justice Fox, has laid down that a High Court is not precluded from interfering in exceptional circumstances with a decision on fact.

With all due respect it appears to me that the interpretation placed on s. 25 of the Provincial Small Cause Courts Act by Fox, J., was unduly narrow. The section itself is very vaguely, and in my opinion, intentionally vaguely, worded. The phrase "according to law" cannot be held to exclude cases in which there has been a grossly erroneous decision on fact. On the other hand to say that a High Court should interfere where there has been substantial injustice due to an erroneous decision on fact would be practically to make the High Court a Court of Appeal from the Small Cause Court, since in the majority of cases, erroneous decisions on fact essentially result in substantial injustice. It may be taken, therefore, that, unless it can be shown that the conclusions on fact were so perverse as to lead to a conclusion that the Judge made no serious attempt to deduce them from the evidence before him or was utterly incapable of making such a deduction, a High Court will not interfere on revision in questions of fact.

No such case has been made out in the pre-ent instance.

I cannot regard the failure of the learned Judge of the Small Cause Court, Moulmein, to suggest an alteration in the frame of the suit as a material error of law or procedure. From the books produced by the plaintiff himself, it was clear that he could have sued Mohammed Sultan in his personal capacity as well as in his representative capacity. He made no application throughout the case, although represented by a Pleader, for amendment of the plaint. I do not consider, therefore, that it was necessarily the duty of the Judge to have suggested an amendment.

(1) 7 Bur. L. R. 15.
(2) 7 Bur. L. R. 241.
(3) 10 Bur. L. R. 298.
(4) 21 B. 250; 11 Ind. Dec. (N. S.) 169.
(5) 59 Ind. Cas. 267; 45 B. 292; 22 Bom. L. R. 1199.
(6) 27 A. 531; 2 A. L. J. 297; A. W. N. (1905) 77.

The application is dismissed with costs—two gold *mohurs*.

Z. K. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 936 TO 938 OF 1923.

May 27, 1925

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

Srimati JASODA SUNDARI CHOUDHURANI *alias* PROVABATI CHOUDHURANI—PLAINTIFF—APPELLANT

versus

LAL MOHAN BASU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Dayabhag School—Joint family—Property acquired in name of junior member—Presumption—Test.

The presumption that all properties acquired by a member of a joint Hindu family must, in the absence of evidence to the contrary, be deemed to be the properties of the family does not apply to a case in which the joint family is constituted only by a father and sons governed by the Dayabhag School of Hindu Law. In other cases of joint families governed by that School the presumption would apply. [p. 682, col. 1.]

Where the question is whether property standing in the name of a junior member of a Hindu family is a self-acquisition the criterion is to consider from what source the money came with which the purchase-money was paid. In the absence of evidence that the junior member had not separate funds or that the property in question was purchased with money belonging to him, the presumption is clear and decisive that it was acquired by the head of the family in the name of the junior member and that it was not the self-acquired property of the junior member. This presumption applied equally to a family governed by the Dayabhag School of Hindu Law as also to such a family consisting of a father and his sons. [p. 682, cols. 1 & 2.]

Appeals against the decrees of the Subordinate Judge, Khulna, dated the 31st of October 1922, reversing those of the Munsif, First Court, at Bagerhat, dated the 29th of July 1921.

Babu *Anilendra Nath Roy Choudhury*, for the Appellant.

Babu *Peary Mohan Chatterjee*, for the Respondents.

JUDGMENT.

Mukerjee, J.—These three appeals arise out of three suits for rent wherein the plaintiff claims 8 annas share of rent due for three holdings making the tenants principal defendants and the other 8 annas co-sharers *pro forma* defendants. The suits were decreed by the Court of first instance and after several interlocutory proceedings were dismissed by the learned Subordinate Judge on appeal.

One Kali Kumar Bose had two sons Kailas and Ram. The original plaintiff was the widow of Ram. The co-sharer landlords, *pro forma* defendants, are the heirs of Kailas. The properties in suit were acquired during the lifetime of Kali Kumar in the name of Kailash. Kali Kumar died in the year 1893 and the properties are said to have been acquired between 1880 and 1886. Two of these properties were acquired in the name of third parties and they subsequently executed deeds of release in respect of them in favour of Kailas.

The question which arises in these appeals is as to whether the properties were those of Kali Kumar or of Kailas and that is the sole point of controversy in these appeals.

In deciding this point the learned Subordinate Judge held that the onus of proving that the properties were those of Kali Kumar lay upon the plaintiff, and being of that opinion he thought that the plaintiff had failed to discharge that onus and in that view of the matter he dismissed the plaintiff's suits.

The question of onus is intimately connected with one or other of the presumptions of Hindu Law which are relevant to a case of his description. It has been argued before us on behalf of the appellant that in dealing with this question of onus the learned Subordinate Judge was in error. The properties having been acquired during the lifetime of Kali Kumar when Kali Kumar and his sons Kailas and Ram were members of a joint family governed by the Dayabhag School of Hindu Law and there being nothing to show that Kailas had separate funds, it is urged, that it should have been held that Kali Kumar was the owner of the properties and it was for the defendants to prove that Kailas had any separate funds out of which the acquisitions were made.

On behalf of the respondents it has been argued that this presumption does not arise in a case in which the members of the family are the father and his sons and reliance has been placed on their behalf upon the decision of this Court in the case

of *Sarada Prosad Roy* v. *Mahananda Roy* (1). The head note of that case runs in these words. "The presumption of law that, while a Hindu family remains joint, all property including acquisitions made in the name of individual members, is joint property does not apply to the case of a joint family governed by the Dayabhaga." As has been pointed out in the case of *Ramanath Chatterji* v. *Kusum Kamini Debi* (2) the head note of the case in *Sarada Prosad Roy* v. *Mahananda Roy* (1) to which I have referred is misleading. All that that case decides is that under the Dayabhag a family consisting of father and his sons cannot be regarded a joint Hindu family in the technical sense and consequently the presumption referred to in the head note quoted above does not apply to such a family. On a reference to the observations contained in page 451* of the case in *Sarada Prosad Roy* v. *Mahananda Roy* (1), it is clear that in that case the family consisted of a father and his sons and the contention that was put forward in that case was that all the properties acquired by a member of a joint Hindu family are properties of the family as a whole and the learned Judges observed that that presumption put in the way in which it was formulated before them by the learned Vakil appearing for the respondent in that case could not be taken as correct in all circumstances and that it would not arise in a case in which the father and the sons form members of a joint family governed by the Dayabhag School of Law. Ordinarily in other cases of joint family governed by the Dayabhag School the presumption of Hindu Law that while a family remains joint all properties including acquisitions made in the name of individual member is joint property does apply. See the case of *Ramanath Chatterjee* v. *Kusum Kamini Debi* (2) and the other cases cited in the judgment of this Court in that case.

In the present case the family as it stood at the time of the acquisitions consisted of Kali Kumar, his son Kailas and probably also his son Ram. Therefore, this presumption of Hindu Law cannot apply to the present case. But there is another presumption also which is relevant and which is founded upon the principle that where the question is whether property standing in the name of a junior member of a Hindu joint family is his self-acquisition the criterion is to consider from what source the money comes with which the purchase-money is paid. Therefore, in the absence of evidence that the junior member had any separate funds or that the property in question was purchased with money belonging to him the presumption is clear and decisive that it was acquired by the head of the family in the name of the junior member and that it was not the self-acquired property of the junior member. This presumption applies to a family governed by the Dayabhag School of Hindu Law as also to such a family consisting of a father and his sons, as would appear from the decision of the Judicial Committee in the case of *Parbati Dasi* v. *Raja Baikuntha Nath De* (3). The question, therefore, is whether in the present case it has been proved that the property in question was purchased with money belonging to Kailas, and also whether it has been proved that Kailas had any separate funds of his own. So far as this question is concerned there is no evidence to show that the property was purchased with separate funds of Kailas but our attention has been drawn by the learned Vakil for the respondent to a passage in the judgment of the learned Subordinate Judge as containing a finding to the effect that at the time when the property was acquired Kailas had separate property of his own. Now the passage in the judgment to which reference is made runs in these words. "It may at once be accepted from the evidence even on the defendant's side that Ram and Kailas were in possession of joint funds and that they, were also in possession of separate funds." I am very doubtful whether this finding really relates to the point of time at which the acquisitions were made, that is to say, the period from 1880 to 1886 when Kali Kumar was alive. The reasons for this doubt are these: The first part of this finding is to the effect that Ram and Kailas were in possession of joint funds. That evidently refers to a period after Kali Kumar's death, for so long as Kali Kumar was alive, it cannot possibly be said that Ram and Kailas were in possession of joint funds. I see no reason to hold that the other part of the finding that Ram and Kailas were in possession of separate funds

(1) 31 C. 448
(2) 4 C. L. J. 56.

*Page of 31 C.—[*Ed.*]

(3) 22 Ind. Cas. 51; 19 C. L. J. 129; 15 M. L. J. 66; (1914) M. W. N. 42; 12 A. L. J. 79; 18 C. W. N. 428; 16 Bom. L. R. 101; 26 M. L. J. 248 (P. C.).

relates to a different point of time from what is referred to in the first part of this finding. It will be seen on a reference to the judgment of the learned Munsif that he found, and that finding has not been displaced by the learned Subordinate Judge, that on a certain calculation the properties were acquired when Kailas' age was between 8 to 15 years and according to another calculation, when he was between 17 and 23 years. This finding as I have said has not been touched or reversed by the learned Subordinate Judge. I am unable to hold that the finding of the learned Subordinate Judge to which our attention has been drawn is really a finding to the effect that at the time when the acquisitions were made Kailas had any separate funds of his own. In the absence of such a finding it is clear that the onus would be upon the defendants and not on the plaintiff.

It has been urged before us on behalf of the respondent that there is evidence on the record upon which it may be found that Kailas had separate funds of his own at the time of the acquisition.

We think, therefore, that the proper order to make is to set aside the judgment of the learned Subordinate Judge and to send back the case to him so that he might come to a proper finding on the question as to whether Kailas had separate funds of his own at the time of the acquisitions, that is to say, between 1880 and 1886. If he finds this question in the negative, then the onus will be on the defendants and the presumption to which I have referred will enure to the plaintiff's benefit and the plaintiff will succeed unless the defendants have succeeded in rebutting the presumption. If he finds this question in the affirmative, the presumption will not arise, and the onus will be on the plaintiff to prove that Kali Kumar Bose was the owner of the properties which were acquired in the name of Kailas and the plaintiff's suit will fail unless he succeeds in discharging that onus.

In the result the decrees of the learned Subordinate Judge are set aside and the cases sent back to him to be dealt with in accordance with the observations I have made. Costs will abide the result.

Greaves, J.—I agree.

M. B. *Appeals allowed.*
Z. K. *Cases remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2116 OF 1922.

May 18, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

KARUNAMOY SINHA—PLAINTIFF—APPELLANT

versus

TINKARI GHOSE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV—Plea not taken in previous suit—Res judicata—*Plea not allowed to be taken, whether can be taken in subsequent suit.*

A plea which a party could and should have raised in a former suit but which was not raised in that suit must be held to have been decided against such party. [p. 684, col. 1.]

Where a plea of non-joinder was not allowed to be taken in a suit on the ground that it was taken at a late stage, the effect is as if the plea had been taken and had been decided against the party taking it and it will not, therefore, be open to that party in a subsequent suit to take that plea. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Second Court, Howrah, dated the 15th May 1922, affirming that of the Munsif, Third Court, Howrah, dated the 19th of January 1921.

Babu *Bireswar Bagchi*, for the Appellant.

JUDGMENT.—In the suit out of which this appeal has arisen, the plaintiff sued the defendant to recover arrears of rent cesses and damages amounting to Rs. 148-14-3 at the rate of Rs 33 as the annual *jama* due for *Kartick* 1323 to 1326 *Chaitra*. The case of the defendant was that the suit was bad for non-joinder of parties, because certa n persons. Kalipada Bepin Behari and Benode Behari Singha were not joined as parties to the suit. There was a further plea that as the plaintiff had let out 3 *bighas* out of the entire land to a third party the defendant was entitled to get suspension of all payment of rent.

The Court of first instance dismissed the suit on the ground that it was bad for non-joinder of parties and this veiw was upheld on appeal by the learned Subordinate Judge.

In appeal to this Court it has been argued that it was not open to the defendant to take this plea of non-joinder. In a former suit for rent between the parties the defendant took the same plea and the point was decided against him and the plaintiff obtained a decree for the 16 annas of the rent. No doubt the learned Subordinate

Judge overruled this objection of the plaintiff on the ground that in the previous suit the plea of non-joinder was not allowed to be raised as the same was taken at a late stage. That, no doubt, was correct. But the plea of non-joinder was one which the defendant could and should have raised in the former suit; and a point which a party could and should have raised in a former suit if it is not raised by the party is held to have been decided against him. In the present case the defendant raised this plea at a late stage and, therefore, was not allowed to contest. That being so, it must be considered to be equivalent as having been decided against him because it was a point which could and should have been raised. That being so it is not open to the defendant now to raise this plea of non-joinder.

The appeal, therefore, succeeds and the case must be sent back to the lower Appellate Court to decide the remaining issues. The appellant is entitled to his costs of this appeal. The other costs will abide the result.

Z. K. *Appeal allowed; Case remanded.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 6 OF 1924.

May 5, 1925.

Present:—Mr. Justice Carr.

MAUNG SHWE YE—APPELLANT

versus

MAUNG PO MYA AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Inheritance—Representation, principle of, whether applicable—Great-grandchildren, whether entitled to inherit in competition with children or grandchildren—Grandchildren, share of—Orasa child, death of, during lifetime of parent—Child of orasa *child, share of.*

Where an *orasa* child dies during the lifetime of the father leaving a child, the latter is entitled on the death of the grandfather to an equal share with any other surviving child of the grandfather and such share vests in such grandchild immediately on the death of the grandfather and passes undiminished to the heirs of the former. [p. 684, col. 2.]

Representation is not a principle of the Buddhist Law, the basic rule under that law being that the nearer heir excludes the more remote. The partial representation allowed to grandchildren in competition with children is merely an exception to that general rule and is the only exception to it. [p. 685, col. 2.]

Great-grandchildren, therefore, cannot inherit in competition with children or grandchildren and the line which the grandchildren represent must for the purposes of partition among the other heirs of the deceased be considered to be extinct. [p 685, col. 2; p. 686, col. 2.]

Where grandchildren are entitled to inherit along with the children of the deceased, the grandchildren take ⅓th of the share of their deceased parent, and the balance of such share goes to the children of the deceased. [p. 686, col 1.]

Special second appeal against a decree of the District Court, Prome, in Civil Appeal No. 73 of 1923.

Mr. *Kya Gaing*, for the Appellant.

Mr. *Ba Thein*, for the Respondents.

JUDGMENT.—This was a suit for partition of the estate of U Lon, who had six children, most of whom predeceased him. The position is as follows:—

Ma Si, who has been found to be the *orasa* died before U Lon, leaving a daughter Ma Aung Tin, who was the original first plaintiff. She died during the pendency of the suit and her husband and children were substituted as the first four plaintiffs.

Ma Ni had a daughter Ma Hnin Nyun. Both had died before U Lon, Ma Hnin Nyun leaving two children—Ma Wet Kyi and Ma Ngwe Kaing—defendants Nos. 6 and 7. It is claimed that they are out-of-time great grandchildren and, therefore, not entitled to share.

Ma Dun also died before U Lon, leaving two children—Ma The Nyun and Maung Po Htaw—defendants Nos. 2 and 3.

The fourth child, U Shwe Ye, is still alive, and is the first defendant and the present appellant.

Maung Shwe E had also died before U Lon, leaving two children—Maung Kyaw Mya and Maung Kyaw Than—defendants Nos. 4 and 5.

Maung Shwe Nyun had also died leaving children—Maung Tha I, Ma Saw Tin and Ma Pwa Tin—plaintiffs Nos. 5, 6 and 7.

Both Courts below gave Ma Aung Tin's children an equal share with the appellant Shwe Ye. It is contended in this appeal that this is wrong. I think this contention may be dismissed at once. On the finding that Ma Aung Tin's mother, Ma Si, was the *orasa* which finding is not now contested, Ma Aung Tin was entitled to an equal share with her uncle Shwe Ye and that share had vested in her before her death. It, therefore passed undiminished to her heirs.

The next question is whether the great-grandchildren Ma Wet Kyi and Ma Ngwe Kaing are entitled to share at all. Both the

Courts below gave them one-fourth of the share allotted to the other sets of grandchildren, but neither Court has given any real reason for doing so or any authority for holding that they are entitled to share at all.

This is a question on which there are few published decisions. It was touched upon in *Ma Gun Bon* v. *Maung Po Kywe* (1) where Mr. Burgess, J. C., said at page 75*— "By analogy, if all the children have predeceased their parents and some of them have left issue living at the time of the death of the grandparents, then the class entitled to the inheritance is that of the grandchildren. If one of the grandchildren should have died before the grandparents leaving issue, he would have missed reaching the inheritance, and the great-grandchildren, his offspring would not be allowed to come into competition with the inheriting class, at least on the same level."

It is to be noticed that there is here no definite decision whether great-grandchildren are entitled to inherit in competition with nearer descendants. That question did not in fact arise in the case.

The next case is *Maung Nyo* v. *Ma Hla Kyu* (2) in which it was definitely held that great-grandchildren were not entitled to share at all in competition with grandchildren. The correctness of this decision was somewhat strongly contested by U Tha Gywe in his Treatise on Buddhist Law, Vol. II (pages 72—77); this I pass over for the present.

The next case—and the only other one that I can find—is *Mi Kin* v. *Mi San Me* (3), in which MacColl, A. J. C., accepted and followed the decision in *Maung Nyo's case* (2), and held that "An out-of time grand daughter of a predeceased son cannot inherit at all in competition with a daughter."

The question was again further discussed in U Tha Gywe's Conflict of Authority in Buddhist Law (Vol. II, page 68 *et seq.*) Here at first the learned commentator seems inclined to contest the decision, but at page 71 he finally accepts it as correct. I have read through his arguments in both books and have referred to all the important authorities cited by him. Most of these are authorities for the proposition that in certain circumstances great-grandchildren are entitled to inherit. But that is not the question—which is whether they are entitled to inherit in competition with children and or grandchildren. I do not think it is necessary to discuss all these authorities in detail but would refer to s. 183 of the Attasankhepa. This, in the translation, reads: "If it is desired that the undivided ancestral property left by parents or grandparents should be divided, a division can be made either among sons, grandsons or great-grandsons . . ." But referring to the text I find that it would be better translated as, "Sons may divide among themselves (*chin gyin*), grand-sons may divide among themselves, great-grand-sons may divide among themselves." Thus it is clearly no authority for the proposition that there may be division between sons and great-grandsons. Indeed the section as a whole seems to refer more to ancestral property long left undivided than to a division on or shortly after the death of the orginal owner.

The question really seems to depend upon whether representation is a principle of Buddhist Law. In my order of reference in *Maung Po Thu Daw* v. *Maung Po Than* (4) I suggested a doubt whether it was. The question was not definitely decided by the Full Bench in that case, but their decision on the question raised confirms me in the view that representation is not a principle of Buddhist Law, that the basic rule is that the nearer heir excludes the more remote, and that the partial representation allowed to grandchildren in competition with children is merely an exception to that general rule, and is the only exception to it.

On that view I have no hesitation in following the decisions in the case of *Maung Nyo* v. *Ma Hla Kyu* (2) and *Mi Kin* v. *Mi San Me* (3) and in holding that great-grandchildren cannot inherit in competition with children. It follows that Ma Wet Kyi and Ma Ngwe Kaing are not entitled to inherit.

The next question is how the estate is to be shared by the remaining parties. The plaintiffs who are now respondents after setting out that these great-grandchildren were not entitled to share, claimed that they themselves were entitled to $1\frac{1}{4}$ shares out of $2\frac{3}{4}$. The basis of this claim was that Ma Aung Tin, first plaintiff and Shwe Ye, defendant were entitled to one share each

(1) U. B. R. (1897-01), Civ. 66.
(2) 2 Chan Toon's L. C. 226.
(3) 29 Ind. Cas. 741; 8 Bur. L. T. 51.
(4) 83 Ind. Cas. 10; 1 R. 316; (1924) A. I R. (R.) 73.

*Page of U. B. R. (1897-01) Civ.—[*Ed.*]

and that each set of grandchildren was entitled to one-fourth share. One set of grand-children was among the plaintiffs, the other two were among the defendants. Thus the plaint claims, in effect, that the child takes four shares and each set of grandchildren one share. This would perhaps be more satisfactory than the actual rule, but it is not the actual rule. The Dhammathats quoted in s. 164 of the Digest are clear that the grandchildren take one-fourth of the share of their deceased parent. As an example of the application of this rule we may take the case of two children, one of whom has pre-deceased the parents. Had this child been alive, his share would have been one-half. His children, therefore, take one-eighth and the remaining seven-eighths go to the surviving child. Similarly, if out of three children one is dead leaving issue, his share is one-third and his children will take one-fourth of this, or one-twelfth, and the remaining eleven-twelfths are divided equally by the two surviving children. If two out of three are dead, both leaving issue, then each set of grandchildren takes one-twelfths and the surviving children take the remaining ten-twelfths.

This, so far as I can ascertain, is the manner in which the rule has always been applied. Instances are *Ma Saw Ngwe* v. *Ma Thein Yin* (5), *Po Sein* v. *Po Min* (6), *Po Zan* v. *Maung Nyo* (7) and *Maung Po Hman* v. *Maung Tin* (8). I should not have thought it necessary to go in this question in such detail, had it not been that the District Judge has adopted a method of division for which there seems to be no authority at all.

A further question arises. In calculating the shares of the grandchildren are we to take into account Ma Ni, the grandmother of the two great-grandchildren whom I have held to be excluded?

I can find no definite authority on this point. In some of the cases that I have just mentioned there had been children who had died leaving no issue and in those cases such children were always left out of account altogether. This was done acitly and without any discussion, but it seems to be reasonable and only fair to the grandchildren. Otherwise we might have to take into account all children who had died whether in infancy or later. The case of Ma Ni is, I think, analogous. She has left descendants, but they are not entitled to share. Her line may, therefore, for the purposes of the partition be considered to be extinct.

In my view, therefore, we should consider that there are only five heirs and not six. On this basis the division should be as follows:—

Ma Dun's children—Ma The Nyun and Maung Po Htaw, defendants Nos. 2 and 3—are entitled to one-fourth of one-fifth, or one-twentieth, which they will share equally between themselves.

Similarly Shwe E's children—Kyaw Mya and Kyaw Than, defendants Nos. 4 and 5—are jointly entitled to one-twentieth.

And Ma Shwe Nyun's children—Tha I, Ma Saw Tin and Ma Pwa Tin, plaintiffs Nos. 5, 6 and 7—are jointly entitled to one-twentieth.

The remaining seventeen-twentieths is to be divided equally between the appellant Shwe Ye who will take seventeen-fortieths, and Ma Aung Tin's heirs, who will jointly take the other seventeen-fortieths.

Z. K. *Order accordingly.*

(5) 1 L. B. R. 198.
(6) 3 L. B. R. 45.
(7) 20 Ind. Cas. 327; 7 L. B. R. 27; 6 Bur. L. T. 105.
(8) 29 Ind. Cas. 756; 8 L. B. R. 113; 8 Bur. L. T. 140.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1670 OF 1923.

July 29, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Cuming.

BINOD KUMAR RAY CHAUDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM KISHORE MISTRY AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Kabuliyat *describing boundaries of land leased—Land subsequently discovered to belong to landlord, not handed over to tenant—Rent, suspension of—Abatement of rent.*

Plaintiffs granted a lease to the defendant of their interest in a certain *mouza* and the *kabuliyat* executed by the defendants described the boundaries of the *mouza*. The defendants obtained possession of all the lands which at the time of the execution of the *kabuliyat*, in the contemplation of the parties to the demise, formed part of the *mouza* and the rent was fixed on the basis of those boundaries. As a result of Settlement operations it was subsequently found

that certain other lands also formed part of the *mouza* and that the plaintiffs had consequently an interest in those lands also. Plaintiffs thereupon began to recover rent from the person who was in possession of this portion of the land. In a suit by the plaintiffs to recover from the defendants the rent reserved in the *kabuliyat* executed by the defendants, the defendants contended that the rent had been suspended inasmuch as the plaintiffs had not been given possession of the whole of the interest which the plaintiffs possessed in the lands of the *mouza*:

Held, that the defendants having been put in possession of the lands described in the *kabuliyat* in respect of which the rent mentioned in the *kabuliyat* was settled, no case of suspension or abatement of rent arose by reason of the fact that certain land was subsequently discovered to have formed part of the *mouza* in addition to the land leased to the defendants. [p. 687, col. 2.]

Appeal against a decree of the Subordinate Judge, First Court, Bakerganj, dated the 22nd of March 1923, reversing that of the Munsif, Second Court at Pirojpore, dated the 31st of March 1922.

Mr. *Ram Chandra Mazumdar* and Babu *Abinash Chandra Guha*, for the Appellants.

Mr. *Gunada Charan Sen* and Babu *Sameswar Prosad Mukherji*, for the Respondents.

Babu *Brij Mohan Mazumdar*, for the Deputy Registrar.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiffs, from a decision of the Subordinate Judge of Bakerganj, reversing a decision of the Munsif of the Second Court of Perojpore. The only point that really arises in the appeal is whether in the circumstances, which I shall presently state, the whole of the rent which the plaintiffs claimed in the suit should be suspended. The plaintiffs are the ten annas owners of a certain *mahal* and the *pro forma* defendants Nos. 25 to 27 own a six annas share thereof. The defendants are tenants of the ten annas interest in the *mouza* of the plaintiffs and also of two annas of the share of the defendants Nos. 25 to 27. The defendants hold under a *kabuliyat* dated 1296. The boundaries of the land are given and the total area is some two hundred *bighas* of which plaintiffs' share is one hundred and twenty-five *bighas*. To the west of the lands of *Mouza* Gamira lies another *mouza* which is the property of the Nurail Babus. When the settlement was made with the defendants the western portion of the land was in the occupation of one Sonatan who paid no rent, but claimed to be a tenant under the Nurail Babus and that the lands which he occupied formed part of their *mouza*. In the years 1905 and 1906 Settlement operations were in progress and in these operations it was found that there was a dispute between the landlords of the two *mouzas* as to the boundaries thereof and it was found in fact that the lands occupied by Sonatan, formed part of the *Mouza* Jamira and not of the *mouza* of the Burail Babus. After the conclusion of the Settlement and the publication of the Record of Rights the plaintiffs on the strength of this finding sued Sonatan for rent and obtained a decree against him. Now the defendants claim that as a result of this decree they have been dispossessed of a part of the land which was demised to them in the year 1296. The First Court refused to accept this contention but the learned Subordinate Judge in the Court of Appeal below has found that the obtaining by the plaintiffs of the rent decree against Sonatan amounted to a dispossession of the defendants, so that the plaintiffs could not claim from the defendants rent so long as the dispossession continued. We think that the learned Subordinate Judge was wrong in the decision at which he arrived. The defendants so far as I can understand were never in possession of the lands occupied by Sonatan and under the circumstances I do not see how we can say that the obtaining of the decree against Sonatan amounted to dispossession with a consequential suspension of rent. At the most, I think, having regard to the facts that I have stated, the defendants might be able to claim abatement of rent because they have not obtained possession of the whole of the lands demised to them and that, to my mind, is the extent of relief which the defendants could claim if indeed they are entitled to claim anything by reason of their failing to get possession of this land. But I am inclined to think that under the circumstances of this case and having regard to the facts which I have stated that no question of abatement of rent arises. After all the defendants obtained possession as a result of the *kabuliyat* of the year 1296 of all the lands which at that time, in the contemplation of the parties to the demise formed part of *Mouza* Jamera and so far as I can see, the rent was fixed on this basis consequently I do not think that the defendants are entitled to any abatement of rent by reason of the fact that certain land now included in *Mouza* Zamira as the rssult of the finding in the Settlement

operation, has not passed into their possession, I think that this appeal must succeed and that the learned Subordinate Judge was not justified in holding as he has done that there must be a total suspension of rent.

We accordingly set aside the decree of the learned Subordinate Judge but there are other questions to which the learned Subordinate Judge refers in his judgment and a decision of which is necessary before the plaintiffs' claim for rent can succeed. We accordingly send back matter to the learned Subordinate Judge in order that he may dispose of the other questions referred to in his judgment which were left open by him at the time the case was before him. The learned Subordinate Judge and after deciding these questions he will finally dispose of the appeal.

We think that the plaintiffs who have succeeded here are entitled to the costs of this appeal. The other costs including the costs of the further hearing before the learned Subordinate Judge will abide the result.

Cuming, J.—I agree.

Appeal allowed.

M. B.
Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2616 OF 1922.

June 10, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

ABDUL KARIM AND OTHERS—PLAINTIFFS —APPELLANTS

versus

CHHALE AHAMED AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 11, 13, 32—Document relating to land on boundaries of land in dispute, admissibility of.

A document relating to land on the boundaries of the land in dispute is not admissible in evidence for the purpose of determining whether a certain party was or was not in possession of the land in dispute at the date of the execution of the document.

Appeal against a decree of the Subordinate Judge, First Court, Chittagong, dated the 27th of June 1922, modifying that of the Munsif, Additional Court, Chittagong, dated the 17th of January 1921.

Babu *Chandra Sekhar Sen*, for the Appellant.

Babu *Narendra Kumar Das*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for recovery of possession on declaration of the plaintiffs' title to 9 annas odd share of certain land. Two schedules of land were set out in the plaint. The plaintiffs have obtained a decree in respect of the land of sch. No. 2. The land in sch. No. 1 consisted of two Cadastral Survey *Dags* Nos. 6460 and 6449. The decree of the lower Appellate Court dismissing the plaintiffs' claim as regards *Dag* No. 6460 is not now attacked.

The only point urged, and we think that it is a good point, is that the lower Appellate Court in deciding the question of limitation with respect to Cadastral Survey Dag No. 6449 has taken into consideration certain documents which are not admissible in evidence. These documents are Exs. E, F, G and they relate to land on the boundaries of the land in suit and were used for the purpose of showing that the defendants and their predecessors were in possession of the disputed land. At one time there was some conflict of decisions in this Court as to the admissibility of similar documents. The later cases are all in one way. We may refer to the cases of *Pramatha Nath Choudhury* v. *Krishna Chandra Bhattacharjee* (1) and *Suraj Kumar Acharji* v. *Umed Ali* (2). Agreeing with these decisions we hold that these documents were not admissible in evidence.

We accordingly set aside the judgment and decree of the lower Appellate Court in respect of the Cadastral Survey Plot No. 6449 and also in respect of costs and direct that it do re-hear the appeal in respect of the said plot and do pass an order according to law after excluding from consideration the documentary evidence of the *kobalas*, Exs E, F and G.

Costs will abide the result.

Appeal allowed.
Case remanded.

Z. K.
M B.

(1) 84 Ind. Cas. 420; 28 C. W. N. 1092; (1924) A. I. R. (C.) 1067.
(2) 6 Ind. Cas. 954; 25 C. W. N. 1022; 35 C. L. J 19; (1922) A. I. R. (C.) 251.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 143 OF 1925.

August 11, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

PIRU RAMA HAVALDAR—ACCUSED —APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 35—Penal Code (Act XLV of 1860), ss. 71, 148, 326—Rioting, armed with deadly weapons—Grievous hurt—Separate sentences, legality of.

Section 35 of the Cr. P. C. empowers a Magistrate to pass separate sentences in respect of convictions under ss. 148 and 326 of the Penal Code, subject to the provisions of s. 71 of the latter Code.

Criminal revision against convictions and sentences passed by the Assistant Judge, Satara, confirmed in appeal by the Sessions Judge, Satara.

Mr. *Y. V. Bhandarkar*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Fawcett, J.—In this case the petitioners have been convicted of offences under ss. 148 and 326, Indian Penal Code, by the Assistant Sessions Judge of Satara. Appeals to the Sessions Judge were dismissed.

It is contended that we should go into the facts contrary to the usual practice of this Court in revision, but no adequate grounds appear for our following this exceptional course. The mere fact that there was some delay in the prosecution of the accused and that the investigating Police apparently formed a conclusion contrary to the truth of the prosecution case are not sufficient to lead us to suppose that there has been any miscarriage of justice. Both the Assistant Sessions Judge and Sessions Judge have written careful judgments, considering all the evidence including these opinions of the Police Officers, and the Sessions Judge acquitted one of the four accused who had been convicted by the Assistant Sessions Judge. In my opinion, there is certainly no reason why we should apprehend that there has been any miscarriage of justice and consider the facts for ourselves.

The only legal point that has been raised is that there has been an error of law in passing separate sentences, (1) for an offence under s. 148 and (2) for an offence under s. 326 in the case of accused Nos. 2 and 3. They have been sentenced to one year's rigorous imprisonment each under s. 148, Indian Penal Code, and to three and two years' rigorous imprisonment respectively under s. 326, the sentences to run consecutively. It was ruled by this Court in *Queen-Empress* v. *Bana Punja* (1) that such separate sentences were quite legal. The subsequent Full Bench case of *Queen-Empress* v *Malu* (2), no doubt overrules this previous decision. But even under that ruling the passing of two separate sentences was held to be a mere irregularity, provided the aggregate of these did not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court sentencing the offender. Section 35 of the Cr. P. C. has, however, now been amended, so as to restore the previous view of the law that such separate sentences are quite legal. For the word 'distinct' in sub-s. (1) of s. 35, and the explanation to s. 35, have been repealed; and the only qualification is that the separate sentences are subject to the provisions of s. 71, Indian Penal Code. This prevents the offender from being punished with a more severe punishment than the Court could inflict, or could have awarded, for any one of offences coming within the scope of that section. But that provision is not infringed in the present case. Our attention was called to the ruling of the Calcutta High Court in *Keamuddi Karikar* v. *Emperor* (3), but this appears to have been decided prior to the present alteration of s. 35 by Act XVIII of 1923; and in any case we are bound to follow the rulings of this Court in preference to those of the Calcutta High Court. The sentences do not seem excessive, having regard to the offences held proved against tne petitioners. I would, therefore, dismiss the application.

Madgavkar, J.—I agree.

Z. K. *Application dismissed.*

(1) 17 B. 260; 9 Ind. Dec. (N. S.) 170.

(2) 23 B. 706; 1 Bom. L. R. 142; 12 Ind. Dec. (N. S.) 472.

(3) 81 Ind. Cas. 593; 51 C. 79; 28 C. W. N. 347; 25 Cr. L. J. 945; (1924) A. I. R. (C.) 771.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 240 OF 1924.

April 11, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice.

HURMAT ALI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 367—Appellate Court, judgment of—Failure to discuss facts—Revision.

A judgment of an Appellate Court which neither discusses the facts of the case nor disposes of the grounds of appeal is not in accordance with law and is liable to be set aside by the High Court in revision.

Dalip Singh v. *Emperor*, 64 Ind. Cas. 377; 2 L. 308; 23 Cr. L. J. 9; 4 U. P. L. R. (L.) 9; 24 P. L. R. 1922, followed.

Case reported by the Sessions Judge, Hoshiarpur, with his No. 28, dated the 7th January 1924.

GROUNDS.—This is an application for revision with respect to an appellate judgment of Sheikh Mahbub Bakhsh Additional District Magistrate, in a case under s. 323, Indian Penal Code. The applicants Hurmat Ali, etc. were sentenced to two months' rigorous imprisonment and a fine of Rs. 50 each under that section by Syed Abbas Hussain Shah, Magistrate, Second Class and their appeal has been dismissed by Additional District Magistrate.

The first point raised before me is that the judgment of the Additional District Magistrate is not in accordance with law inasmuch as it does not discuss the facts nor the grounds of appeal. This contention is, I think, fully justified. The appellate order consists of only about seven lines. There were eight grounds of appeal before the Additional District Magistrate. But there is no attempt to deal with them in a systematic manner. An important ground of appeal with respect to the question of self-defence has not even been touched. The judgment clearly fails to comply with the provisions of s. 367, Cr. P. C. [*vide Dalip Singh* v. *Emperor* (1).]

I, therefore, submit the records of the case to the Hon'ble High Court with the recommendation that the judgment be set aside and the Additional District Magistrate directed to deliver a fresh judgment after re-hearing arguments and dealing fully with the grounds of appeal before him.

Dr. *Muhammad Alam*, for the Petitioners.

(1) 64 Ind. Cas. 377; 2 L. 308; 23 Cr. L. J. 9; 4 U. P. L. R. (L.) 9; 24 P. L. R. 1922.

ORDER.—The judgment of the Additional District Magistrate does not comply with the requirements of the law, *vide Dalip Singh* v. *Emperor* (1) and must be set aside. Accordingly I accept the recommendation made by the Sessions Judge and, setting aside the judgment of the Appellate Court, direct, it to try the appeal again and deliver a judgment in accordance with the provisions of the law.

N. H. *Appeal accepted.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 118 OF 1925.

July 23, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

EMPEROR—APPELLANT

versus

ABDUL GANI BAHADURBHAI—ACCUSED—RESPONDENT.

Evidence Act (I of 1872), ss. 9, 88, 114—Penal Code (Act XLV of 1860), ss. 411, 414—Assisting in disposing of stolen property—Telegram informing Police of theft, whether admissible—Presumption—Ownership of stolen property, whether must be traced—Circumstantial evidence—Prosecution, duty of.

In order to establish a charge under s. 414 of the Penal Code on circumstantial evidence, the prosecution must show that upon the facts admitted or proved the propositions that the property which is the subject-matter of the charge is stolen property, and that the accused had guilty knowledge are the only propositions which are consistent with the rest of the evidence. If, on the other hand, the accused can put forward any alternative hypothesis reasonably possible or even probable, he is entitled to the benefit of the doubt and the case against him must fail. [p. 692, col. 2.]

The Bombay Police received a telegram purporting to emanate from the Chief Commissioner of Police, Nyasaland, informing the Commissioner of Police, Bombay, that certain blank drafts in duplicate belonging to the Blantyre Branch of the Standard Bank on their London Office had been stolen and it was feared that signatures would be forged and negotiation attempted in Bombay. The Bombay Police sent a telegram in reply to the Nyasaland Police making enquiries from the latter and received a second telegram in reply, whereupon the Commissioner of Police, Bombay, circulated the information contained in the telegrams to the Banks in Bombay. Accused cashed one of the drafts mentioned in the telegrams from Nyasaland at the French Bank in Bombay and obtained payment. Next day he presented and attempted to obtain payment of another of the drafts at the Eastern Bank of Bombay. The clerk to whom the draft was presented asked the accused to wait and informed his superiors who communicated with the Police and the latter arrested the accused. The accused was put upon his trial for offences under

ss. 414 and 414 511 of the Penal Code in respect of the draft cashed by him and that attempted to be cashed :

Held, (1) that the telegrams purporting to be sent by the Nyasaland Police were relevant to explain the conduct of the clerk of the Eastern Bank and of the Bombay Police and were, therefore, admissible in evidence under s. 9 of the Evidence Act ; [*ibid.*]

(2) that in the circumstances of the case it was a reasonable presumption under s. 114 of the Evidence Act that the telegrams had emanated as they purported to do from the Nyasaland Police and that the Nyasaland Police had received information from the Standard Bank of Blantyre that the drafts mentioned in the telegrams were missing and that the Bank believed that they were stolen and feared that they might be forged and misused in Bombay ; [p. 693, col. 1.]

(3) that the telegrams being admissible in evidence could be considered along with the rest of the evidence in order to determine whether the drafts were stolen property ; [p. 692, col. 2.]

(4) that for the purposes of a conviction under s. 414 of the Penal Code it was not necessary to trace the ownership of the drafts and that it was sufficient if it was proved that the drafts were stolen property ; [p. 694, col. 2.]

(5) that as upon the evidence on the record read along with the explanation of the accused it was not possible to hold that the accused could have been in possession of the drafts honestly, the drafts must be held to be stolen property, and that the accused was guilty of the offences charged. [p. 694, col. 2; p. 695, col. 1.]

Per *Fawcett, J.*—There is no warrant for the proposition that a person who might be charged under s. 411 of the Penal Code cannot be charged and convicted under s. 414 of the Code. [p. 695, col. 1.]

Section 414 of the Penal Code requires that the accused should have assisted some one else in the disposal of the property and does not cover a case where a person receives and then disposes of the stolen property entirely on his own account. [p. 695, col. 2.]

Criminal appeal by the Government of Bombay from an order of acquittal passed by the Acting Third Presidency Magistrate, Bombay.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

Mr. *G. N. Thakor* (with him Messrs. *M. M. Kotasthane* and *P. N. Vijayakar*), for the Accused.

JUDGMENT.

Madgavkar, J.—This is an appeal by the Government of Bombay from an acquittal by the Third Presidency Magistrate of the accused Abdul Gani Bahadurbhai *alias* Karim Kasam.

The accused is a Muhammadan of Kathiawar and has been doing business as a baker at Blantyre in Africa. He returned to India about the end of October 1924. On November 12, 1924, accompanied by the witness Vanechand, a clerk in a Velophone office, he presented at the French Bank in Bombay and obtained payment of a Bill of Exchange No. 3281 (Ex. A) dated June 10, 1924, from the Blantyre branch of the Standard Bank of South Africa on their London office for £900. The next day he presented and attempted to obtain payment at the Eastern Bank of Bombay of a similar Bill No. 3293 (Ex. E) from the same branch in South Africa on their London office for £2,000. The Bombay Police had, however, on June 27 and July 5, received two telegrams purporting to emanate from the Chief Commissioner of Police, Nyasaland, informing the Commissioner of Police, Bombay, that four blank drafts Nos. 3281, 3285, 3289 and 3293 in duplicate belonging to the Blantyre branch of the Standard Bank on their London office had been stolen and it was feared that the signatures would be forged and negotiation attempted in Bombay. The Commissioner of Police, Bombay, circulated information of this letter to the Banks in Bombay, among them the Eastern Bank ; and the clerk Amritrao of the Eastern Bank, on presentation by the accused of the Bill No. 3292, asked him to wait and informed his superiors. They communicated with the Police, the latter appeared and arrested the accused. The third draft No 3285 for £1,500 (Ex. G) was found on him. The last draft No. 3289 (Ex E) for £2,500 was, the accused admits, given by him together with a sum of Rs. 1,000 to Vanechand referred to above. Vanechand, on hearing of the accused's arrest, tore up the draft. The pieces (Ex. E) were secured by the Police.

Apart from the telegrams, which the learned Magistrate held to be inadmissible, no evidence was adduced from Africa. The other evidence consisted of what transpired in Bombay as to which there was little or no dispute and of the accused's statement and explanation, that he had received all four drafts at Blantyre from one DeSouza, a clerk in the Standard Bank and a neighbour of his for negotiation in Bombay.

The learned Magistrate in view of the Full Bench decision in *Empress* v. *Moorga Chetty* (1), was doubtful as to his jurisdiction. But he framed two charges against the accused, one under s. 414 or in the alternative under s. 420 as to the first draft which had been honoured, and another under the same sections read with s. 511, in respect of the second draft, presented but not paid.

On a consideration of the evidence, how-

(1) 5 B. 338; 3 Ind. Dec. (N. S.) 223.

ever, it appeared to the learned Magistrate that no false representation was proved to support either charges under s. 420, Indian Penal Code, and that on the charges under s. 414, there were grave reasons for suspicion, but in the absence of evidence from Africa, that the accused's guilt was not proved. On the other hand, he ordered that the moneys realised by the first accused should be returned to the Bank on the ground that the draft must have come into De Souza's hands by theft or some offence.

It is not clear how the learned Magistrate could, on the main charges, hold that the drafts were not proved to be stolen but as regards the return of the money that they were so proved.

It is argued for the Government that the evidence on record sufficed to prove both that the drafts were stolen property and the accused's guilty knowledge and intention under s. 414, Indian Penal Code; and on the charge of misrepresentation, it is argued that presentation was a misrepresentation that he was a holder in due course.

For the accused it is contended that there was no evidence that the drafts were stolen and that the accused's guilty knowledge and intention are not only not proved but his conduct and statement throughout were straightforward. Reliance is placed on the *dictum* of this Court, in cases such as *Queen-Empress* v. *Alu Kala* (2) and *Emperor* v. *Jethalal* (3), that s. 414 of the Indian Penal Code applies only where there is no possession of the stolen property.

There are two peculiarities in this case. There is no direct evidence as to the stolen nature of the drafts, the difficulty being due to the distance between Bombay and Africa, and the difficulty was common to both sides. The prosecution apparently made no inquiry, and at all events produced no evidence from Africa. Nor could the accused examine DeSouza or other witnesses. His application for commission being issued to Africa was clearly outside the authority of the Court under s. 503 of the Cr. P. C. as it is now framed. The second peculiarity is that, unlike most cases under s. 414, Indian Penal Code, the property alleged to be stolen consists not of ornaments or similar valuable or cattle but of Bills of Exchange.

These peculiarities, however, leave the duty of the Court unaffected. It is reduced, in fact, to a case of circumstantial evidence not only on the question of the accused's guilty knowledge and intention but also on the question whether the drafts are proved to be stolen property within the meaning of s. 410, Indian Penal Code. The method of arriving at an answer, as in other cases of circumstantial evidence is, I conceive, the same Upon the facts admitted or proved the prosecution must show that these two propositions, *viz.*, that they were stolen property and that the accused had guilty knowledge, are the only propositions which are consistent with the rest of the evidence. If, on the other hand, the accused can put forward any alternative hypothesis reasonably possible or even moderately probable, the accused is entitled to the benefit of the doubt and the case against him must fail.

The telegrams Ex. X were held to be inadmissible by the learned Magistrate, presumably because of the absence of evidence from Africa. But they are relevant to explain the conduct of the witness Amritrao, the clerk of the Eastern Bank, and of the Bombay Police, and are, therefore, admissible, and are not rendered inadmissible by s. 28 of the Indian Evidence Act, on which reliance is placed for the accused. That section merely embodies the fact that a telegraph office makes no inquiries and is in no way responsible for the identity of the sender of a message, much less for the truth of its contents. It is not open to the prosecution on the single evidence of the telegrams to ask the Court to presume that they were sent by the Police of Nyasaland or that the drafts were stolen property. But there is nothing in the section to prevent the telegrams once admitted from being considered along with the rest of the evidence on the questions stated above.

In regard to the accused's statement under s. 342, Cr. P. C., it can, and in cases of circumstantial evidence must, be taken into consideration. It may, in the circumstances of the present case of inability to procure evidence from Africa, even be accepted as to the circumstances under which the accused came into possession of the drafts. On these premises I proceed to enter on a consideration of the proper in-

(2) Rat. Unrep. Cr. C. 553; Cr. Rg. 28 of 1891.
(3) 29 B. 449 at p. 463; 7 Bom. L. R. 527; 2 Cr. L. J. 400.

ferences from the facts admitted or proved including this statement.

As for the telegrams, it appears that when the first telegram was received on June 27, the Bombay Police inquired from the Nysaland Police from whom it purported to come, and received a reply by a second telegram on July 5. It is not alleged for the accused that there was any person in Africa who had an interest in June in sending false information in code in the name of the Nyasaland Police as regards the blank draft forms to the Bombay Police. On the contrary, the second telegram was an answer to the telegram addressed to the Chief Commissioner of Police of Nyasaland. It is, in my opinion, a reasonable presumption under s. 114 of the Indian Evidence Act, firstly, that the telegram Ex. X has emanated, as it purports, from the Nyasaland Police, and, secondly, that the Nyasaland Police received information from the Standard Bank of Blantyre that these drafts were missing and that the Bank believed that they were stolen and feared that they might be forged and misused in Bombay.

What happened to these drafts from the time of their disappearance from the Bank in June up to the time they came into the possession of the accused in Africa, is not in evidence. He got them, it may be conceded from one DeSouza, one of the clerks of the Bank. This clerk DeSouza gave the four missing drafts totalling £ 6,900 to his neighbour the accused, a baker. Even according to the accused's own brother, the drafts usually sent by the accused were not frequent and were of small amounts. His brother Abdul states: "One draft of £ 33 was given to Narsi Jina on December 3, 1922. Another draft of February 1, 1923, for £ 20 was paid to Sharif Hassam. On April 8, 1924, a draft for £ 20 was paid to Narsi Jina." To take the accused's own statement: "DeSouzaasked me if I would cash drafts for him in India. I asked him what remuneration I was to get. If I would cash four drafts of £ 6,900 for him in India I was to get Rs. 4,000 for my trouble as commission. I asked him if I should negotiate in my own name. DeSouza said 'no' and he told me that I should not endrose them in the name by which I was known in Africa as I had creditors in Africa and the money might be attached. I endorsed the drafts in the name of Karim Kasam as I had opened a firm in my native place in the name of my young brother Karim and in my name Kasam."

On the first point, namely, whether the drafts were stolen or otherwise, it appears to me that no alternative hypothesis has been set up or is possible on all this evidence except that the drafts were stolen. The information by the Bank to the Police at Nyasaland in June, never contradicted hitherto, that the Bank drafts were missing or stolen, the fact that they disappeared till about October and were in the possession of the clerk in the same Bank, who probably knew of the loss and would not cash them in Blantyre but thought it necessary to send them all the way to Bombay, without his own endorsement—all these circumstances coupled with the large amount of the drafts and the presumably small pay of the clerk DeSouza make it impossible, I think, to arrive at any other inference except that the drafts were stolen—stolen by whom, it is not necessary for the purpose of this case to consider. In this connection it is relevant to consider Vanechand's own action. It is argued for the Government that Vanechand was also one of the conspirators and that under s. 10 of the Indian Evidence Act his conduct was relevant against the accused. But Vanechand has not expressly been implicated in the present case as a conspirator with the accused and the fact that he tore up the draft is evidence only admissible under s. 9, and not under s. 10 of the Indian Evidence Act. But after making every allowance for timidity, it is impossible to get over the fact that unless Vanechand thought that the draft must have been stolen, it is unlikely that he would tear to pieces in a moment of nervousness a draft for so large an amount.

I pass on to the second point as to the accused's knowledge and intention. Accepting the accused's own version, the question is whether from the admitted circumstances there was a reasonable possibility of his believing that the drafts were not stolen, or whether he must have had reason to believe that they were stolen. DeSouza was a clerk presumably on small pay. He shows to the accused four drafts for £ 6,900 dated June from the Bank where he is employed to the knowledge of his neighbour the accused. None of the drafts bear DeSouza's endorsement. DeSouza instead of cashing the drafts himself in Blantyre, deliberately makes them over to the accused and requests him to cash them in Bombay and

tells him expressly that he should not negotiate them in his own name. The accused keeps them with himself in Bombay for about two weeks and makes no attempt to negotiate them through a recognised broker. He takes with him the clerk Vanechand, and in negotiating the smallest of them, he signs not his own name but uses a double name, his brother's name and a name he says is his own. He gave Vanechand, with whose help he negotiated the first draft, not less than Rs. 1,000. Vanachand states that this sum was given to keep for the expenses for the office which the accused said he was going to open in some premises in Kalbadevi Road. It is difficult to accept this explanation of the receipt by Vanechand of so large an amount for an office still to be rented and opened in the future. Vanechand on the accused's arrest, tears up the fourth draft. On the change of the notes obtained at the Bank on the first draft into smaller notes in the currency office, I do not lay much stress. Under all these circumstances stated above, it appears to me that, here again, no alternative hypothesis is made out, and that the accused's conduct from the time he received the drafts till the time of negotiations is only consistent with his guilty knowledge and intention.

Addmitting that DeSouza told him of his intention to import agricultural implements and that the accused believed it, that does not affect the other admitted conduct and the adverse inference against him. I am of opinion, therefore, that the second issue must also be answered against the accused.

As regards jurisdiction, the Full Bench ruling and view in *Queen-Empress* v. *Moorga Chetty* (1) have been modified by the subsequent amendment of s. 410, Indian Penal Code, by the words inserted in the section by s. 9 of Act VIII of 1882; and undoubtedly the Court had jurisdiction in the case.

On the legal question as to s. 414, Indian Penal Code, the case of *Queen-Empress* v. *Alu Kala* (2) has been cited. In that case it appears that the person who dishonestly received or retained the stolen bullocks with guilty knowledge was also held to have disposed of them but in one and the same transaction; and this Court held that the separate and consecutive sentences passed under ss. 411 and 414 could not stand, confirmed the sentence under s. 411, Indian Penal Code, and set aside the other. It was certainly observed in that case in the short judgment that "s. 414, Indian Penal Code, applies only where there has been no actual receipt" and this observation has been referred to with approval by Batty, J., in *Emperor* v. *Jethalal* (3). It does not appear, however, that Illustration (*j*) to s. 235 of the Cr. P. C, was brought to the notice of the Court in either case. That Illustration runs as follows:

"Several stolen sacks of corn are made over to *A* and *B*, who know they are stolen property, for the purpose of concealing them. *A* and *B* thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain-pit. *A* and *B* may be separately charged with, and convicted of, offences under ss. 411 and 414 of the Indian Penal Code."

Taking the sections themselves and Ch. XVII of the Indian Penal Code in which they stand, it would appear that ss. 378 to 409, Indian Penal Code, deal with various criminal methods by which property may be dishonestly taken from the possession of the lawful owner, that is, theft, extortion, robbery and dacoity, criminal misappropriation of property and criminal breach of trust. The next portion of the Chapter deals with subsequent criminal acts with stolen property as defined in s. 410. Stolen property when it passes may be first received retained and then finally concealed or disposed of; and it is in this chronological sequence that ss. 411 to 414, in my opinion, deal. When receipt or retention, not necessarily for disposal, is dishonest, s. 411 is the appropriate section. If, on the other hand, dishonest receipt or retention cannot be proved but only dishonest concealment or disposal, s. 414 is more appropriate. Thus, in the case of *Emperor* v. *Budhankhan* (4) certain gold bangles, the ownership of which was not known and could not be traced, were found and concealed on the Railway line, in a place only known to the accused Pathan. It was held that he himself had concealed it. The Sessions Judge thought that the verdict of 'guilty' of the Jury was erroneous and referred the case, feeling doubtful as to the lack of legal proof that the property was stolen. As was pointed out by Batchelor, J., in a case under s. 414, Indian Penal Code, the ownership of the property need not be traced. It was sufficient if it was proved that the property was stolen. It was held to be stolen property in that case, because it was such that it could not honestly

(4) 17 Ind. Cas 537; 14 Bom. L. R. 893; 13 Cr. L J. 793.

be in the possession of a wandering Pathan. With this view of law I agree.

Applying the law to the present case, though there is no direct evidence before us as to the actual theft of these drafts, for the reasons stated above no reasonable doubt is left in my mind, firstly, that they were stolen, and, secondly, that when the accused negotiated the first draft, and attempted to negotiate the second draft, he had reason to believe they were stolen property. I would, therefore, allow the appeal, set aside the order of acquittal and convict the accused on the first charge under s. 414, and on the second charge under ss. 414 and 511, Indian Penal Code.

In this view it is not necessary to express any opinion on the alternative charges under s. 420. But I agree upon the whole with the learned Magistrate that no definite false representation by the accused is proved.

Fawcett, J.—I agree generally with the reasonings of my learned brother and his exhaustive judgment leaves little for me to add. On the legal question that was raised as to the applicability of s. 414, Indian Penal Code, to this case, I think that Illustration (*j*) to s. 235, Cr. P. C. supplies a conclusive answer to the contention that a person who has dishonestly received stolen property cannot possibly be charged and convicted of voluntarily concealing or disposing of that property. The Illustration is one where *A* and *B* both receive property knowing it to be stolen property, and then go and conceal it. The Illustration says as plainly as possible that both of them may be separately charged with and convicted of offences under ss. 411 and 414. This is an illustration to the general principle embodied in sub-s. (2) of s. 235 that, if the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences. Therefore, the remarks that have been made in some cases that a person who might be charged under s. 411, cannot be charged and convicted under s. 414 are not, in my opinion, binding upon us, and must be rejected so far as they are in conflict with this particular illustration. In the present case the proper charge against the accused, in my opinion, is clearly one under s. 414, because the particular act which led to his arrest and trial was the disposal of one draft and the attempted disposal of another; and the evidence that was adduced by the prosecution related to such particular act or acts and to the subsequent conduct of the accused and Vanechand, who accompanied him to negotiate the first draft. The accused might have possibly been charged and even convicted under s. 411. For although it was contended on his behalf that the Court would have no jurisdiction on a charge under s. 411, I fail to see how that contention can possibly prevail against the clear wording of s. 4, Indian Penal Code, and s. 180 of the Cr. P. C., especially having regard to the Illustration (*b*) to s. 180 and the new sub-s. (3) of s. 181. He could, at any rate, it seems to me, have been convicted of retaining stolen property, assuming of course that the ingredients of the offence are proved and also assuming that he was born in British India and domiciled there his parents being similarly British Indians. But this point was not fully argued and it is unnecessary to decide it. Section 414, no doubt, requires that the accused should have assisted someone else in the disposal of the property and does not cover a case where a person receives and then disposes of stolen property entirely on his own account. But in the present case the accused himself asserts that the clerk DeSouza made a proposal to him to help in the disposal of these drafts and he fell in with that proposal and so committed the acts which are the subject of the prosecution. Therefore, it seems to me, on the facts alleged and held proved, the accused clearly voluntarily assisted in disposing of these drafts.

On the merits, I agree with my learned brother that the circumstantial evidence *plus* the statement of the accused under s. 342, Cr. P. C., afford no other reasonadle hypothesis, than that he had a guilty knowledge, or at any rate felt convinced in his own mind, that these drafts had been stolen, so that he had reason to believe they were stolen, following the ruling in *Empress* v. *Rango Timaji* (5). In regard to the accused's own statement some remarks were made that the Court should not use it to fill up any gap in the prosecution case. There are no doubt cases in which that is a proper remark to make, but the present, in my opinion, clearly is not one of them. The Code itself says in sub-s. (3) of s. 342 that his

(5) 6 B. 402; 6 Ind. Jur. 538; 3 Ind. Dec. (N. S.) 724.

statement can be "taken into consideration." That is a phrase that is also used in s. 30 of the Indian Evidence Act in regard to the confession of a co-accused, and it has been held in *Queen-Empress* v. *Khandia*, (6) and various other cases, that the Court may take the confession into consideration in order to determine whether the issue of guilt is proved or not, and to that extent it becomes practically on the same footing as other evidence, although technically it is not evidence in the case according to the definition contained in the Indian Evidence Act, inasmuch as it is not made on oath. In the present case the inference of guilt arising against the accused from his own conduct and the inference arising that the property was stolen from Vanechand's conduct in tearing up the draft that accused had given to him (Ex. E), did throw an onus on the accused to explain how it was that he came to dispose of the drafts. His explanation, I agree with my learned brother, should be taken as it stands because the accused had no opportunity of adducing evidence in support of it; and taking it in that way, it clearly is a part of the material on which the Court has to decide the issue of the accused's guilt or otherwise.

On the other hand in regard to the telegrams I think the learned Magistrate has not given due weight to them. He has in fact excluded them as inadmissible. The fact, however that these telegrams were sent is clearly relevant and admissible under s. 9 of the Indian Evidence Act, and I agree with my learned brother that the circumstances referred to by him raise a presumption under s. 114 of the Indian Evidence Act that the main telegram of June 26, emanated from the Nayasaland Police. That telegram is not of course evidence that the drafts had actually been stolen; but it gave information to the Bombay Police, which at any rate afforded a ground for a reasonable suspicion that these particular drafts were stolen property, and the Police, therefore, had authority to arrest the accused when he was found in possession of one of these drafts, under s. 33, cl. (*d*), of the Bombay City Police Act, IV of 1902. The telegram explains how it was that they came to arrest the accused, and this case is not, therefore, on the same footing as it would have been if there were nothing to attach suspicion to the accused's possession of the drafts. The drafts are alleged by the Nyasaland Police to have been stolen, and that is a circumstance which has to be taken into consideration as part of the evidence in this case. If any evidence had been adduced by some officer of the Standard Bank in Africa regarding the alleged theft, then of course this would have been a simple case, The only difficulty that arises is due to the absence of such evidence, but it does not necessitate the accused's acquittal. I agree with my learned brother that the Court is entitled to consider whether the evidence, coupled with the accused's own statement, does not circumstantially prove the accused's guilt. As long ago as 1865 this Court, in *Reg.* v. *Harishankar Fakirbhat* (7) refused to interfere in a similar case where the evidence was purely circumstantial. In that case it was argued that there was no proof that the property was stolen and that the evidence failed to show guilty knowledge. It was held that the persons concerned must have known, or have had reason to believe, that the property was stolen, and that the mere fact that the prosecution could not definitely establish from whom it had been stolen did not prevent the accused's conviction. A reference may also be made to Wills on Circumstantial Evidence, 6th Edition, page 95, which cites cases where a similar course has been followed to meet a difficulty in establishing the identity of stolen property. We are, therefore, not in any way setting up a new principle or departing from established law. I feel no reasonable doubt whatever as to the guilt of the accused in this case. I, therefore, agree in convicting him on both the charges that relate to s. 414.

Per Curiam.—In sentencing the accused we take into account his conduct which has been fairly straightforward and of assistance in the inquiry, and also the fact that the full amount obtained by cashing one of the drafts has been practically recovered, so that no substantial loss has been caused to the Bank, as far as we are aware. On the other hand, the drafts were for large amounts, and it is obvious that the punishment should be of a somewhat deterrent nature. We do not think that it is a case for inflicting a fine. We

(6) 15 B. 66; 8 Ind. Dec. (N. S.) 45.

(7) 2 B H. C. R. 130.

sentence the accused to six months' rigorous imprisonment on each of the two charges of which he has been convicted, the sentences to run concurrently.

The accused should accordingly be taken into custody and sent to Jail.

We wish to add that, while recognising the difficulties in the case, we think that the Commissioner of Police, Bombay, should have endeavoured to have obtained some evidence from Nyasaland regarding the loss of these drafts, before sending up the accused to the Magistrate. As similar cases may occur in future, we think it right to draw his attention to this particular point, as the omission to do this has very nearly resulted in a failure of justice.

Z. K. *Order set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 21 OF 1921.

April 11, 1924.

Present :—Sir Shadi Lal, KT.,
Chief Justice, and Mr. Justice Zafar Ali.

CHOGHATTA—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 154—First Information Report—Ruqa *by Police Officer during investigation—Evidence Act (I of 1872), s. 157—First Information Report, whether substantive evidence.*

A *ruqa* by a Police Officer sent from the spot during the course of investigation, embodying the substance of the complainant's report made previously and some result of the investigation neither signed nor thumb-marked by the complainant is not a First Information Report within the meaning of s. 154, Cr. P. C. [p. 698, col. 1.]

Emperor v. *Kampu Kuki*, 11 C. W. N. 554; 6 Cr. L. J. 86 and *King-Emperor* v. *Daulat Kunjra*, 6 C. W. N. 921, referred to.

A First Information Report is not a substantive piece of evidence. It can only be used as a previous statement to corroborate or contradict a statement made subsequently in Court. [p. 698, col. 2.]

Appeal from an order of the Sessions Judge, Attock at Campbellpur, dated the 8th December 1923.

Mr. *Khurshaid Zamun*, for the Appellant.

Mr. *D. R. Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—The two appellants Khan Muhammad and his son-in-law Choghatta who are blacksmiths of the village Saggar, District Attock, have been convicted of the murder of Fazal and awarded capital sentences under s. 302, Indian Penal Code. The convicts have lodged separate appeals and the case is also before us under s. 374 of the Cr. P. C.

Fazal deceased was the full brother of Khan Muhammad accused but there was no love lost between them. They had been quarrelling ever since the death of their father Shera so much so that in June 1921 they and their wives were put on security to keep the peace. This animosity between the brothers was produced by an act of Shera himself which was that he gifted all his landed property to Khan Muhammad to the exclusion his other son Fazal. On the death of Shera which took place some three years before the murder, Fazal brought a suit against Khan Muhammad for his share of the property and obtained a decree with costs. In execution of that decree a quantity of grain belonging to Khan Muhammad was attached and in prosecution of his application for sale of that grain Fazal attended the Executing Court at Talagang on the fateful day (25th June 1923) but did not return home at night. The suspicion that some evil had happened to him was roused in a fortuitous way almost immediately after his murder. As he was leaving for Talagang in the morning Sultan Muhammad (P. W. No. 11) had asked him to find out the price of cotton in the market there. In order to ascertain what information Fazal had brought on this point Sultan Muhammad proceeded to his residence at the time of night prayers, *i. e*, long after dusk, when he was expected to have returned. On the way Sultan Muhammad came across his cousin Fatta (P. W. No.3) who metioned to him that as he (Fatta) had been passing close to the area known as *Shahidan* he heard a voice crying in the dark "I am alone and being murdered." On arrival at Fazal's house Sultan Muhammad found that Fazal had not returned and suspecting foul play he related to *Musammat* Bakhat Bhari wife of Fazal what Fatta had told him. Khan Muhammad and Choghatta who had not gone to Talagang that day were found absent from home at that time. Therefore, *Musammat* Bakhat Bhari felt alarmed and at once set out on a search for her husband.

Accompanied by Sultan Muhammad and her uncle Jan Muhammad, she went at first to *Shahidan* and thence proceeded to the village Kufri which is on the way to Tala-

gang, because her husband used to pay visits there to his cousin and namesake Fazal for his advice and assistance in the litigation against his brother. The party reached Kufri at midnight and were told by Fazal that the deceased came to him that evening on his return from Court but went his way home after having a drink and smoke at his place. After a fruitless search *Musammat* Bakhat Bhari came back to her village and found that her husband was still absent while Khan Muhammad and Choghatta had both returned. The next day (26th June) she appeared at the Police Station at 6 A. M. and gave a detailed account of all the facts and circumstances stated above, and a description of the clothes that her husband was wearing when he departed from home, and stated that she strongly suspected that Khan Muhammad and his son-in-law Choghatta had murdered her husband. Further she expressed suspicions against Baza and his father and a third man on the ground that they were fast friends of Khan Muhammad and might have taken part in the crime. This report was entered in the diary of the Police Station because it was not yet known for certain that Fazal had been killed. The Sub-Inspector of Police, however, proceeded to the spot at once to make an enquiry under s. 174 of the Cr. P. C Baza who is a youth of about 20 years confessed the next day (27th June), showed the scene of murder where marks of blood and struggle were observable, and also led to a ravine wherein the body of Fazal was found floating. The body was naked with a ligature round the neck. The Sub-Inspector then wrote a *rukka* embodying therein *Musammat* Bakhat Bhari's report of the 26th June and added thereto an account of the discovery of the body with the direction to the clerk at the Police Station the First Information Report should be drawn up in accordance with the *ruqa*. The clerk copied this *rukka* in the charge register as the First Information Report in the case.

Counsel for the appellants contends that as the *ruqa* was not signed or thumb-marked by the complainant *Musammat* Bakhat Bhari it could not constitute a First Information Report within the purview of s. 154 of the Cr. P. C , and should be excluded from consideration as such. This objection appears to be well-founded and there are several rulings of the Calcutta High Court and the Punjab Chief Court also in support of it. Though the *ruqa* contains information relating to the commission of a cognizable offence, *i.e.*, murder that information was not given by any body to "the officer in charge of Police Station" but was sent to the Police Station by that officer himself for the purpose of registering a charge of murder. The rulings, however, are that a statement recorded in the course of a Police investigation cannot be treated as a First Information Report. Where on the report of a person that his brother was missing the Sub-Inspector did not record it as required by s. 154, Cr. P. C., but commenced investigation and after four days when the matter had so developed that there was some reason to believe that the missing man had been murdered, he, for the first time recorded the brother's statement as the First Information Report; it was held that such a practice was contrary to the provisions of the section and that a statement recorded under such circumstances cannot be regarded as a First Information [*Emperor* v. *Kampu Kuki* (1).] And where on the information given by a *chaukidar* which was duly recorded in the station diary—the Sub-Inspector went to the hospital and took down the statement of the dying man and filed it as the First Information it was held that the statement could in no sense be regarded as the First Information [*King-Emperor* v. *Daulat Kanjra* (2).] In the present case the First Information to the Police was that entered in the station diary on the 26th June but the original record of that report was not proved which should have been done to make it admissible in evidence. The *ruqa* of the Sub-Inspector in which it was re-produced was not signed or thumb marked by *Musammat* Bakhat Bhari and that *ruqa* cannot fall within the definition of "First Information". But no Information Report is substantive evidence by itself. It can only be used under s. 157 of the Evidence Act as a previous statement to corroborate or contradict a statement made subsequently in Court. This *ruqa*, therefore, is to be excluded from consideration and the case for the prosecution is to be judged by the evidence of the witnesses produced in Court.

The main question for the determina-

(1) 11 C. W. N. 554; 6 Cr. L. J. 86.
(2) 6 C. W. N. 921.

tion in this Court is whether the evidence of Baza who accepted a tender of pardon and appeared as a witness for the Crown is sufficiently corroborated by the other evidence. We are, of opinion, that it is. In the first place there can be no manner of doubt that the act of overpowering and strangling the deceased could not have been done by anybody single handed and that one of the culprits was Baza approver who knew where the body was. Young and inexperienced as he is, it is quite conceivable that he readily entered into the conspiracy to kill Fazal because his father was a partisan of Khan Muhammad and had given evidence in his favour and against Fazal in the civil suit between them. Secondly, there is no denying the fact that Khan Muhammad had a strong motive for taking the life of his brother. Thirdly, there is the evidence of quite independent and trustworthy witnesses that Choghatta produced the shoes of the deceased on the 27th June from over the roof of the shop of one Megh Raj which was 100 or 150 feet from his (Choghatta's) house and that Khan Muhammad accused produced on the day following (28th June) blood stained clothes of the deceased from a heap of manure in his yard. The shoes and the clothes were duly identified by *Musammat* Bakhat Bhari and other witnesses. Fourthly, there is the evidence of Hayat Muhammad and Sarfraz Khan that on the night of the occurrence they were going from Kufri to the village Saggar when on the way Khan Muhammad, Choghatta and Baza met them coming from Saggar. Another witness, *i. e.*, Shah Nawaz (P. W. No. 7) deposed that on the night of the occurrence he was going to Dhok Usri from Saggar when the three met him before dawn coming from the direction of Dhok Baza and that Khan Muhammad was carrying a bundle of clothes at that time. A clue to these three witnesses was given by the accused themselves. No reason could be assigned for disbelieving the evidence of anyone of these witnesses. The story of the approver as to the manner of causing death was corroborated by the medical witness who made the *post mortem* examination and found that the cause of death was strangulation.

Having regard to all the facts and evidence reviewed above we have come to the conclusion that the appellants have been rightly convicted of the murder of Fazal.

The result is that we dismiss the appeal and confirm the sentences of death.

R. L. *Appeal dismissed.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 233 OF 1925.

August 19, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

EMPEROR—APPELLANT

versus

CHAND MAHABOOB—ACCUSED—RESPONDENT.

City of Bombay Police Act (IV of 1922), s. 112 (d) – *"Reputed thief", meaning of—Person convicted of theft, whether reputed thief.*

The fact that a person has actually been convicted of theft is a ground for holding that he is a "reputed thief" within the meaning of cl. (*d*) of s. 112 of the City of Bombay Police Act. The expression "reputed thief" does not mean a thief who has achieved, not merely one or two convictions, but in addition a reputation and a distinction amongst his neighbours and his community as a habitual offender. A reputed thief is not something more than a convicted thief but something less and means a person who even though he might not have been convicted as a thief is so reputed in the circles to which his reputation is a matter of interest. A man who is convicted twice of theft is more than a reputed thief and not less, the question of reputation being one of fact. [p. 700, cols. 1 & 2; p. 701, col. 1.]

Criminal appeal from an order of acquittal passed by the Fourth Presidency Magistrate, Bombay.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

Mr. *J. G. Rele*, for the Accused.

JUDGMENT.

Fawcett, J.—This is an appeal by the Government of Bombay against the acquittal of the accused Chand Mahoboobsah by the Fourth Presidency Magistrate. He was put before that Magistrate on a charge under s. 112, cl. (*d*), of the Bombay City Police Act IV of 1902, namely, that being a reputed thief he was found loitering in the street and without being able to give a satisfactory account of himself. Evidence was given by a Police Constable that he was arrested at 1-15 A. M. on the Proctor Road and that nothing was found in his possession; also that the accused had two previous convictions. There was no cross-examination, and the Magistrate upon this acquitted the accused on the ground that he could not come in the category of a reputed thief, having only two previous convictions.

It has been objected by Mr. Rele for the accused that in any case accused's two previous convictions have not been properly proved. Certainly, so far as the information sent by the Criminal Investigation Department is concerned, that information would require to be supplemented by other evidence under s. 511 of the Cr. P. C. or otherwise to prove the previous convictions, if they are denied by the accused. But we have a scanty record in this case, and it is possible that the accused himself admitted the convictions. In any case in dealing with this appeal, we must take it that there were two previous convictions, either admitted or proved or provable against the accused. The only point, therefore, is whether the fact of there being two previous convictions for theft suffices to make the accused a reputed thief within the meaning of cl. (*d*) of s. 112. The word "reputed" is defined in Webster's Dictionary as "having the reputation of being, or supposed or thought to be, that expressed or implied by the qualified noun." The prefix "re" no doubt would ordinarily suggest that the supposition must be entertained by a certain number of people. It is impossible to lay down any definite rule on a question of that kind. The fact that a person has actually been convicted of theft is certainly a ground for taking it that he is a reputed thief. For it is a substantial basis for that reputation among persons who know of the conviction ; and it is not, in my opinion, necessary to have additional evidence that some person knows of his conviction and considers him to be a thief. Nor, in my opinion, is it possible to lay down any rule such as the one applied by the Magistrate, namely, that a certain number of convictions (more than two) is necessary before a person can be a "reputed thief." Obviously difficulties would arise in fixing what should be the actual number of convictions that should be taken as sufficient. In the present case the two convictions are within a space of two years prior to the arrest of the accused, and it is not a case where the convictions are many years before arrest, so that the habit of thieving may have ceased. In my opinion, therefore, there was evidence before the Magistrate that the accused was a "reputed thief," and the ground that he gave for the acquittal is insufficient.

It has, however, been urged that there is also no evidence that the accused was loitering in the street at the time of his arrest. It is true that the evidence does not show that the Police Constable stated exactly in what circumstances the accused was arrested, but I think there is a presumption that those circumstances would have appeared, if the evidence had been fully recorded. The Government Pleader asserts that the accused was found in company with another man, in whose possession there were instruments of burglary and who was convicted under s. 112, cl. (*e*). Certainly, if that is the case, it would be relevant evidence against the accused that at the time of the alleged offence he was in the company of a person who had such instruments upon him, and that evidence would affect any explanation which the accused might offer as to the circumstances of his being in the street at the unusual time of 115 or so in the morning. The best course, in my opinion, therefore, is to direct a re-trial of the accused by such of the Presidency Magistrates as the Chief Presidency Magistrate may direct, in which evidence, if it has not been already adduced in the way it should have been given, can now be so adduced and, if necessary, the alleged previous convictions should also be proved. I would order accordingly.

Madgavkar, J.—The question argued before us is the construction of the words a "reputed thief" under s. 112, cl. (*d*) of the Bombay City Police Act IV of 1902. I am unable to agree with the learned Magistrate and the Pleader for the accused that these words must be taken to mean a thief who has achieved, not merely one or two convictions, but in addition, a reputation and a distinction amongst his neighbours and his community, as a habitual offender, on evidence of the character referred to in *In re Kottamiddu Ranga Reddi* (1) a case under s. 110 of the Cr. P. C. The present Act applies only to the City of Bombay and the present offence can only be committed between sun-set and sun-rise by a reputed thief loitering or lying in the street without being able satisfactorily to account for his presence. It appears to me that the words "reputed thief" are not something more than a convicted thief but something less and mean a person who even though he might not be convicted is so reputed in the circles to which his reputation is a matter of interest. In a city such as

(1) 55 Ind. Cas. 722: 43 M. 450; 38 M. L. J. 97; 11 L. W. 331; 21 Cr. L. J. 354; (1920) M. W. N. 398.

Bombay where a person does not usually know the occupation or reputation of his neighbour, the circles where the reputation of a thief would be known are practically two, the Police and thieves or receivers. A man who has been convicted twice of theft is more than a reputed thief and not less, and the question of reputation is one of fact and cannot further be defined by the Courts. The acquittal must be set aside.

There appears to me to be no reason in law, if the accused was arrested in company and along with another person in possession of implements of house-breaking, why the two should not have been sent up together or at least evidence of such fact put in against the present accused. On the meagre record a re-trial appears to be the best course. I agree accordingly in the order proposed by my learned brother.

Z. K. *Re-trial ordered.*

CALCUTTA HIGH COURT.

GOVERNMENT APPEAL No. 2 OF 1925.

August 12, 1925.

Present :—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

THE SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL—APPELLANT

versus

SADER SAIK—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 423 (2)—Sessions trial—Prosecution witnesses not present—Adjournment, refusal to grant—Discretion of Court—Jury directed to record verdict of "not guilty"—Misdirection—Appeal—Verdict, whether can be set aside.

On the date fixed for the trial of a Sessions case no witnesses for the prosecution were present and the hearing was adjourned to the next day. Again there were no witnesses present and the Judge refused to grant any further adjournment and called upon the accused to plead and empanelled a Jury. He then directed the Public Prosecutor to open the case, and the latter did so under protest and informed the Court that he had no witnesses present to support the case for the prosecution. Thereupon, the Judge directed the Jury to return a verdict of "not guilty", and after that verdict had been returned acquitted the accused. On appeal :

Held, (1) that the Judge had exercised his discretion unwisely both on the first and second day and that he should have ascertained the cause of the absence of the prosecution witnesses and should have granted a reasonable adjournment in order to enable them to be re-summoned ; [p. 701, col. 2.]

(2) that in the circumstances of the case it was a misdirection for the Judge to tell the Jury that there was no evidence for the prosecution and direct them to return a verdict of "not guilty" ; [p. 702, col. 1.]

(3) that the verdict of the Jury and the order acquitting the accused must, therefore, be set aside under sub-s. (3) of s. 423 of the Cr. P. C., and the accused must be re-tried. [*ibid.*]

Appeal.

Mr. *Khundkar*, Deputy Legal Remembrancer, for the Appellant.

Babu *Urukramdas Chakravarty*, for the Respondent.

JUDGMENT.

Walmsley, J.—The facts necessary for the decision of this appeal are as follows :—Sadir Sheikh was tried upon a charge under s. 366, Indian Penal Code, before the Assistant Sessions Judge of Mymensingh : he was convicted and sentenced to undergo three years' rigorous imprisonment. He preferred an appeal and the learned Sessions Judge set aside the conviction and sentence on the ground that the Trying Judge had not complied with the provisions of s. 360, Cr. P. C.

The case was fixed for fresh trial on October 29th. On that date no witnesses were present, and the hearing was adjourned to next day. Again there were no witnesses present. The learned Judge then refused to grant any further adjournment : he then called upon the accused to plead, and empanelled a Jury : he then directed the Public Prosecutor to open the case, and the latter did so under protest, and informed the Court that he had no witnesses present to support the case for the prosecution. Thereupon the learned Judge directed the Jury to return a verdict of "not guilty," and after that verdict had been returned he acquitted the accused.

It seems to me clear that the learned Judge exercised his discretion unwisely both on the first day and the second day. He must have realised that some one had blundered and that the witnesses could not be collected and sent to his Court at less than a day's notice. He should have ascertained what had happened and should have granted a reasonable adjournment.

It is said, however, on behalf of the accused that the Cr. P. C. gives us no authority to interfere with the verdict and the order of acquittal. Our attention is drawn to the words of s. 423 (2) of the Code, and it is urged that there was no misdirection by the Judge, and, therefore, we cannot disturb the verdict of the Jury. I do not agree with

this argument for this reason, that the Public Prosecutor did not say that he had no evidence to offer or that he did not intend to offer any evidence : his attitude throughout was that he had witnesses who would substantiate the case if further opportunity were allowed to him, and I think that in such circumstances it was a misdirection for the Judge to tell the Jury that there was no evidence and that they should return a verdict of "not guilty".

I, therefore, set aside the verdict of not guilty and the order acquitting the accused, and direct that he be tried in accordance with law.

Mukerji, J.—I agree.

M. B. *Appeal allowed;*
Z. K. *Acquittal quashed.*

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 164 OF 1925.

April 30, 1925.

Present:—Mr Justice Devadoss and Mr. Justice Wallace.

MARUDAYYA THEVAR—PETITIONER

versus

SHUNMUGASUNDARA THEVAR AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 423 (1) (d), 439, 561-A—Dispute with regard to immoveable property—Order under s. 145—Revision—Receiver, whether can be appointed pending disposal of revision petition—High Court, power of.

The High Court has no jurisdiction to appoint a Receiver pending the disposal of a criminal revision petition filed against the order of a Magistrate passed under s. 145 of the Cr. P. C. [p. 703, col. 1.]

Section 561-A of the Cr. P. C., confers no new powers on the High Court, and the Court cannot by invoking its inherent powers extend the powers given to it by Statute. [p. 702, col. 2.]

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to appoint a Receiver for the properties in dispute, in Cr. R. C. No. 239 of 1925 presented to the High Court against an order of the Joint First Class Magistrate, Court of Tinnevelly, dated the 18th February 1925, and made in Miscellaneous Case No. 9 of 1925, pending disposal of the said criminal revision case.

Messrs. *Marthandam* and *A. Srirangachari*, for the Petitioner.

Messrs. *K. S. Jayarama Iyer* and *S. Nagaraja Iyer*, for the Respondents.

Mr. *K. N. Ganapathi*, for the Public Prosecutor, for the Crown.

ORDER.—This is a petition asking this Court to appoint a Receiver pending disposal of Criminal Revision Case No. 239 of 1925, which is a petition asking this Court to revise an order of the lower Court passed under s. 145, Cr. P. C.

Mr. Jayarama Iyer, for respondents, raises a preliminary objection that this Court has no jurisdiction to entertain such a petition. We think the preliminary objection is well-founded. If this Court has jurisdiction it must be found, within the Cr. P. C, see the remarks of the learned Chief Justice in *Sankaralinga Mudali* v. *Narayana Mudaliar* (1). Section 561-A confers no new powers on this Court, since "the Court cannot by invoking its inherent powers extend the powers given to it by Statute." Full Bench ruling in *Veerappa Naidu* v. *Avudayammal* (2). Petitioner relies on s. 423 (1) (*d*) read with s. 439, but an interlocutory order of the kind now sought by petitioner, to be passed before the criminal revision case is heard is obviously not an order either incidental to or consequential on an order which has not yet been passed in the criminal revision case and which may eventually not be in petitioner's favour at all. It cannot be an order which necessarily follows from the order eventually passed in revision. The cases quoted by petitioner *Reid* v. *Pichardson* (3) and *Katras-Jherriah Coal Co* v. *Sibkrista Daw & Company* (4) have no bearing on this point.

It is next urged that the High Court must be deemed to possess all the powers which the Magistrate has in an enquiry under Ch. XII, Cr. P. C. Such a general claim was considered in another connection by a Full Bench of this Court in a case reported at *Veerappa Naidu* v. *Avudayammal* (2) and negatived. Even assuming for the sake of argument that the High Court has that power, it would not in the least avail petitioner. For in the first place, the Magistrate and, therefore, *ex hypothesi* the High Court can only appoint

(1) 68 Ind. Cas. 615; 45 M. 913; 16 L. W. 413; 43 M. L. J. 369; (1922) M. W. N. 579; 31 M. L. T. 342; 23 Cr. L. J. 583; (1922) A. I. R. (M.) 502.

(2) 86 Ind. Cas. 147; 48 M. L. J. 106; (1925) A. I. R. (M.) 438; 26 Cr. L. J. 707; 21 L. W. 688; 48 M. 262.

(3) 14 C. 361; 11 Ind. Jur. 379; 7 Ind. Dec. (N. S.) 239.

(4) 22 C. 297; 11 Ind. Dec. (N. S.) 199.

a Receiver while the enquiry is pending, and the enquiry is now over, and in the second place, the Magistrate and, therefore, again the High Court can appoint a Receiver only where it is satisfied that a dispute likely to cause a breach of the peace exists, where as now the Magistrate's order has put respondent in possession of the property, and there is no danger of a breach of the peace, unless petitioner intends to defy the order of the Magistrate, and the High Court would certainly not encourage a party who announces his intention of doing so

It is urged finally that, unless petitioner's prayer is granted, he will suffer much loss if he eventually succeeds in the criminal revision case. Obviously such a consideration does not confer on the High Court powers which it does not possess. In any case Criminal Courts are not primarily for the purpose of preventing private parties from sustaining pecuniary loss. Petitioner has his remedy in a civil claim for damages. We dismiss this petition.

V. N. V. *Petition dismissed.*
Z. K.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 357 OF 1925.
July 22, 1925.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Pearson.

MOHAMAD KESHAB—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Opium Act (I of 1878), s. 11—Conveyance used for carrying opium—Confiscation—Notice to owner, necessity of.

Under s. 11 of the Opium Act a conveyance used for the purpose of carrying opium is liable to confiscation, which means that the section leaves it to the discretion of the Tribunal which is trying the case to decide whether having regard to the facts of a particular case, the conveyance used in the carrying of the opium may be confiscated. [p. 703, col. 2.]

In a case where there is no improper conduct imputed to the owner of the conveyance, and, where during the course of the case nothing is proved to show improper conduct on the part of the owner, it would be advisable for the Magistrate who is trying the case to give the owner an opportunity of being heard before he comes to the conclusion whether the conveyance should be confiscated. [p. 704, col. 1.]

Rule against the order of the District Magistrate, Calcutta.

JUDGMENT.

Sanderson, C. J.—This is a Rule granted by my learned brother, Mr. Justice Panton, and me, calling upon the District Magistrate to show cause why the order complained of should not be set aside, altered or modified and the boat restored to the petitioner on grounds Nos. III and IV.

Ground No. III was "that the liability to confiscation of a conveyance arises only when the owner of such conveyance uses the same for transportation, and there being no evidence to that effect in this case the order is bad and fit to be set aside."

Ground No IV was "that the said order which was passed without giving an opportunity to the petitioner, who is the owner of the *ninghee*, to show cause is improper and without jurisdiction."

Hanumia, *majhee*, who was recorded as the *majhee* of the boat was not arrested, but three of the crew were arrested and they were tried before the learned Chief Presidency Magistrate and convicted under s. 9 of Act I of 1878. At the same time the learned Presidency Magistrate made an order confiscating the boat and the opium under the provisions of s. 11 of the above mentioned Act.

The material part of s. 11 is as follows: "In any case in which an offence under s. 9 has been committed, the opium and other matters" shall be liable to confiscation. The vessels, packages and coverings, in which any opium liable to confiscation under this section is found, and the other contents (if any) of the vessel or package in which such opium may be concealed, and the animals and conveyances used in carrying it, shall likewise be liable to confiscation.

It is to be noticed that the Act does not say that the conveyance used in carrying the opium *shall be confiscated*, but the Act provides that the conveyance "*shall likewise be liable* to confiscation." In my judgment that leaves it to the discretion of the Tribunal which is trying the case to decide whether, having regard to the facts of the particular case, the conveyance used in carrying the opium should be confiscated.

The petitioner in this case had no opportunity of being heard upon the question whether the boat should be confiscated.

The learned Magistrate in his explanation upon this part of the case said: "There is nothing in the section requiring that the owner should be given an opportunity to show cause. If it was intended that this should be done, there was nothing to

prevent it being explicitly laid down in the section."

I am of opinion that in cases like this where there is no improper conduct imputed to the owner, and where, during the course of the case nothing is proved to show improper conduct on the part of the owner, it would be advisable for the Magistrate who is trying the case to give the owner an opportunity of being heard before he comes to the conclusion whether the conveyance should be confiscated.

I am not prepared to make the Rule absolute upon ground No. III, but I am of opinion that the Rule should be made absolute on the ground that having regard to the facts of this case, the owner should have had an opportunity of being heard before the order for confiscation was made.

In my judgment, therefore, the Rule should be made absolute and the boat, or the sale-proceeds, if the boat has been sold, and if the money realized by such sale is still in the hands of the authorities, should be handed to the petitioner, the owner of the boat,

Pearson, J.—I agree.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 577 OF 1925.

October 22, 1925.

Present :—Mr. Justice Daniels.

KALKA—COMPLAINANT

versus

RANJIT SINGH AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation, order directing payment of—Notice to complainant, absence of, effect of—Complainant absent at time of announcement of judgment—Procedure.

Where at the time of announcing judgment in a criminal case the complainant is absent and the Magistrate proposes to make an order directing the payment of compensation under s. 250 of the Cr. P. C. the proper procedure is to issue a summons for the attendance of the complainant and to give him an opportunity of showing cause why an order under s. 250 should not be made against him. An order under that section made without giving the complainant an opportunity of showing cause against the order is illegal and cannot be allowed to stand.

Criminal reference made by the District Magistrate, Cawnpore, dated the 11th September 1925.

REFERRING ORDER.—In this case Kalka complainant was ordered to pay Rs. 50 as compensation to the accused under s. 250 of the Cr. P. C. Kalka has now applied to me for the revision of this order. The record shows that the Magistrate neglected to call upon the complainant to show cause why he should not pay compensation to the accused. The complainant was absent on the day judgment was pronounced and the order granting the accused compensation was passed on the same day, *viz.*, the 7th July 1925.

It was clearly the duty of the Magistrate to issue a summons to the complainant to appear and show cause as laid down in the last sentence of para. 250 (*i*) of the Cr. P. C. but there is nothing on the file to show that this was done.

I consider that the irregularity is a material one and the Magistrate's order was illegal. I recommend that the illegal order be set aside and that the complainant may be called upon to show cause why compensation should not be paid by him to the accused.

The Assistant Government Advocate, for the Crown.

Mr. *Saila Nath Mukerji*, for the Opposite Parties.

JUDGMENT.—This reference is made on the ground that the Trial Court made an order of compensation under s. 250 without giving the complainant an opportunity to show cause against it. The Trying Magistrate says in the explanation that the complainant was absent when judgment was pronounced, and the Magistrate believes him to have deliberately absented himself. The section provides, however, for what is to be done in case the complainant is not present when judgment is pronounced. I, therefore, set aside the Magistrate's order and direct him or his successor-in-office to do what he should have done originally, namely, to summon the complainant and give him an opportunity of showing cause before passing the order.

Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 309 OF 1923.

July 20, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

ANANDA PRIYA BAISHNAVI—DECREE-HOLDER—APPELLANT

versus

BIJOY KRISHNA RAY—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (1)—Evidence Act (I of 1872), s. 92—Decree—Oral adjustment, validity of—Appeal—Finding of fact, interference with—Pardanashin *lady, compromise entered into by—Burden of proof.*

The words "otherwise adjusted" in r. 2 (1) of O. XXI of the C. P. C. are wide enough to cover an oral adjustment of a decree. [p. 705, col. 2.]

Section 92 of the Evidence Act applies only to what are known as "dispositive documents" and has no application to a decree. [p. 706, col. 1.]

Generally speaking it is undesirable for an Appellate Court to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour. The view of the Trial Judge as to the credibility of witnesses should not be put aside by the Appellate Court on a mere calculation of probabilities. Where, however, the question to be determined does not depend upon the demeanour of the witnesses and their manner in the witness-box, but upon inferences to be drawn from facts, the Appellate Court is as good a Judge of facts as the Trial Court. [p. 706, cols. 1 & 2.]

A person who relies upon a deed or power executed by a *pardanashin* lady must satisfy the Court that the deed or power was explained to and was understood by the lady. This doctrine applies also to agreements to compromise litigation, though it may be sufficient in such a case to show that the general result of the compromise as distinct from the details and legal technicalities involved was understood by the lady and that disinterested and competent persons with a fair understanding of the whole matter advised her to execute it. [p. 709, cols. 1 & 2.]

Appeal against an order of the Subordinate Judge, First Court, Comilla, dated the 30th July 1923.

Babus *Brojolal Chakraburty* and *Nripendra Chandra Das*, for the Appellant.

Dr. *Dwarka Nath Mitter* and Babu *Sasadhar Ray*, for the Respondent.

JUDGMENT.

Graham, J.—This appeal is directed against an order of the First Subordinate Judge of Tippera and arises out of certain proceedings in execution of a decree. The facts which have led up to it are shortly these:—

The judgment-debtor respondent Bejoy Krishna Ray brought a Title Suit (No. 1004 of 1917) against the decree-holder appellant *Sreemutty* Ananda Priya Baishnavi in the Court of the Subordinate Judge at Comilla, which was dismissed. There was an appeal to the High Court which was decreed on the 14th December 1921. On the 14th March 1922 Bejoy Krishna filed an application for leave to appeal to the Privy Council which was granted on the usual terms on the 10th April 1922. On the 21st July 1922 the appeal was allowed to be withdrawn it having been represented to the Court on the 14th July that a compromise was likely to be effected. In the meanwhile on the 31st March 1922 the decree-holder had applied for execution of the decree amounting in all to Rs. 4,237-5-6. Execution proceedings followed and in the course of these the judgment-debtor on the 31st July 1922 filed an objection under O. XXI, r. 2 of the C. P. C., praying the Court to record an amicable adjustment of the decree alleged to have been arrived at between the parties on the 29th June 1922 whereby the decree-holder relinquished her claim to costs in both the Courts on condition that the judgment-debtor withdrew his appeal to the Privy Council. To this the decree-holder replied by a petition filed on the 28th October 1922 denying that there had been any adjustment of the decree. The Court then went into evidence and allowed the objection of the judgment-debtor as stated above.

On behalf of the appellant two points only have been urged before us. It is first contended that the alleged adjustment does not come under O. XXI, r. 2 of the C. P. C, and that in any view of the matter an oral agreement in substitution of the decree could not be proved having regard to the provisions of s. 92 of the Evidence Act. Secondly, it is urged that upon the evidence and regard being had to all the facts and circumstances of the case the Court below ought to have held that the adjustment had not been proved.

In my opinion the first of these contentions is without substance. The words "otherwise adjusted" in r. 2 (1) of O. XXI appear to be wide enough to cover such an adjustment as is stated to have taken place in this instance.

As regards s. 92 of the Evidence Act the portion of that section which is relied on is the portion containing the following words "or any matter required by law to be reduced to the form of a document" the argument being that a decree is a matter required by law to be reduced to the form of a document, and that a new agreement is clearly a matter contradicting

or varying the terms of the decree. In support of this contention reference has been made to the case of *Lachhmi Das* v. *Ram Nath* (1) where one of the learned Judges Walsh, J., held that s. 92 of the Evidence Act applies to a decree. The point, however, was not, it appears, necessary for the determination of the appeal. Nor are we bound by that decision. No case of this Court has been brought to our notice in which it has been held that a decree comes within the purview of s. 92 of the Evidence Act, and looking to the language of that section and s. 91 which precedes it, and to the principle which underlies them, it appears to me that they refer only to what are known as "dispositive documents," and that the words "or any matter required by law to be reduced to the form of a document" must be read in that sense.

It remains to deal with the second contention that the Court below ought on the evidence, and upon all the facts and circumstances to have held that the adjustment had not been proved. The decision of this matter was dependent to a great extent upon the view taken of the oral evidence, and the learned Advocate for the respondent has conceded that the only material witnesses were the judgment-debtor himself, his brother Probodh Chandra Ray, and the execution *mohurrir* Sarat Chandra Chaudhury. The Subordinate Judge has accepted the evidence of these witnesses as proof of the fact of adjustment and has observed that the two former belong to a respectable family, and that he was impressed by their demeanour in the witness-box. In this connection the learned Advocate for the respondent has drawn our attention to the case of *Bombay Cotton Manufacturing Co.* v. *Motilal Shivlal* (2) where it was held by the Privy Council that generally speaking it is undesirable for an Appellate Court to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, and that the view of the Trial Judge as to the credibility of the witnesses should not be put aside on a mere calculation of probabilities by the Appellate Court. This is a doctrine which is well recognised in every system of law and is certainly entitled to be treated with respect. It must not, however, be allowed to become a fetish, and, as was pointed out in a more recent case of the Privy Council *Palchur Sankara-reddi* v. *Palchur Mahalakshmama* (3), where the question does not depend upon witnesses' demeanour and manner in the box, but upon inference from facts the Appellate Court is as good a Judge of fact as the Trial Court. Now it appears to me that the present case is a case of that description, and further that the estimate, which has been formed by the Court below as regards the reliability of the witnesses, can be demonstrated to be erroneous. Apart too from this there are facts and circumstances in the case, not referred to by the learned Subordinate Judge in his judgment, which go to show that no adjustment ever took place, and that the story of the adjustment has been concocted in order to deprive the decree-holder of her costs in the litigation.

I propose to deal first of all with the witnesses relied upon by the Court below, and then to go to a consideration of the salient facts and circumstances which to my mind throw a flood of light on the truth or otherwise of the alleged adjustment.

As I have already stated, the material witnesses are the judgment-debtor Bijoy Krishna, his brother Probodh, and the execution *mohurrir* Sarat Chandra. The Court below being impressed with their demeanour has accepted their evidence. Some reliance has also been placed on the telegram and letter said to have been sent by the judgment-debtor to his Vakil Upendra Kumar Ray at Calcutta informing him of the compromise. But it is clear that the evidence of the Vakil is essentially of a hearsay character and is not of much evidentiary value for the purpose of proving the adjustment. Such a telegram and letter could easily be sent, and if accepted as proved (though the evidence as to this is not satisfactory), would not establish that the adjustment had taken place

I will now deal briefly with each of the three witnesses referred to above, Bejoy Krishna Ray, the judgment-debtor, whatever his demeanour may have been in the witness-box, is obviously not a person

(1) 64 Ind. Cas. 990; 44 A. 258; 20 A. L. J. 65; (1922) A. I. R. (A.) 13.

(2) 29 Ind. Cas. 229; 42 I. A. 110; 19 C. W. N. 617; 17 M. L. T. 408; 28 M. L. J. 593; 21 C. L. J. 528; 17 Bom. L. R. 455; 2 L. W. 521; 39 B. 386; (1915) M. W. N. 788 (P. C.).

(3) 70 Ind. Cas. 949; 27 C. W. N. 414; (1922) A. I. R. (P. C.) 315; 31 M. L. T. 307; 17 L. W. 1 (P. C.).

upon whom any reliance can be placed. Apart from the fact that he is vitally interested in the result of the case, his landed properties including his homestead having been attached by the decree-holder, it is clear that he is capable of making the most reckless, if not deliberately false statements. For example in his petition (Ex. A) of the 3rd April 1922 he represented to the Court that he had obtained leave to appeal to the Privy Council, though in point of fact that leave was not given until a week later. Then again he has stated that he deposited Rs. 200 or Rs. 300 as preliminary costs of the Privy Council appeal, though the order-sheet shows that the actual amount deposited was only Rs. 100.

In this connection he has made the following statements in his evidence "I do not know how much I was asked to deposit. My Pleader did not tell me that I was to deposit a further sum. I would have deposited the sum, if my Pleader told me of that. I don't know that my Pleader repeatedly told him (*sic*) to deposit money." The total amount required to be deposited was Rs. 4,237, and these statements of the judgment-debtor that he knew nothing of the matter are palpably false.

Probodh Chandra Ray describes himself as first cousin of the judgment-debtor by adoption but says he was his brother before adoption. On his own admission he is involved in debt, his wife gets a monthly allowance of Rs. 50 from the judgment-debtor, and he has on two previous occasions borrowed money from the judgment-debtor. He further admits that he has a share in the dwelling-house in Govindapur. He is clearly, therefore, a very much interested witness.

Sarat Chandra Chaudhury, the execution clerk, is the most importent witness on the side of the judgment-debtor, but there are obvious indications that he is a partisan witness. He has admitted that he is on friendly terms with Bejoy, and that the letter might have requested him to withhold the attachment till the order for withdrawal of the appeal from the High Court was received.

This fact, and the fact disclosed in the evidence of Bijoy that he was present at the final adjustment show the interest which he was taking in the matter. There are also the two additional circumstances that this witness was responsible for the delay from the 30th June to the 11th July in sending the writ of attachment to the *nazarat*, and that he failed to carry out the order of the Court dated the 28th July 1922 for issue of notice under O. XXI. r. 66 of the C. P. C., thus necessitating a fresh application by the decree-holder on the 25th November 1922.

As against the evidence of these three witnesses we have the evidence of the decree-holder herself, her son-in-law and *ammukhtar* Dakshina Ranjan, and grand-son-in-law Upendra Chandra Rakhit, who have emphatically denied that any adjustment ever took place. The decree-holder has deposed in her evidence that there was no talk of amicable settlement but this is negatived by her petition of objection filed on the 28th October 1922 wherein she admitted (*vide* para. 6) that the judgment-debtor had made a proposal for amicable settlement. It seems clear that this fact has been suppressed by the decree-holder, possibly because it may have been felt that such an admission would weaken her case. Be that as it may the crucial point is not whether there was talk of a compromise, but whether in fact a final adjustment was arrived at between the parties and as to that it seems to me that the evidence of the decree-holder and her witnesses is entitled to as much weight as that of the witnesses on the other side. The onus was heavily upon the judgment-debtor, and to my mind the evidence of the three witnesses examined on his behalf wholly fails to discharge that onus. These witnesses are clearly not to be relied on, and the following facts and circumstances which are established by the evidence, but have not been taken into account by the Court below, go to show beyond a shadow of a doubt that the adjustment was never made.

Firstly there is the *prima facie* improbability that the decree-holder would give up her claim to the costs which she had obtained in this protracted litigation, especially in view of the strained relations existing between the parties. It is in evidence that she had already refused to compromise at a previous stage (*vide* evidence of Upendra Kumar Ray.

Secondly there is the significant fact that the alleged adjustment was never embodied in any written document, though the importance of this was clearly present to the minds both of the judgment-debtor and his Vakil. The Vakil had in fact suggested that

this should be done. (See his evidence and cross-examination of Bejoy).

Thirdly there is the fact that the telegram and letter said to have been sent by the judgment-debtor to his Vakil have not been produced. The statement of the Vakil that he received them may be accepted but the fact that they have not been produced is suspicious especially in view of the anxiety shown by the Vakil to have something definite to go upon. It might have been expected in these circumstances that both the telegram and letter would have been kept. But, as I have already stated elsewhere, the mere fact that such a telegram and letter were sent would not be evidence of any value for the purpose of proving that the adjustment took place. They might obviously have been sent merely for the purpose of creating evidence.

Fourthly the judgment-debtor's account of the manner in which the compromise was effected seems highly improbable. The decree-holder is a *pardanashin* lady of 70. No one was present on her behalf, though the matter was obviously one of considerable importance to her. Neither her son-in-law, who generally acted for her in such matters, nor her grand-son-in-law was present. No Pleader was present. Her Pleader in the original suit, one Jotindra Nath Sen, lives close to her, but he also was not present. The adjustment, as the judgment-debtor has stated in his evidence, took place with Ananda Priya alone. The son-in-law and grand-son-in-law were admittedly in the house, but took no part in the affair. The judgment-debtor attempts to moderate this damaging admission by saying that they "took no active part", whatever that may mean. In this connexion the learned Subordinate Judge has observed in his judgment that it is "very natural" that they did not take any part in the compromise. It seems to me on the contrary that it was most unnatural, and that, if there had really been any adjustment, they, as the nearest male relatives and advisers of the decree holder, would have been concerned in it.

Again in so far as the fact of withdrawal of the Privy Council appeal has been relied upon in the Court below as a ground for accepting the adjustment as true, there is another explanation which is quite sufficient to account for the withdrawal of the appeal, and that is that the judgment-debtor was without the funds necessary for the purpose of prosecuting it. There is ample evidence that he had been in need of money for some time and had been selling his properties piecemeal "*vide* Exs. C, E, E (1), E (2) and E (3)." In January 1922 he tried without success to obtain a loan of Rs. 1,000 from the Comilla Loan Office (Ex. N). The learned Subordinate Judge has referred in this connexion to the loan which the judgment-debtor obtained from Babu Bhudar Chandra Das (Ex. E-2), but the amount in question was only Rs.2,500 and some of that (it is not stated how much) was borrowed to pay off money previously borowed. The balance would soon have been swallowed up in connection with the Privy Council application. The extracts from the judgment-debtors Rokar Book (Ex. D) show what the state of his finances was. It is clear too that he did not comply with requisitions for money on account of the Privy Council appeal. As he himself has said, he was always in need of money.

Then there is the very material fact that independent and reliable evidence, which might have been adduced to prove the adjustment has not been given. Indeed no attempt has been made to do so. When the judgment-debtor was told by this Vakil that it would have been better if the matter had been put into writing, he replied that no difficulties would arise, as it was done in the presence of so many respectable witnesses. None of these persons has been examined. But apparently this is another instance of the untruthfulness of the judgment-debtor since he has deposed in his evidence that he never made any such statement. We may accept the version of the Vakil on the point. The judgment-debtor, however, says that he informed Pleaders Akhil Babu, Kamini Babu, Sachindra Babu and many other Pleaders that the case had been compromised. Not one of these persons has been called.

Lastly there is fact that the judgment-debtor had undoubtedly a strong motive for concocting a story about adjustment of the decree The decree-holder had taken out execution of her decree on the 31st March 1922. Thereafter the judgment-debtor succeeded in delaying execution pending receipt of orders from the High Court. But the security amounting to Rs. 4,237 was to be deposited as a condition of the stay of execution This was not complied with and on the 30th June 1922 a writ of attachment of the judgment-debtor's immoveable properties was issued. On the 29th June, there-

fore, when this adjustment is alleged to have taken place, the judgment-debtor was in an awkward predicament and was under the necessity of promptly taking action of some kind to extricate himself. If he could prove an adjustment, he could evade the unpleasant consequences of the decree, including attachment of his dwelling-house.

It may be noted here that on the 30th June 1922 no steps of any kind were taken by the judgment-debtor though time had been allowed to him up to that date, and as a consequence the writ of attachment was ordered to be issued. If the adjustment had taken place on the previous day, it is difficult to understand why the judgment-debtor who was admittedly at Comilla, did not take steps to bring to the notice of the Court that the parties has effected an adjustment. He has stated that the decree-holder promised to certify the amicable arrangement to the Court. That being so, it might have been expected that he would go to Court in order to satisfy himself that she meant to carry out her promise. As a matter of fact his own application was not made till the 31st July. It may be argued that he had to wait till the Privy Council appeal had been withdrawn, but he could at all events have asked for postponement of the writ of attachment.

In my opinion the comulative effect of all the above facts and circumstances taken in conjunction with the weak and unsatisfactory evidence adduced on behalf of the judgment-debtor goes to show that no adjustment ever took place, and that the entire story, except for the fact that there was some vague talk of a compromise, is a concoction pure and simple designed with the object of defrauding the decree-holder.

But quite apart from these considerations there is another aspect of the case, which to my mind would in itself be fatal to the appellant, even if the appeal did not fail on other grounds, and it is this. It has been laid down in a recent decision of the Privy Council *Sarat Kumari Dasi* v. *Amulyadhan Kundu* (4) that the principle that those who rely upon deeds and powers executed by a *pardanashin* lady should satisfy the Court that they had been explained to and were understood by her, applies to agreements to compromise litigation, though it may be sufficient in such a case to show that the general result of the compromise, as distinct from the details, and legal technicalities involved was understood by her and that disinterested and competent persons with a fair understanding of the whole matter advised her to execute it.

What are the facts here? The decree-holder is a *pardanashin* lady aged 70. The evidence of her grand-son-in-law, which has not been contradicted, is to the effect that she can only sign her name, and is unable to read or write. The judgment-debtor himself has stated that he does "not know whether she can read and write well". This lady is alleged to have entered into a compromise whereby she agreed to give up her claim to costs amounting to over Rs. 4,000, and to settle in rent-free right with the judgment-debtor certain lands, which had been decreed in her favour. Admittedly no one was present on her behalf to advise her, and no attempt of any kind was made to explain to her the nature and consequences of the transaction into which she was entering. Such a proceeding cannot be defended, and in my judgment applying the principle laid down in the case referred to above and in numerous other cases it was incumbent upon the judgment-debtor to see that the lady had competent legal advice, or that at least some one was present who could explain the matter to her. Nothing of the kind was, however, done.

For the reasons stated I am of opinion that the order of the Subordinate Judge cannot be supported, and that the appeal must be allowed with costs both in this Court and in the Court below. The hearing-fee is assessed at 5 gold *mohurs*.

Newbould, J.—I agree.

Z. K. *Appeal allowed.*

(4) 71 Ind. Cas. 632; 27 C. W. N. 629; 17 L. W. 481; (1923) A. I. R. (P. C.) 13; 32 M. L. T. 137; 25 Bom. L. R. 548; 37 C. L. J. 501; (1923) M. W. N. 393 (P. C.)

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 624 OF 1924.

April 30, 1925.

Present :—Mr. Justice Odgers.

V. N. ALAGAR IYENGAR—DEFENDANT No. 2—PETITIONER

versus

SRINIVASA IYENGAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870) as amended by Madras Act (V of 1922), s. 7 (iv) (A)—Hindu Law—Joint

family—Alienation of family property by father—Suit by son to set aside alienation—Court-fee payable.

An alienation of family property by a Hindu father not merely as manager of the family but also as guardian of his minor sons is *prima facie* binding on the minors who must be treated as parties to the alienation. A suit by the sons for a declaration that the alienation shall not affect their share in the family property is in substance one for the cancellation of the alienation so far as the minors' share in the property is concerned and falls within the purview of s. 7, cl (iv) (A) of the Court Fees Act as amended by Madras Act V of 1922 and Court-fee in such a suit is payable on the amount of the consideration for the alienation which is sought to be set aside. [p. 710, col. 2; p. 711, col. 1.]

Petition, under s. 115 of Act V of 1908, praying the High Court to revise the judgment of the District Court, Ramnad, at Madura, in C. M. A. No. 1 of 1924, preferred against an order of the Court of the Principal District Munsif, Srivalliputtur, in O. S. No. 854 of 1922.

Mr. *S. Rajagopalachari*, for the Petitioner.

Mr. *S. Narayana Iyengar*, for the Respondents.

JUDGMENT.—This is an application to revise the order of the District Judge of Ramnad in C. M. A. No. 1 of 1924. The plaintiffs in O. S. No. 954 of 1922 on the file of the Principal District Munsif's Court of Srivalliputtur seek for a declaration that certain alienations made by the 1st defendant in respect of certain items of property are not valid and binding as against the two-thirds share of the plaintiffs and for partition and possession of two-thirds share in these and other plaint properties. The plaint properties are the joint properties of the plaintiffs and their father, the 1st defendant who was the family manager. They originally valued the plaint as if it were one for possession of their two-thirds share in all the plaint schedule properties and paid *ad valorem* Court-fee apparently in accordance with s. 7 (v) of the Court Fees Act. The learned District Munsif held that the suit although in form for a declaration was really one for setting aside or cancellation of the sale-deeds executed by the 1st defendant in so far as they related to the shares of the plaintiffs, and valued the plaint reliefs at Rs. 3,965. This was outside his pecuniary jurisdiction. He accordingly returned the plaint for presentation to the proper Court. The learned District Judge to whom an appeal was taken was of opinion that the plaintiffs were entitled to treat the alienations in question as absolutely void and that they were entitled to proceed on that footing and that if the alienations should subsequently be found in the suit not to be so void, the suit in respect of these items should simply be dismissed. I am unable to agree that this is the policy of the Court Fees Act. If that were so, there is no difficulty in seeing that anomalies would arise. A plaintiff could grossly undervalue his suit, plead that his plaint is only for a declaration and then say "If it is found that my plaint is for more, dismiss my prayers with regard to the rest." This would lead not only to great waste of judicial time but would also encourage absolutely unsustainable claims. These alienations were made by the father of the plaintiffs not only as manager of a joint Hindu family but also as their guardian. In my opinion, therefore, the minors appear as parties to these alienations which are *prima facie* binding on them. The power of a Hindu father may be more or may be less than the power of a guardian to bind his minor sons but unless it can be established that the alienations were for unnecessary or illegal purposes (for which the onus is on the minors) the alienations are *prima facie* good: see *Subba Goundan* v. *Krishnamachari* (1). Of the cases cited on the other side, in *Unni* v. *Kunchi Amma* (2), the document was not executed by the plaintiffs or by any person under whom they claimed. *Putiaru Kamraju* v. *Chunduri Gunnayya* (3) was not a case of Court fees. There a vendor of the plaintiffs sold the property to them on the footing that a sale by his mother made during his minority as his guardian was not binding on him. He has chosen to avoid it and obtained a complete title which would become effective if the Court ultimately found that the sale by the mother was not binding as alleged. I cannot see that this case has any bearing on the present, whereas in *Malikka Meladathil* v. *Kunji Achammal* (4) a case very similar to the present where all the plaintiffs but one were parties to the deed through their mother as guardian, it was held that a suit in which the plaintiffs ask for a declaration that a *jenm* sale-deed of the suit properties

(1) 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 507; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112.

(2) 14 M. 26; 5 Ind. Dec. (N. S.) 19.

(3) 74 Ind. Cas. 1003; 18 L. W. 233; 45 M. L. J. 240; (1923) M. W. N. 756; (1924) A. I. R. (M.) 322.

(4) 5 Ind. Cas. 927; 20 M. L. J. 791; 7 M. L. T. 177.

was not valid and binding on their *tarwad* must be treated as a suit for the cancellation of the deed and an *ad valorem* fee was requisite. Further it was held that the application of any particular clause of s. 7 must depend on the substance of the claim and not on the mere words used in the plaint. In 1922 by Madras Act V of that year, a further sub-cl. (A) was added to s. 7 (*iv*) whereby in a suit for cancellation of a document securing property having a money value, the amount or value of the property for which the document was executed is the amount on which the *ad valorem* Court-fee is to be paid: see also *Lagan Burt Kuer* v. *Khakhan Singh* (5). In *Arunachalam Chetty* v. *Rangasamy Pillai* (6), it was held that a suit for a declaration that a decree or a document is not binding is a suit under sub-cl. (iv) (*c*) and must be stamped *ad valorem*. In my opinion, the learned District Judge is wrong and the plaint must be construed as a plaint for cancellation or avoidance of these alienations, to which the minors were parties and which *prima facie* bind them. The order of the learned District Judge must be set aside and that of the learned District Munsif restored with costs throughout.

V. N. V. *Order set aside.*

Z. K.

(5) 43 Ind. Cas. 962; 3 P. L. J. 92.

(6) 28 Ind. Cas. 79; 28 M. L. J. 118; (1915) M. W. N. 118; 17 M. L. T. 154; 38 M. 922.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 102 OF 1924.

July 20, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

SARADA PROSAD ROY—AUCTION-PURCHASER—APPELLANT

versus

KRISHNA DOME AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r 22—Execution of decree—Notice to judgment-debtor, absence of—Sale, validity of—Order setting aside sale—Appeal, second, whether lies—Notice service of, proof of—Report of peon, whether admissible.

An order setting aside an auction sale on the ground that no notice had been served on the judgment-debtor under r. 22 of O. XXI of the C. P. C. falls within the purview of s. 47 of the Code and is open to second appeal. [p. 711, col. 2.]

The omission to serve a notice under r. 22 of O. XXI of the C. P. C, deprives the Executing Court of its jurisdiction to hold an auction sale of the judgment-debtor's property, and a sale held in the absence of such notice is held without jurisdiction and is, therefore, void and a nullity. [p 712, col. 1.]

A peon's report of service of notice cannot be used as evidence to prove such service unless the peon is examined as a witness and the report is proved. [*ibid.*]

Appeal against an order of the District Judge, Bankura, dated the 15th December 1923, reversing that of the Munsif, Third Court at Bishnupur, dated the 30th of August 1023.

Babu *Trailakhya Nath Ghose*, for the Appellent.

Dr. *Dwarka Nath Mitter* and Babu *Kalikinkar Chakravarti*, for the Respondents.

JUDGMENT.

Cuming, J—This appeal arises out of an application by the judgment-debtor to set aside a certain sale on two grounds, first of all that no notice as required under O. XXI, r. 22, had been served on him and secondly under O. XXI, r. 90 because processes had been fraudulently suppressed, and in consequence of that suppression the land had been sold for a nominal price. The Trial Court decided the issues in favour of the auction-purchaser and rejected the application. On appeal the learned District Judge held that no notice under O. XXI, r. 22 had been served on the judgment-debtor and that being so the sale was without jurisdiction and could not stand. The auction-purchaser has appealed to this Court; he contends that the want of service of notice under O. XXI, r. 22 does not render the sale void but only voidable and that it is necessary for the judgment-debtor to prove that he suffered some substantial loss or injury by reason of the failure to serve notice under O. XXI, r. 22.

The respondents contended that no appeal lies in the present case. With regard to this objection taken by the respondents it is quite clear that an appeal does lie because this objection, namely, under O. XXI, r. 22, comes within s. 47 of the C. P. C.

The appellant to support his contention has relied upon the rulings reported in the case of *Kumad Bewa* v. *Prasanna Kumar Ray* (1), where it is held that it must be proved that omission to serve such notice has resulted in substantial injury to the owner of the property sold. It is, however, unnecessary for me to discuss this case at any length, because the point has been set

(1) 15 Ind. Cas. 506; 40 C. 45.

at rest by the decision of the Privy Council, *Raghunath Das* v. *Sunder Das Khettry* (2) and this point is particularly dealt with at page 83 of the report. If further authority is necessary, the case of *Shyam Mandal* v. *Satinath Banerjee* (3), a decision to which I was myself a party, may be referred to and also the case of *Gurudas Biwas* v. *Thakamani Dasi* (4), a decision which was relied upon by the learned Vakil for the appellant apparently in support of his case. It is quite clear from these decisions that the omission to serve a notice under O. XXI, r. 22 deprives the Court of its jurisdiction to hold a sale and the sale held without having served a notice under O. XXI, r. 22, is made without jurisdiction and is, therefore, void and a nullity. The learned Vakil seems to have argued that the lower Appellate Court was not correct in saying that there was no evidence to prove the service of the notice except the testimony of the purchaser and that Court was not willing to accept this uncorroborated statement. The learned Vakil seems to have argued that there is one other evidence and would seem to rely upon the report of the peon. As far as I can understand the peon was not examined, neither was his report proved. Clearly his report was not evidence in the case, neither can it be used as such in the circumstances. The learned Judge was, therefore, quite correct in saying that there was no evidence in proof of the service of the summons except that of the purchaser, which he was quite justified in saying that he was unwilling to accept unless it was corroborated. The learned Judge was, therefore, clearly right and this appeal must be dismissed with costs. Hearing fee one gold *mohur* payable to the judgment-debtor respondents.

Chakravarti, J.—I agree.

Z. K. *Appeal dismissed.*

(2) 24 Ind. Cas. 304; 42 C. 72; 27 M. L. J. 150; 18 C. W. N. 1058; 16 Bom. L. R. 814; 13 A. L. J. 154; 1 L. W. 567; 16 M. L. T. 353; (1914) M. W. N. 147; 20 C. L. J. 555; 41 I. A. 251 (P. C.).

(3) 38 Ind. Cas. 493; 44 C. 954 at p. 955; 24 C. L. J. 523; 21 C. W. N. 776.

(4) 64 Ind. Cas. 476; 25 C. W. N. 972.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 543 AND 544 OF 1923.

June 23, 1925.

Present:—Mr. Justice Pearson and Mr. Justice Dwarka Nath Chakravarti.

BHABADEB CHATTERJEE—DEFENDANT—APPELLANT

versus

BHUSAN CHANDRA MUKHERJEE—PLAINTIFF AND ANOTHER—*Pro forma* RESPONDENT—RESPONDENTS.

Limitation Act (IX of 1908), s. 26—Easement, right of—Customary easement, proof of—Water of tank, user of, enjoyment of, for long period, effect of.

The object of the provisions of s. 26 of the Limitation Act is to make more easy the establishment of rights of easement. The section is remedial and neither prohibitory nor exhaustive and does not exclude or interfere with the modes of acquiring easements. [p. 713, col. 1.]

It is open to a plaintiff in a suit for the establishment of an easement to show that he is entitled to a right which may be of the nature of an easement although not actually within the strict meaning of the term. [*ibid.*]

Per *Chakravarti, J.*—Where a tank has existed for a long time and the public have enjoyed the use of the water of such tank, it is open to the Court to presume that the water of such tank was dedicated by the owner for public use. [p. 714, col. 1.]

Appeals against the decrees of the District Judge, Burdwan dated the 10th June 1922, affirming that of the Munsif, Second Court, Burdwan, dated the 30th June 1920.

Babu *Baranashibashi Mukherjee*, for the Appellant.

Babu *Sarat Kumar Mitter*, for the Respondents.

JUDGMENT.

S. A No. 543 OF 1923.

Pearson, J.—The plaintiff claims the use of the water in the defendant's tank for bathing and other purposes. His claim has been upheld.

The argument on behalf of the appellant has been rested very largely upon considerations arising upon the English authorities relative to the law of easements prevailing in that country, though it is indeed conceded that the word in its use in s. 26 of the Indian Limitation Act, as shown by the explanation in s. 2 is wider than the meaning of the word in English Law and would include at least a *profit a prendre*. In cases of this character attention has been directed by the Judicial Committee to the danger of proceeding uccessarily upon English authorities. In *Bhola Nath Nandi* v. *Midnapore Zemindary Co.* (1), a case of

(1) 31 C. 503; 31 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 152; 8 Sar. P. C. J. 611 (P. C.).

villagers claiming a right of pasturage, Lord Macnaghten said: "It appears to their Lordships that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately, however, both in the Munsif's Court, and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured, by copious references to English authorities and by the application of principles or doctrines more or less refined, founded on legal conceptions not altogether in harmony with Eastern notions". I am of opinion that the present case does not in fact fall to be decided upon a question of easement arising under s. 26 of the Limitation Act, and it does not follow that, because the plaintiffs may fail to show their right to relief on that ground, they are, therefore, entitled to no relief and the suit must fail. As pointed out in *Rajrup Koer* v. *Abul Hossein* (2), the object of the Statute was to make more easy the establishment of rights of this description; but it is remedial, and neither prohibitory nor exhaustive, and it does not exclude or interfere with other modes of acquiring easements. Clearly, therefore, it is open to the plaintiff to show, if he can, that he is entitled to a right which may be of that nature although not actually within the strict meaning of the term. It is argued that the Court ought not to make out a case for the plaintiff which he has not made himself, and that the plaintiff in this case has grounded his case on easement and must, therefore, succeed upon that or not at all. From an examination of the plaint, however, which has been placed before us it is clear that though mention is made of the plaintiff's claim as upon an easement, it is also said to be based on customary right, and in any case what the plaintiff has done substantially is to plead the facts and ask for such relief as he may be entitled to. There is nothing unreasonable in the right claimed, which is one without which in this country probably village life could not go on. From the long continued user which has been proved in the present case it is reasonable to presume a dedication of the tank to those uses. As pointed out in *Rajrup Koer's case* (2) the up-holding of such a right does not mean that the owner is shut out altogether from improving or dealing with his property. An instance where a right of this nature was upheld is to be found in *Channanam Pillay* v. *Manu Puttur* (3).

For these reasons I think the appeal must be dismissed with costs.

Chakravarti, J.—I agree with the order which my learned brother proposes to make in this case and wish to add a few observations.

The right claimed by the plaintiff is for the use of the water of the tank for bathing and for other domestic purposes; it was clearly stated in the plaint that the claim is based upon user for over 20 years peacefully, uninterruptedly, openly and as of right. The lower Appellate Court has found upon the evidence that such user by the plaintiff has been fully made out. On this finding the lower Appellate Court has granted a decree to the plaintiff and has affirmed the decree of the Trial Court.

The main contention of the defendant-appellant is that the right which the plaintiff sought to establish was a right of easement and that in the circumstances of this case the plaintiff's claim cannot be based on easement as contemplated in s. 26 of the Limitation Act.

It is an well-established proposition now that s. 26 of the Limitation Act does not give an exhaustive description of the right acquired by long user.

The right claimed in this case is by the neighbouring residents of an old tank. The water of the tank they say was used for the various purposes stated in the plaint.

In a hot country like Bengal necessity for the user of pure water is very great indeed. A good tank largely supplies such a need and it is only a rich man who can find the money necessary for the construction of such a tank but the poor people also need the water which they cannot themselves provide for. In these circumstances it has been an immemorial custom in this country that those who can afford think it an act of great public benefaction to construct tanks for public use. The Hindu Sastras have laid down in numerous texts the high merits which a man acquires by digging a tank and dedicating it for public use. I shall quote one of such texts which when translated runs as follows:—

"As there is no sustaining of life in both worlds without water consequently the wise

(2) 6 C. 394; 7 C. L. R. 529; 7 I. A. 240; 4 Shome. L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. S.) 257 (P. C.).

(3) 1 M. L. J. 47.

man should always construct a reservior of water. A well is equal to the *Agniitama* sacrifice, in a desert it equals the *Ashwamedha*" Vishnudharmattora. Again it "promises heaven to the maker of wells and large tanks". See P. N. Saraswati's Tagore Law Lectures, pages 192-193. The word by which the dedication is made are these:—"This water has been given by me to all beings in common; let all beings be satisfied by bathing, drinking and immersion:" see page 205. Whether from religious views or from a sense of public duty many thousands of such tanks were excavated all over Bengal and dedicated for public use.

In this country, therefore, where this mode of dedication is so widely known, when one finds that a tank exists from a long time past and the public, that is the people of its neighbourhood, have enjoyed the use of the water of such a tank, it is open to the Court to presume that the water of such a tank was dedicated by the owner for public use. Such a dedication can be inferred from the manner and the duration of such use. It is not necessary, therefore, to seek the aid of s. 26 of the Limitation Act for the acquisition of such a right. It should also be remembered that in this country a large number of tanks do exist which were intended for private use and no dedication to the public was intended, although, as a matter of fact, the people in the neighbourhood are ordinarily allowed to use the water. The words used in dedicating such a tank are expressive of a limited use. They are these:—"Let the relations in my family, that have come to this world, or will come into existence in future have satisfaction by means of the water: let all beings enjoy it by washing, drinking and bathing". Raghu Nandan in his treatise on Consecration of Tank. Such private tanks are usually found in the compound of a private house. In such cases the user by the neighbours will, of course, be merely taken to be permissive. The Court shall find in the evidence in each case whether the tank is a private one, or one in which a dedication in favour of the public may be presumed. The tank in this suit was not shown to be a private one.

S. A. No. 544 OF 1923.

Our judgment in S. A. No. 543 of 1923 governs this appeal also. This appeal is, therefore, dismissed with costs.

M. B.
Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 1 OF 1923.

August 10, 1925.

Present:—Mr. Justice Ramesam and Mr. Justice Jackson.

G. GOVINDASAMI PILLAI—PLAINTIFF—APPELLANT

versus

V. E. N. K. R. R. M. A. RAMANATHAN CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Criminal Procedure Code (Act V of 1898), s. 146—Suit for declaration—Property in possession of third person—Injunction, whether must be prayed for—Consequential relief, whether necessary.

A plaintiff who seeks a declaration in respect of properties which are in the possession of a third person is not bound to ask for an injunction. [p. 715, col. 1.]

Though an injunction may be granted in a suit for declaration if the plaintiff wants it, it cannot be regarded as a relief which the plaintiff is bound to ask when he does not feel any apprehension from the conduct of the defendant and when he does not feel it necessary to ask for it. In such a case the declaratory suit is not liable to dismissal on the ground that it is open to the plaintiff to ask for further relief. [p. 715, col. 2.]

Appeal against a decree of the Court of the Additional Subordinate Judge, East Tanjore, at Mayavaram, dated the 31st August 1922, in Original Suit No. 39 of 1921.

Mr. *T. R. Ramachandra Iyer*, for the Appellant.

Mr. *C. S. Venkatachariar*, for the Respondents.

JUDGMENT.—The plaintiff is the appellant before us. He and the defendants Nos. 1, 2 and 3 are trustees of the temple of Chayavaram in the Tanjore District. Defendants Nos. 2 and 3 were appointed in 1911 and first defendant in 1908. The plaintiff alleged that one Ramalingam Pillai was the common agent of the parties and on account of his mismanagement disputes arose, which culminated in proceedings under s. 145, Cr. P. C. During the pendency of those proceedings, Ramalingam Pillai died but the Magistrate ordered the attachment of the temple and the properties. The plaint in para. 9 alleges that the order of the Magistrate attaching the properties is illegal and that the plaintiff is entitled to joint possession of the properties. The cause of action is given as the order of the Magistrate dated 17th August 1918 and the plaintiff prays for a declaration that "he is entitled to joint possession and enjoyment of the properties described hereunder along with the defendants." There is

no prayer in respect of the office of trusteeship. Several issues were framed in the case but the suit was dismissed by the Subordinate Judge with reference to the 6th issue which and Issues Nos. 5, 7 and 8 were all the issues that were considered by him. He held that the plaintiff was bound to ask for an injunction and as he has not asked for it, the suit as framed is bad under s. 42 of the Specific Relief Act, and dismissed the suit. We are unable to agree with this view. Mr. Venkatachari, the learned Counsel for the respondents, concedes that he is not able to cite any case in which it has been held that the plaintiff is bound to ask for an injunction in a dispute regarding properties where the properties are in the possession of a third person. In *Kalabhai* v. *Secretary of State for India* (1), there is an expression of opinion by Chandravarkar and Ashton, JJ. that the suit in the form in which it was brought is bad. That suit was against the Secretary of State for a declaration that the plaintiff was entitled to hold the land which was the subject matter of the suit, free of assessment. It may be that in such a case an injunction is a proper relief to ask for but we do not wish to express any final opinion about it. The learned Judges granted an amendment and this question was really unnecessary. The cases in *Thakur Prosad* v. *Punkal Singh* (2) and in *Kunhamad* v. *Kutti* (3) related to decrees. It may be said that in the case of decrees, an injunction to the defendant not to execute a decree is the proper relief. *Kunj Bihari Prasadji* v. *Keshevlal Haralal* (4) related to an office and it was said in the case of an office a prayer for possession is unnecessary and a prayer for injunction will give all that can also be obtained by a prayer for possession. In *Rachappa Subrao Jadhav* v. *Sidappa Venkatrao* (5) Sir Lawrence Jenkins said "It is at once apparent that as to the whole of the property except the house, no consequential relief could have been prayed and that even as to the house the injunction was demurrable in the sense that no cause of action was disclosed which could have supported this relief." In that case the property other than the house was in the possession of the Collector and their Lordships thought that it is unnecessary to ask for an injunction. Following this opinion of the Privy Council we think that, though an injunction may be granted if the plaintiff wants it, it cannot be said to be relief which the plaintiff is bound to ask when he does not feel any apprehension from the conduct of the defendant and when he does not feel it necessary to ask for it. We think the suit is maintainable in the form in which it is framed and allowing the appeal we set aside the decree of the Subordinate Judge and remand it to him for disposal according to law. The costs in the High Court will abide the result. The Court-fee paid by the appellant will be refunded.

V. N. V.
Z. K. *Appeal allowed.*

(1) 29 B. 19 at p. 29; 6 Bom L. R. 648.
(2) 8 C. L. J. 485.
(3) 14 M. 167; 1 M. L. J. 338; 5 Ind. Dec. (N. S.) 119.
(4) 28 B. 567; 6 Bom. L. R. 475.
(5) 50 Ind. Cas. 280; 43 B. 507 at p 516; 17 A. L. J. 418; 25 M. L. T. 298; 36 M. L. J. 437; 29 C. L. J. 452; 21 Bom. L. R. 489; 10 L. W. 274; 24 C. W. N. 33; 1 U. P. L. R. (P. C.) 83; 46 I. A. 24 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 2228 OF 1922.
June 5, 1925.

Present :—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

RAM BALLAV MARWARI—
DEFENDANT—APPELLANT
versus
MRIGANKA LAL MUKHERJEE
—PLAINTIFF—RESPONDENT.

Procedure—Local investigation—Inspection note not recorded, effect of—Prejudice to parties—Decision, whether can be set aside.

A Judge should not in a civil case himself hold a local investigation with a view to gather information which he might use as the foundation of his judgment, although he might inspect the locality with a view to enable him to understand the evidence. In the absence of prejudice to the parties the mere fact that a Judge has held a local investigation without recording a note thereof is not a sufficient ground for setting aside his decision. [p. 716, col. 2.]

Appeal against the decree of the District Judge, Bankura, dated the 10th July 1922, affirming that of the Subordinate Judge, Bankura, dated the 28th November 1921.

Mr. *Bankim Chandra Mukherjee* and Babu *Nalini Kumar Mukherjee*, for the Appellant.

Babu *Baranashibashi Mukherjee*, for the Respondent.

JUDGMENT.—This is an appeal against a decision of the District Judge of

Bankura confirming a decision of the Subordinate Judge of that place. The plaintiff sued the defendant to recover possession of a plot of land about 1 *bigha* in area. The plaintiff claimed the land as a portion of the land which he had been granted under a lease dated the 12th *Magh* 1285 from the then *patnidar* Ali Zamin. The defendant purchased the *patni* right at a *patni* and rent sales in the years 1913 and 1914. The dispute between the parties is whether the land in suit is included in the land which was leased to the plaintiff. The lease has not been translated or put forward before us but from the judgment it appears that the land is described as measuring 2½ *bighas* from north to south and 16 *cottas* from east to west. At the trial the main issue was as to the position of the line towards the south from which this 2½ *bighas* to the north should be measured. In *Aswin* 1286 *B. S.* the plaintiff's father had taken a settlement of some *ghatwali* land immediately to the south of the land leased by the *putnidar*. According to the defendant's case 2½ *bighas* measured from the boundary between the *ghatwali* lands would not include any of the land in suit. It is found by both the Courts below that the correct boundary line is shown in the map prepared by the Commissioner as the boundary line of the map prepared in 1285. The finding of the District Judge is "Taking all the facts and circumstances into consideration I think the inference is justified that what was treated as the boundary line in 1879 was, if not the exact line of 1885 at least closely approximate thereto". He has further found that shortly after his purchase the plaintiff's father Amrita Lal Mukherjee erected boundary pillars showing the northern extremity of his land and that the then *putnidar* was aware of this. From this the lower Appellate Court has drawn the inference that it was understood at that time that the disputed land was included in the land leased under the *potta* of 1285 *B. S.* It is further found that ever since then until dispossessed by the defendant, Amrita Lal Mukherjee the plaintiff's father exercised such acts of possession as were possible in respect of a piece of waste land. On these findings we see no reason to interfere in second appeal with the decree of the lower Appellate Court. As already stated the lease has not been put before us and we are unable to say whether it should be so construed that the measurements are intended to limit the land leased exactly to the area described in the deed or whether the lease can be interpreted in the light of the circumstances and we see no ground for holding that the lower Appellate Court was wrong in deciding that the fact that the plaintiff's predecessor was allowed to occupy the land in suit to the knowledge of the *patnidar* shows that it was the intention of both parties that this land should be included in the lease. It is further found by both the Courts below that the plaintiff has obtained a title by adverse possession. On behalf of the appellant it is urged that there could be no title by adverse possession since his purchase at a *putni* and rent sale would give a right to the land as it was at the creation of the *putni* tenure without any encumbrance subsequently created thereon. This point was not urged in either of the lower Courts and we are unable on the material before us to hold that the defendant by his purchase was entitled to ignore the long possession of the plaintiff and his predecessor.

The further point taken is that the learned Subordinate Judge has based his judgment on the result of a local inspection made by him. It was pointed out in *Rai Kishori Ghose* v. *Kumudini Kanta Ghose* (1), that "since the amendment of the C. P. C. it may well be argued that the intention of the Legislature was to adopt the English rule and that the Judge should not himself hold a local investigation with a view to gather information which he might use as the foundation of his judgment although he might inspect the locality with a view to enable him to understand the evidence." But we are unable to hold that this action of the learned Judge has in any way prejudiced the appellant. He visited the spot at the request of the parties and there is nothing to suggest that he formed any conclusion on the evidence which he might have altered had the appellant been given an opportunity of criticising a recorded note of his inspection. In the absence of the prejudice of the parties we hold that the mere fact that the learned Judge held the local investigation without recording a note thereof is not a sufficient ground for setting aside his decision.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

M B.

Z. K.

(1) 14 Ind. Cas. 377; 15 C. L. J. 138.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1443 OF 1922.

November 5, 1924.

Present:—Mr. Justice Ramesam.

DURGAMMA AND OTHERS—PLAINTIFFS NOS. 1 TO 25—APPELLANTS

versus

KECHAMAYYA AND OTHERS—DEFENDANTS NOS. 1, 2 AND 4 TO 10—RESPONDENTS.

Hindu Law—Aliyasanthana family—Suit by junior members to set aside mortgage-decree against manager—Cause of action—Fraud, allegations of, whether must relate to conduct of suit.

In a suit by certain junior members of an Aliyasanthana family for a declaration that a decree passed on a mortgage executed by the managers and certain other members of the family was not binding on the plaintiffs, the plaint alleged that the mortgage on which the decree was obtained was executed fraudulently and collusively:

Held, that if the plaintiffs established fraud in the execution of the mortgage, the decree would be equally vitiated by fraud and would not bind the plaintiffs, but that it would have been different if the parties to the mortgage suit had not been the same as those to the mortgage, in which case a further allegation of fraud in the conduct of the suit would have been necessary to sustain the suit.

Second appeal against a decree of the Court of the Subordinate Judge, South Kanara, in Appeal Suit No. 189 of 1921, (A. S. No. 125 of 1921, on the file of the District Court), preferred against a decree of the Court of the Additional District Munsif, Kasargod, in Original Suit No. 36 of 1920, (O. S. No. 85 of 1919 on the file of the Principal District Munsif).

Mr. *P. Sitaramarao*, for the Appellants.

Mr. *K. Yegnanarayana Adiga*, for the Respondents.

JUDGMENT.—The suit was brought by the junior members of an Aliyasanthana family for a declaration that a decree obtained against certain other members (including the two managers) is not binding on them. The plaintiffs were not parties to the former suit. The Courts below dismissed the suit on the ground that the plaint disclosed no cause of action. The plaint made various allegations of fraud in connection with the execution of the mortgage-deed on which the former suit was laid but made no further specific allegations of fraud in the conduct of the former suit. In the cases relied on by the Courts below [*Logadapatti Chinnayya* v. *Kotla Ramanna* (1) and *Venkatarama Aiyar* v. *South Indian Bank, Ltd.*, (2)], the plaintiff in the last suit was a party to the prior decree and was bound by it unless the decree was obtained by fraud. Those cases can apply to the present case only on the footing that the plaintiff, though not a party to the former suit, was represented in it by the 5th defendant therein (Ejamanthi) and by the 3rd defendant therein (described as a manager along with the 5th defendant). Now it is clear that if the executants of the mortgage document acted fraudulently and collusively in executing the documents and they were the defendants in the suit and allowed it to proceed *ex parte* they were only continuing the original fraud and there can be no new fraud to allege or prove. If the plaintiffs succeed in establishing fraud and collusion in respect of the execution of the document, they have also succeeded in establishing that the non-defending of the former suit is also fraudulent—the fraud in the suit being merely a continuation of the original fraud. In the present case, of the seven executants of the mortgage document six (including the manager) were parties to the former suit (the seventh being dead). In such a case the plaint must be construed as alleging fraud throughout from the execution of the document to the passing of the decree. It would be no doubt different, if the defendants in the former suit were different from the executants of the mortgage. In such a case, the plaintiff ought to make a further allegation about the conduct of the defendants in defending the suit, such as that the defendants did not raise an obvious plea open to them, or that the executants of the document were not managers at the time—conduct showing gross negligence equivalent to fraud and collusion. An example of such a case is *Yusuf Sahib* v. *Durgi* (3). In the present case the plaint attributes initial fraud to the defendants in the suit at the stage of the execution of the document. I do not think it necessary for the plaintiff to make this redundant allegation that the fraud continued during the conduct of the suit. I think the plaint discloses a cause of action. The facts ought to be fully ascertained before the suit can be disposed of. If the plaintiffs establish fraud in the execution of the mortgage the decree is equally vitiated by fraud and cannot bind plaintiffs.

The decrees of the Courts below are

(1) 19 Ind. Cas. 579; 33 M. 203; 25 M. L. J. 228; 13 M. L. 421; (1913) M. W. N. 387.

(2) 55 Ind. Cas. 452; 43 M. 381; 27 M. L. T. 66; 38 M. L. J. 108; 11 L. W. 81; (1920) M. W. N. 92.

(3) 30 M. 447; 17 M. L. J. 260; 2 M. L. T. 368.

reversed and the suit remanded for disposal according to law. Costs to abide the result. Court-fee in first appeal and second appeal should be refunded to plaintiffs.

V. N. V. *Suit remanded.*

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 642 OF 1923.

June 4, 1925.

Present:—Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

RADHA NATH DUTTA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHANDRA KUMAR DUTT AND OTHERS DEFENDANTS AND *Pro forma* DEFENDANTS—RESPONDENTS.

Bengal Alluvion and Diluvion Act (IX of 1847), s. 6—Bengal Alluvion Land Settlement Act (XXXI of 1858), s. 2—Bengal Alluvion Amendment Act (IV of 1868), s. 3—Diara *proceedings, nature of—Proceedings, whether binding on under-tenure-holders claiming adversely to each other.*

What is dealt with in proceedings under the Bengal Alluvion and Diluvion Act and the subsequent amending Acts is the assessment of revenue, and the parties concerned are the proprietor and the Government. The powers of the Revenue Authorities operating under these Acts only extend, so far as the tenants are concerned, to ascertaining or recording existing rights, that is, to the nature and extent of any existing tenancies, and not to settling rent so as to bind the tenant. These proceedings are binding on the proprietor with regard to the assessment of revenue but are not binding as between under-tenure-holders claiming the land adversely to each other under different proprietors. [p. 719, cols. 1 & 2.]

Appeal against a decree of the Subordinate Judge, First Court, Backergunge, dated the 9th August 1922, affirming that of the Munsif Third Court at Barisal, dated the 30th May 1921.

Babus *Prokash Chandra Majumdar* and *Aswini Kumar Gupta*, for the Appellants.

Babu *Rupendra Kumar Mitter*, for the Respondents.

Babu *Biraj Mohan Mazumdar*, for the Deputy Registrar.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiffs against a decision of the Subordinate Judge of the First Court, Backergunge, confirming a decision of the Munsif of Barisal. The plaintiffs sued for establishment of their title to and for *khas* possession of *Dags* Nos. 329, 358 and 359 of the Settlement Survey and claimed them as part of their *howla* and as accretions to *Dag* No. 300. Their case was that in *diara* proceedings in 1913, the *dags* in suit were resumed by Government, assessed for revenue, and settled as a separate estate with the *zemindar* under whom the plaintiffs hold their tenure. In the Record of Rights which was published in 1907, the *dags* in suit were found in possession of the defendants but the appellants contend that the defendants are bound by the *diara* proceedings and the dispute in this appeal is whether this is so or not.

The Munsif has found that the defendants were not parties to the *diara* proceedings and that no notice was served on them and that the suit is time-barred. The Subordinate Judge presumably accepts these findings but he has not arrived at any express findings on these points. He finds, however, that *Dag* No. 329, to which *Dags* Nos. 358 and 359 are accretions, is according to the *thak mal asli* land situate at the bend of the river Gazalia and that any presumption raised by the *diara* map in favour of the plaintiffs is rebutted by the *thak* map and that apart from the *diara* there is no evidence in favour of the plaintiffs' contention.

He holds that the *diara* did not and could not create any right but could only assess revenue on land in excess of the Revenue Survey.

We were referred by the Vakil for the appellants to the material provisions of Regulation II of 1819, Regulation VII of 1822, Regulation IX of 1825, Regulation XI of 1825 and Regulation IV of 1828. These were superseded by the Bengal Alluvion and Diluvion Act of 1847 (Act IX of 1847) and it is not necessary to refer to them.

By s. 6 of Act IX of 1847 provision is made for the assessment of revenue on land added to an estate paying Revenue to Government. By s. 2 of the Bengal Alluvion Land Settlement Act of 1858 (Act XXXI of 1858), it is provided that nothing contained in the preceding section shall affect the rights of any under-tenant in any alluvial land and officers making settlements of such land are enjoined to ascertain and record all such rights and to determine whether any and what additional rent is payable by any under tenure-holder. The previous section (s. 1) provides for adding the new assessment on the proprietor to the

(1) 58 Ind. Cas. 902; 24 C. W. N. 813.

jama of the original estate or if the proprietor objects to this for settlement of the alluvial land as a separate estate with a separate *jama* with the proprietor if he is willing to accept settlement or "in farm" if he objects to accept settlement. The last Act to which reference is necessary is the Bengal Alluvion Amendment Act of 1868 (Act IV of 1868).

Section 3 of this Act provides for the local Revenue Authorities taking immediate possession of any island thrown up in a large and navigable river liable to be taken possession of by Government and for assessment and settlement of the land and the section further provides that any party aggrieved by the Revenue Authorities taking possession shall be at liberty to contest the same by a regular suit in the Civil Court. A consideration of the provisions of these Acts shows that what is dealt with thereby is the assessment of revenue and that the parties concerned are the proprietor and the Government. The case of *Profulla Nath Tagore* v. *Secretary of State in Council* (1) upon which the Vakil for the appellant relied referring to Fahamudunnessa's case does not lay down that an order under s. 6 of Act IX is final for all purposes and as against all persons but only that it is final for the purpose of the assessment imposed on the land which is another matter altogether. And *Secretary of State in Council* v. *Rai Jatindra Nath Chaudhury* (2), only deals with the finality of such orders as regards the assessment imposed.

As is pointed out in *Dhirendra Chunder Rai* v. *Nawab Khaja Habibulla* (3) the power of the Revenue Authorities operating under these Acts only extend so far as tenants are concerned to ascertaining or recording existing rights (that is as to the nature and extent of any existing tenancies) and not to settling rent so as to bind the tenant.

I think, therefore, that the decisions of the Courts below were right and the *diara* proceedings are not binding on the defendants. Such proceedings are doubtless binding on the proprietor with regard to the assessment of revenue but are not binding as between under-tenure-holders in questions such as arise in this appeal where the parties are not proprietors but under-tenure-holders claiming the land adversely to each other under different proprietors.

Moreover it does not appear that the proprietor under whom the defendants claim was a party to the *diara* proceedings and although he may be bound by the revenue assessment made on the lands it is difficult to see how he is otherwise bound upon the materials before us.

In the result the appeal fails and is dismissed with costs.

Mukerji, J.—I agree.

Z. K. *Appeal dismissed.*

(2) 80 Ind. Cas. 1023; 29 C. W. N. 1; (1924) A. I. R. (P. C.) 175; 47 M. L. J. 48; (1924) M. W. N. 588; 35 M. L. T. 146; 51 C. 802; 51 I. A. 241 (P. C.).

(3) 87 Ind. Cas. 442; 29 C. W. N. 505; (1925) A. I. R. (C.) 758.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2217 OF 1922 WITH CROSS-OBJECTION.

June 10, 1925.

Present:—Sir Babington Newbould, KT., and Mr. Justice Graham.

NIL MADHAB MAHAPATRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JOY GOPAL MAHANTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 132, 148—Mortgages, prior and subsequent—Suit by prior mortgagee without impleading puisne mortgagee—Decree—Purchase by prior mortgagee—Subsequent suit by puisne mortgagee without impleading prior mortgagee—Purchase by puisne mortgagee—Suit to recover possession from prior mortgagee—Limitation.

A prior mortgagee brought a suit to enforce his mortgage without making a puisne mortgagee party to the suit and in execution of the decree obtained by him purchased the mortgaged property himself. The puisne mortgagee subsequently brought a suit to enforce his mortgage without making the prior mortgagee a party and in his turn purchased the mortgaged property in execution of his decree. He then brought a suit to recover possession of the mortgaged property from the prior mortgagee who held it as purchaser under his decree:

Held, that the suit was governed by Art. 132 and not by Art. 148 of Sch. I to the Limitation Act. [p. 720, col. 1.]

Appeal against a decree of the District Judge, Bankura, dated the 6th June 1922, affirming that of the Subordinate Judge, Bankura, dated the 12th January 1922.

Dr. *Basak* and Babu *Jyotish Chandra Sarkar*, for the Appellant.

Messrs. *Ram Chandra Majumdar*, *Bimala Charan Deb* and Babu *Tarakeswar Nath Mitter*, for the Respondent.

JUDGMENT.—This appeal arises out

of a suit brought by a puisne mortgagee for redeeming a prior mortgage of the defendants and for recovery of possession of the mortgaged property. The defendant's mortgage is dated 21st *Aaar* 1301. A suit was brought on that mortgage to which the plaintiffs, the puisne mortgagees, were not made parties. In execution of the decree obtained by the defendants the mortgaged property was sold and purchased by them on the 7th February 1910 and they took delivery of possession through Court on the 2nd October 1911. The date of the plaintiffs' mortgage is 8th *Aswin* 1304. The plaintiffs sued on that mortgage without making the defendants parties. In execution of that decree the mortgaged property was purchased by the plaintiffs on the 22nd February 1913. This suit was brought on the 17th November 1920. Both the Courts below have dismissed the suit on the ground that it was barred by limitation. They held, and it has not been disputed by either parties before us, that the facts of this case are not distinguishable from the facts of the case of *Nidhi Ram Bandopadhya* v. *Sarbeswar Biswas* (1) and both the lower Courts after expressing their respectful doubt as to the correctness of that decision have held themselves bound thereby. In that case it was held under similar circumstances that Art. 132 of the Second Schedule of the Indian Limitation Act was applicable. It was contended before us that the proper Article is Art. 148 which would give the plaintiffs in a suit to redeem 60 years from the date when the right to redeem accrued. Our attention has been drawn to a decision of the Allahabad High Court in *Priya Lal* v. *Bohra Champa Ram* (2) in which it was held under somewhat similar circumstances that the Article applicable to a suit for redemption brought by a puisne mortgagee was Art. 148. But that case is distinguishable on the important point that there it was the puisne mortgagee who had first sued on his mortgage and in execution of his decree he was put into possession of the property. It is a very different matter when a puisne mortgagee brings a mere suit for redemption being in possession of the property; in the present case he sued not only for redemption but also for recovery of possession. In suing for recovery of possession he was not seeking to recover possession as against the mortgagee since the defendants to this suit were in possession of the property not by virtue of their mortgage but by virtue of their purchase of the property at the sale in execution of their decree. The decision of this Court which has been followed by the lower Courts was in the year 1909 and it does not appear to have been ever doubted or questioned in any subsequent case. We are not prepared to dissent from that decision and we cannot accept the contention raised on behalf of the appellants that this is a proper case for making a reference to a Full Bench with a view to having that decision overruled.

The cross-objection taken on behalf of the respondents was not pressed and is dismissed.

The appeal is dismissed with costs.

M. B. *Appeal dismissed.*

Z. K.

(1) 5 Ind. Cas. 877; 14 C. W. N. 439.
(2) 79 Ind. Cas. 498; 45 A. 268; (1923) A. I. R. (A.) 271.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 71 OF 1925.

March 10, 1925.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

BAVA C. VAITHILINGA MUDALIAR—DEFENDANT No. 1—PETITIONER—APPELLANT

versus

CHIDAMBARAM PILLAI—PLAINTIFF—RESPONDENT.

Execution of decree—Executing Court, whether can go behind decree—Decree directing payment out of certain fund—Fund, whether can be exempted in execution.

A Court executing a decree must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree. Where a decree directs that the decretal amount should be recoverable from a certain fund, the Executing Court cannot go behind the decree and it is not open to the judgment-debtor to say that a particular portion of the fund indicated in the decree out of which the decretal amount is made recoverable should be excluded from the operation of the decree. [p. 721, cols. 1 & 2.]

In a suit against the trustees of a *kattalai* called *ulturai katalai* in a temple, the decree provided for recovery of the decretal amount from the income and assets of the *kattalai*. In execution of the decree, objection was raised against the attachment of the *mohini* allowance due to the *kattalai* on the ground that it was ear marked for a certain specific purpose. There was no evidence to show that the debt in respect of which the decree was passed was not in-

curred for a purpose which would be a legitimate charge on the *mohini* allowance :

Held, that the Executing Court could not go behind the decree and it was not open to the trustees to contend that any particular item of income or assets of the *kattalai* should be excluded. [p. 721, col. 2.]

Zemindar of Ettiyapuram v. *Chidambaram Chetty*, 58 Ind. Cas. 871; 43 M. 675 at pp. 686, 687, 688; (1920) M.W.N. 460; 28 M. L. T. 75; 12 L. W. 217; 39 M. L. J. 203 (F. B.), relied on.

Appeal against an order of the Court of the Subordinate Judge, Tiruvalur, in E. A. No. 52 of 1925 in E. P. No. 8 of 1925, in O. S. No. 21 of 1923.

Messrs. *K. Bhashyam Iyengar* and *S. Panchapegesa Sastri*, for the Appellant.

Mr. *C. A. Sashagiri Sastry*, for the Respondent.

JUDGMENT.—The first defendant-appellant objects to execution on two grounds, first, that the *mohini* allowance which is sought to be attached is an endowment for a special purpose, and, therefore, it cannot be made available to a creditor who has obtained a decree against the *ultural kattalai* in general terms, secondly, that the allowance does not constitute either the assets or the income of the *ultural kattalai*.

The first objection assumes that the *mohini* allowance is a part of the assets of the *ulturat kattalai*; but the argument is that the *kattalai* provides for various objects ; and that the *mohini* allowance is ear-marked for a certain specific purpose. Granting but not deciding that this is so, it has not been shown that the debt in respect of which the decree was passed was not incurred for a purpose which would be a legitimate charge on the *mohini* allowance. On the other hand, from the judgment it would appear that the debt was incurred for carrying out the objects of the *kattalai* and performing all kinds of duties in connection with them, and there is no trace anywhere that the amount borrowed was expended in connection with any particular object. Next the debt was incurred by the Receiver who fully represented the *kattalai* and the first and second defendants being the trustees of the *kattalai* equally represented it in the suit in which the decree in question was passed. The decree contained clear words that the plaintiff was to recover the amount from the *income* and *assets* of the *ulturai kattalai*. The Executing Court cannot go behind the decree and it will not be open to the defendant to say that a particular item of income or assets should be excluded. See *Zemindar of Ettiyapuram* v. *Chidambaram Chetty* (1) Sir John Wallis who delivered the judgment of the Full Bench thus observes :—"This is the view taken in *Hari Govind* v. *Narsingrao* (2) and *Kalipada Sarkar* v. *Hari Mohan Dalal* (3) is also a recent authority for the proposition that the Court executing the decree cannot go behind it." This was followed in *Sami Mudaliar* v. *Muthiah Chetty* (4). In *Kalipada Sarkar* v *Hari Mohan Dalal* (3) the learned Judges said. "It is indisputable that the Court executing a decree must take the decree as it stands, and has no power to go behind the decree or to entertain an objection to the legality or correctness of the decree."

It is noteworthy that no such defence was put forward in the suit although a similar plea was taken in connection with a particular sum which seems to form a part of the *kattalai*. The learned Vakil for the appellant tells us that apart from the *mohini* allowance of Rs. 7,200 per year, there are two other sums which constitute the endowment Rs. 1,000 the sum in respect of which exception was taken in the suit itself, and a sum of about Rs. 700 which represents the realisation from the sale of *parsadams*. If the contention is correct, the only amount that is available to the decree-holder is the latter sum of Rs. 700.

We shall next deal with the second objection. We cannot follow the argument that the *mohini* allowance is neither the income nor the assets of the *kattalai*. The very documents on which the appellant relies show that this contention is utterly devoid of force. Exhibit B refers to the *mohini* allowance as cash income. Exhibit C includes *mohini* allowance among the items belonging to the *kattalai* in question. Again the case which the learned Vakil for the appellant has relied on *Vythilinga Pandara Sannadhi* v. *Somasundaram Mudaliar* (5) refers to the *mohini* allowance as constituting the largest portion of the income of the *ulturai kattalai*.

(1) 58 Ind. Cas. 871; 43 M. 675 at pp. 686, 687; 688 (1920) M. W. N. 460; 28 M. L. T. 75; 12 L. W. 217; 39 M. L. J. 203 (F. B.).

(2) 23 Ind. Cas. 123; 38 B. 194; 16 Bom. L. R. 30.

(3) 35 Ind. Cas. 856; 44 C. 627; 24 C. L. J. 375; 21 C. W. N. 1104.

(4) 69 Ind. Cas. 465; 16 L. W. 314; 43 M. L. J. 293; (1922) M. W. N. 597; (1923) A. I. R. (M.) 212.

(5) 17 M. 199; 6 Ind. Dec. (N. s.) 137.

This argument, therefore, cannot be accepted.

The appellant lastly contends that we should in our discretion restrain the plaintiff from attaching this allowance and direct him to proceed against the other properties of the *kattalai*. It is unnecessary to decide whether we have this power; granting we have it, no reason has been given why we should exercise it in favour of the appellant. The only other items available according to him are the two paltry sums of Rs. 1,000 and Rs. 700. We must also note that this contention was not put forward before the lower Court. There is no equity on his side, as the judgment which at present we must assume is right, makes it clear, that the debt is a long standing one; and the plaintiff has been kept out of his money for several years; on the other hand, the defendant has not shown that the interests of the trust will be advanced by allowing execution against the other properties.

Finally, the appellant's learned Vakil has contended that if the whole *mohini* allowance is attached, the daily *puja* in the temple cannot be performed and may have to be discontinued. Mr. Seshagiri Sastri, the learned Vakil for the respondent, without admitting the truth of this statement agrees to leave out Rs. 1,200 and attach the balance only *viz.*, Rs. 6,000. Any sums already drawn by the appellant out of the *mohini* allowance must go towards the said sum of Rs. 1,200.

The appeal fails and is dismissed with costs.

V. N. V.
Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1072 AND 1073 OF 1925.

May 27, 1925.

Present:—Mr. Justice Suhrawardy and Mr Justice Duval.

NAGENDRANATH ADDY AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

THE COMMISSIONER OF THE PRESIDENCY DIVISION AND OTHERS —RESPONDENTS.

Bengal Municipal Rules of 1896—Municipal election—Candidate, whether can withdraw after commencement of poll.

Under the Bengal Municipal Rules of 1896 a candidate at a Municipal election is entitled to withdraw from the election at any time before the closing of the poll [p. 723, c. 1].

Appeals against the decrees of the Officiating District Judge, Murshidabad, dated the 14th April 1925, confirming that of the Munsif, First Court, Berhampore, dated the 9th February 1925.

Messrs. *N. Sarcar, S. C. Roy* and Babu *Amulya Chandra Sen*, for the Appellants.

Babu *Surendranath Guha*, for the Respondents.

JUDGMENT.—These two appeals arise out of two suits brought by certain persons who claim that they are the duly elected Municipal Commissioners for the Berhampore and Khagra Wards of the Berhampore Municipality. In one suit the plaintiffs claim to have been legally elected to represent the Berhampore Ward and in the other suit the plaintiffs made a similar claim in respect of the Khagra Ward. It appears that the elections took place on the 3rd September 1924. There were 11 candidates standing for the 5 vacancies in the Berhampore Ward and 14 candidates for the 4 vacancies in the Khagra Ward. After the polling commenced, 4 candidates from the Khagra Ward withdrew during the hours within which voters were admitted into the polling station. The time at which the doors were closed against every voter entering into the place for voting was 6 o'clock; and under rule 17-A the polling had to go on until all the voters in the polling station had recorded their votes. Shortly after 6 o'clock, apparently by some arrangement amongst the candidates, 6 out of the 11 candidates of the Berhampore Ward withdrew their candidature leaving 5 only, whom the polling officer then declared to be duly elected. Similarly in the Khagra election 6 candidates withdrew after 6 o'clock and this left, as 4 had withdrawn previously, only 4 candidates who were also declared to be duly elected. Certain rate-payers approached the District Magistrate on the ground that these withdrawals were illegal. The District Magistrate held that they were illegal and in consequence the Commissioner of the Division has ordered a fresh election in respect of the two Wards. The present suits were then brought against the Magistrate and Com-

missioner and the petitioners before the Magistrate and have been decided against the plaintiffs in both the lower Courts.

In the appeals before us there is no dispute with regard to the facts and it is now clear that all the withdrawals took place before the poll was finally closed, though the majority of the withdrawals was made after the doors of the polling stations were closed against new voters coming in. The only question, therefore, before us is whether there is anything in the rules to prevent a candidate withdrawing after the voting has commenced and before it is concluded. Now it had to be admitted that the rules are silent on this point. The rules framed by the Local Government under the Bengal Municipal Act (as amended up to date for this Municipality) provide that if the number of candidates is not greater than the number of vacancies all the candidates shall be deemed to be elected. Rule 21 (2) lays down generally that the name of any candidate who may have withdrawn his candidature shall be removed by the polling officer on receipt of information of withdrawl in writing. We understand these candidates all withdrew in writing. Thus there is nothing in these rules which at all fixes the time within which withdrawal before the closing of the polls will be allowed and after which it will be forbidden. The District Judge's point appears to have been that in the rules which the Government has recently made for elections for the Howrah Municipality under this Act, provision is made permitting withdrawal only up to a certain time and reading these new rules with other election rules he thinks that the Howrah rule must be of universal application among the Municipalities of Bengal. His argument appears to be that as in the rules ralating to Howrah there is such an arrangement and as in the rules for election to the Imperial Legislative Assembly and Provincial Legislative Councils (both sets of rules being of very recent date) there are similar restrictions on withdrawal, a general principle forbidding any one to withdraw after the polling has commenced should be implied in these old local Municipal Election Rules (made in 1896) also. This argument appears to us to be fallacious. The fact that in recent years the Howrah Municipality has found it necessary to have its rules amended to prevent withdrawals after a certain time but that the ordinary rules which apply to the Berhampore Municipality continue as before seems to us to be an equally good argument that the framers of the Howrah amendments thought the time for withdrawal under the old rules lasted right up to the time of the closing of the poll. We are not, however, concerned with what modern draftsmen have thought about the old rules. It is our duty to interpret the existing rule as it applies to this and other *mofussil* Municipality in Bengal (excluding Howrah) and the fact that recent drafting has limited the right to withdraw is no argument, one way or another, as to the interpretation of the Rules of 1896. We must, therefore, decide the case on the Rules of 1896 and no other. In this connexion we are fortified in the order which we consider is the only possible one by the decision of the Chief Justice Allahabad High Court in the case of *Sultan Baksh* v. *Abdul Hamid* (1) where exactly the same state of affairs arose. (The suggestion of the learned Government Pleader that a dispute between two persons for election is not the same as one where several dispute does not appeal to us). There were two candidates for two vacancies and during the course of the day one candidate withdrew. The High Court held interpreting the rules under which Municipal elections in that Province are held that a candidate for election could withdraw his candidature at any time before the election was concluded. The rules in force in the Province of Agra are not word for word the same as the rules obtainting in Bengal but their purport is the same and in both there is no provision dealing with the time up to which withdrawals are valid. We must hold in the absence of any restriction in the Bengal Rules as to the time of withdrawal that candidates are, under the existing rules, entitled to withdraw at any time before the closing of the poll and as it is admitted that the polling had not closed when these candidates withdrew, their withdrawal was lawful and the remaining candidates thereby were in consequence duly elected.

The appeals must, therefore, be allowed, but in the circumstances of the cases and as the appellants do not press for them, we make no order as to costs.

M. B.
Z. K. *Appeals allowed.*

(1) 74 Ind. Cas. 24; 45 A. 685; 21 A. L. J. 639; (1924) A. I. R. (A.) 134.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1595 OF 1922.

April 21, 1925.

Present:—Mr. Justice Devadoss.

MUNUSWAMY NAYAKAR—
DEFENDANT No. 1—APPELLANT
versus
ABUL AZEEZ SAHIB AND OTHERS—
PLAINTIFFS NOS. 1, 2, 7 AND 8—
DEFENDANTS NOS. 3 TO 5 AND PLAINTIFFS NOS. 3 TO 6 AND 9—RESPONDENTS.

Trust—Trust property, alienation of—Alienation set aside—Alienee, whether entitled to recovery of benefit derived by trust from alienation—Costs—Interest.

Where a sale of trust property is set aside and it is quite clear that the trust has had the benefit of the consideration for the sale which is set aside, the Court should make the trust pay back what it has gained by the sale which is held not to be binding on the trust. Where in such a case it is found that the transaction so far as the alienee of the trust property is concerned was a fair and *bona fide* one, the alienee is entitled to his costs and also to interest on the amount of the consideration which the Court directs should be paid back to him. [p. 724, col. 2; p. 725, col. 1.]

Second appeal against a decree of the Court of the Subordinate Judge, Chingleput, in A. S. No. 113 of 1921, (A. S. No. 285 of 1921 on the file of the District Court, Chingleput), preferred against that of the Court of the Additional Munsif, Chingleput, in O. S. No. 152 of 1918, (O. S. No. 103 of 1918, on the file of the Court of the District Munsif, Poonamallee, remanded by the District Court, Chingleput, in A. S. No. 475 of 1919)

Mr. *E. V. Anantakrishna Iyer*, for the Appellant.

Mr. *V. Viswanatha Sastry*, for the Respondents.

JUDGMENT.—This appeal is by the 1st defendant. He purchased certain property belonging to a mosque in St. Thomas Mount from the *muttwalli*, the 3rd defendant in the suit for Rs. 1,000. After the purchase some persons interested in the mosque brought the present suit for setting aside the sale on the ground that the sale was not binding on the trust. The District Munsif dismissed the suit but on appeal the Subordinate Judge of Chingleput decreed the suit in plaintiff's favour. Mr. Anantakrishna Iyer, who appears for the 1st defendant does not object to the judgment of the Appellate Court so far as it sets aside the sale in favour of the plaintiffs. But his contention is that inasmuch as the trust was benefited by the sale to him, the trust is bound to pay back to him the amount which it received from him by sale of the property. The property was sold to the 1st defendant, and out of the sale-proceeds another property was purchased in St. Thomas Mount. The *mutwalli* and the persons who attended the meeting of the committee which advised him to sell the property evidently thought that the property was not yielding any appreciable income whereas a shop in St. Thomas Mount would be yielding a very fair income. The sale was on 5th October 1917 under Ex. V and the purchase of the shop in St. Thomas Mount was under Ex. I on 12th February 1918. From both the documents it is quite clear that the sale to the 1st defendant was for the purpose of buying property in St. Thomas Mount and the whole of the consideration for the sale to the 1st defendant was utilised for the purpose of buying the shop. That being so, the question is whether the trust, that is, the mosque should be allowed to get back the property on the ground that the sale did not bind the trust and should also keep the property which it purchased by utilising the sale proceeds obtained from the defendant. I think in a case like this where it is quite clear that the trust has had the benefit of the sale which is set aside, the Court should make the trust pay back what is gained by the sale which is afterwards held not to be binding on the trust. In the case of minors it was held that if the guardian sells property belonging to the minor or borrows money for the purpose of buying property and if afterwards the minor seeks to set aside the transaction, the Court would be justified in making the minor pay back what was got by the sale or by borrowing on his account. *Vide Jeladi Burrayya* v. *Ponduri Ramayya* (1), *Rabia Bi* v. *Angappan* (2) and *Dewijendra Mohan Sarma* v. *Monarama Dasi* (3). I think the same principle should be made applicable to a trust. It is a well-known principle of equity that if a person seeks equity he ought to do equity. The sale is set aside merely on the ground that the vendor who acted on behalf of the trust could not bind the trust by his act, but where with the proceeds of the sale some

(1) 78 Ind. Cas. 90; 47 M. 449; 19 L. W. 67; 46 M. L. J. 49; (1924) M. W. N. 42; (1924) A. I. R. (M.) 472.
(2) 28 Ind. Cas. 714; 2 L. W. 369.
(3) 70 Ind. Cas. 990; 36 C. L. J. 326; (1922) A. I. R. (C.) 150; 49 C 911; 28 C. W. N. 57.

other property is purchased it is but proper that when the sale is set aside the vendee should be allowed to proceed for the money paid by him to the trust against the property which was purchased with the consideration given by him for the sale in his favour. This principle was applied by the Calcutta High Court in a case reported as *Badal Mirza* v. *Tinkori Koley* (4). In that case a *mutwalli* granted a lease and received Rs. 400 by way of *selami*. His successor sued to set aside the lease. The Court held that he could do so on his paying back Rs. 400 which was received as *selami* for the lease. In this case the sale was for a definite purpose, namely, for the purchase of a shop and the proceeds were utilised in purchasing the shop. It is but proper that when the sale to the 1st defendant is set aside he should be allowed to proceed not against the general assets of the trust but against the shop which was purchased with the sale-proceeds. I, therefore, modify the decree of the lower Appellate Court by directing the *mutwalli* of the mosque to pay to the 1st defendant Rs. 1,000 before he recovers possession of the property sold to the 1st defendant, and this amount will be a charge on the shop which was purchased in St. Thomas Mount. If the *mutwalli* does not pay the amount the 1st defendant will be entitled to proceed in execution of the decree against the shop purchased under Ex. I in St. Thomas Mount. The transaction so far as the defendant is concerned was a fair and *bona fide* one. I think in the circumstances the 1st defendant is entitled to his costs incurred in the three Courts. The direction as regards mesne profits will stand. But the 1st defendant is entitled to get interest at 6 per cent on the amount from the date of Ex. I to the day on which the money is paid to him. The 1st defendant will have a charge for the total amount of Rs. 1,000 interest and costs in the shop in St. Thomas Mount. The decree of the lower Appellate Court will be further varied by directing possession to be given not to the 1st plaintiff in the suit but to the 3rd defendant the *mutwalli* of the mosque. The plaintiff's costs in the three Courts will come out of the trust funds belonging to the mosque.

V. N. V.
Z. K. *Decree varied.*

(4) 41 Ind. Cas. 736; 26 C. L. J. 263.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 970 OF 1923.

May 29, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

SOURAB BIBI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABBAS ALI BISWAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 123, applicability of—Muhammadan Law—Suit by co-heir to recover possession of his share—Possession of co-heirs, whether adverse—Ouster, proof of.

Article 123 of Sch. I to the Limitation Act applies only to cases in which the property sought to be recovered is not only a legacy but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the Will or otherwise represents the estate of the testator. [p. 726, col. 1.]

Although the doctrine of joint family does not apply to a Muhammadan family, there is nothing to prevent the ordinary law of occupation applying to such a family. Where, therefore, it is found that certain Muhammadan co-heirs have been in possession of the property of a deceased person, the possession of the co-heirs must enure for the benefit of the other co-heirs unless it can be shown that there has been an ouster of the latter by the co-heirs in possession. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Nadia, dated the 5th of December 1922, reversing that of the Munsif, Second Court at Krishangar, dated the 7th of March 1922.

Dr. *Bijan Kumar Mukerjee*, for the Appellants.

Babus *Shib Chandra Palit* and *Surendra Nath Bose*, (Sr)., for the Respondents.

JUDGMENT.

Greaves, J.—It is necessary first of all to state the facts which arise in this appeal. There was a *raiyati* holding which was the property of two brothers Molam and Madhab. Molam died without leaving any issue and the whole 16 annas thereupon passed to Madhab who died in the year 1904 or 1905 leaving him surviving three sons and two daughters one of whom is the plaintiff No. 1 in the suit, the plaintiffs Nos. 2 to 4 being the heirs of the 2nd daughter. In 1914 the holding was attached at the instance of one Ijjatulla. As the result of a compromise Ijjatulla got $6\frac{1}{2}$ annas and the heirs of Madhab the remaining $9\frac{1}{2}$ annas. Madhab's three sons in the year 1919 transferred their interest in the property to defendant No. 1 in the suit. Up to that time the heirs of Madhab, that is to say, his

three sons had been in possession of the property.

The First Court decreed the plaintiffs' suit which was to establish their title to 4 annas of the property and for joint possession thereto. The lower Appellate Court has reversed the decision of the First Court.

It seems to us that the judgment of the learned Subordinate Judge is founded upon a misapprehension of the law. He says that the suit is barred by the provisions of Art. 123 of the Limitation Act it having been brought more than 12 years after Madhab's death. Clearly on the facts which I have stated Art. 123 has no application whatsoever. The suit was brought against defendant No. 1 who did not in any way represent Madhab's estate. In these circumstances it is impossible to contend that the provisions of Art. 123 have any application whatsoever. The limited application of that Article has been pointed out in the case of *Issur Chunder Doss* v. *Juggut Chunder Shaha* (1). It is there pointed out that this Article only applies to cases in which the property sought to be recovered is not only a legacy but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is executor of the Will or otherwise represents the estate of the testator. So much then for the first ground upon which the learned Subordinate Judge decided the appeal before him.

He is equally wrong in law with regard to the second ground. He says that the doctrine of joint family does not apply to a Muhammadan family. But that does not prevent the ordinary law of occupation, applied to a Muhammadan family. Here there is no evidence and no finding with regard to the ouster of plaintiff No. 1 by her brothers. They have been in possession all along down to the year 1919 and possession of these co-owners enured for the benefit of the plaintiffs, if, as was the case here, there was no ouster.

In the result, therefore, the appeal succeeds for the learned Subordinate Judge has found that there is no doubt that the plaintiffs have shown that they are the heirs of Madhab.

The appeal is accordingly allowed. The decree of the lower Appellate Court is set aside and that of the Court of first instance restored with costs of this Court and of the lower Appellate Court.

Mukerji, J.—I agree.

Z. K. *Appeal allowed.*

(1) 9 C. 79 at p. 81; 4 Ind. Dec. (N. S.) 705.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2634 OF 1922.

June 11, 1925.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice Graham.

BROJO DHABAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

PREM CHAND KUNDU—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 72—Landlord and tenant—Transfer of landlord's interest—Liability of tenant to pay rent to transferee—Payment to landlord, effect of.

Before the tenant can be excused from payment of rent to the transferee of the landlord under s. 72 of the Bengal Tenancy Act, two conditions must be fulfilled, first, he must have paid rent to the landlord whose interest has been transferred and, secondly, he must have done so without notice of the transfer. [p. 727, cols. 1 & 2.]

Appeal against a decree of the Subordinate Judge, Bankura, dated the 31st of July 1922, reversing that of the Munsif, First Court, Bankura, dated the 20th of March 1922.

Dr. *D. N. Mitra* and Babu *Phanindra Nath Das*, for the Appellants.

Mr. *Ram Chandra Mazumdar* and Babus *Panchanan Ghose* and *Jyotish Chandra Guha*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants against a decree of the Subordinate Judge of Bankura by which they were held liable to pay rent for the Bengali year 1327 to the plaintiff.

The main contest between the parties was as to the plaintiff's title. Somewhat complicated evidence bearing on this dispute has been discussed in the judgment of the lower Appellate Court. But sitting in second appeal we must accept the finding of facts and need only state the more important points. The plaintiff claimed as a transferee from one Ram Kamal. The defendants' main allegation on the question of title was that Ram Kamal was a *benamdar* for his three brothers Brojo, Surendra and Jugol. Brojo is now dead and his interest is now represented by his daughter

Kishori who is wife of Ram Kamal. On the question of title the lower Appellate Court held that Ram Kamal was not a *benamdar* for Brojo, Surendra and Jugol. It further found that as the defendants had executed a *kabuliyat* in favour of Ram Kamal they were estopped from denying Ram Kamal's right in the land. In our opinion, the finding of fact is conclusive on the plaintiff's title. It is argued that there was an error in law in the decision of the question of estoppel since there was evidence that one of the defendants was in possession of the land before the execution of the *kabuliyat*. The most that could be said was that defendant No. 3 Mahindi Majhi was admittedly in wrongful possession of some land but it is held by the Final Court of fact that there were no materials for finding that Mahindi was holding this particular land at that time. Further, even if he was in possession of the land of this tenancy as a trespasser he would still be stopped from denying the plaintiff's title on the finding that the holding was created by the *kabuliyat*. The leading case on estoppel of a tenant which was cited in support of this contention is *Lal Mohamed* v. *Kullanus* (1). In that case the *ryot* was in possession of the holding before he executed the *kabuliyat* regarding his holding and he was not a trespasser on the land of the holding That ruling decides that the words "at the beginning of the tenancy" in s. 116 of the Evidence Act only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession. Here there was no tenancy before the execution of the *kabuliyat* and the tenants were put into possession of that tenancy by Ram Kamal.

The main contention urged in this appeal was that s. 72 of the Bengal Tenancy Act is a bar to the plaintiff recovering rent from the defendants. That section runs thus. "A tenant shall not, when his landlord's interest is transferred, be liable to the transferee for rent which became due after the transfer and was paid to the landlord whose interest was so transferred, unless the transferee has before the payment given notice of the transfer to the tenant". Before the tenant can be excused from payment to the transferee under this section two conditions are necessary. The first is that he must pay rent to the landlord whose interest has been transferred and secondly, he must have done so without notice of the transfer. The lower Appellate Court held that this section was inapplicable because one of the three defendants had knowledge of the transfer and his knowledge must the taken as the knowledge of all the joint tenants. In our opinion, it is not necessary to decide whether the knowledge of one joint tenant can bo imputed to his co-tenants since the other condition of s. 72 has not been fulfilled. It is not the defendants' case that they had paid rent to Ram Kamal who was their landlord and whose interest had been transferred to the plaintiff. It is contended that the payment to Jugol, Surendra and Brojo's daughter is equivalent to payment to Ram Kamal since Ram Kamal had executed a deed of release in favour of Brojo. But on the finding that Ram Kamal was a purchaser of the property and was not a *benamdar* for these persons the execution of a mere deed of release would not transfer his interest to Jugol, Surendra and Brojo. There having been no payment of rent to the landlord whose interest was transferred to the plaintiff s. 72 is of no benefit to the appellants.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

M B.
Z. K.

(1) 11 C. 519; 5 Ind. Dec. (N. S.) 1104.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 692 OF 1923.

July 17, 1925.

Present:—Mr. Justice Jackson.

KANAPARTHI SRINIVASA RAO AND OTHERS—PLAINTIFFS—PETITIONERS Nos. 1 TO 4 AND 6 TO 9

versus

KANAPARTHI VENKATANARASAMMA —COUNTER-PETITIONER—DEFENDANT No. 1 —RESPONDENT

Civil Procedure Code (Act V of 1908), s. 151, O. XXXII, r. 7, O. XLVII, r. 1—Minor plaintiff—Next friend exonerating defendant—Sanction of Court, absence of—Inherent power of Court to safeguard interests of minor.

A Court has a special responsibility to safeguard the interests of a minor party and where those interests have been overlooked it ought, if possible, to remedy the defect.

Once a Court is asked to go back on its own procedure it is not a question whether there is any section in the C. P. C. to warrant the action of the Court in

amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled.

A minor cannot be expected to exercise due diligence and as soon as he discovers that the Court has failed in its duty in safeguarding his interests he is entitled to move the Court to remedy the defect under s. 151 of the C. P. C.

Where the next friend of a minor plaintiff exonerates a defendant from liability without obtaining the leave of the Court under r. 7 of O. XXXII of the C. P. C., the Court has inherent power to re-open the matter on the application of the minor plaintiff.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Masulipatam, dated the 29th of January 1923, in C. M. P. No. 1249 of 1922, in O. S. No. 45 of 1920.

Mr. *R. Ramadoss*, for the Petitioners.

Mr. *K. Venkatanarasamma*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the Subordinate Judge of Masulipatam on C. M. P. No. 1249 of 1922.

In O. S. No. 45 of 1920, the plaintiffs-minors appeared by their next friend and he exonerated the first defendant. The minors now apply to have the matter re-opened. No one appears for first defendant.

The point for determination is whether the learned Judges' concluding remark is justified, "even if it be held that my predecessor ought to have made some inquiry before allowing the next friend to give up first defendant, I think as a successor I cannot re-open the suit." It must be held that his predecessor should have acted under O. XXXII, r. 7 of the C. P. C. and should have recorded the leave of the Court. Then can the present Judge re-open the suit which is thus found to have been improperly decided?

The Court has a special responsibility to safeguard the interests of the minor plaintiffs [see *Doraswami Pillai* v. *Phungasami Pillai* (1) and the case quoted therein *Karmali Rahimbhoy* v. *Rahimbhoy Habibbhoy* (2)] and where those interests have been overlooked it ought, if possible, to remedy the defect. The question then is reduced to one of procedure, whether the Court has the power to review the proceedings. In *Peary Choudhury* v. *Sonoory Das* (3) it is observed, quoting *Basangouda Hanmantgouda* v. *Churchigirigouda Yogangouda* (4) that once the Court is asked to go back upon its own procedure it is not a question whether there is any section in C. P. C. to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled. One should be careful not to read too broad a sense into the *dictum* but I think it is applicable to the peculiar circumstances of the present case.

Nothing seems to turn on the fact that the personnel of the Court has changed. A minor cannot be expected to exercise due diligence and as soon as he discovers the important matter that the Court failed in its duty in safe guarding his interests, he is entitled to move for a review. If he were moving under O. XLVII, the rule applicable would be r. 1 and not r. 2, but it is laid down in the case cited above *Peary Choudhury* v. *Sonoory Das* (3) that s. 151 is more appropriate.

The petition is allowed and the suit should be re-opened and heard so far as it relates to first defendant.

V. N. V.

Z. K. *Petition allowed.*

(1) 27 M. 377.
(2) 13 B. 137; 7 Ind Dec. (N. S.) 92.
(3) 27 Ind. Cas. 628 at p. 629.
(4) 5 Ind. Cas. 968; 34 B. 408; 12 Bom. L. R. 223.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1918 OF 1923.

August 4, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Cuming.

RAJ CHANDRA HALDAR—PLAINTIFF—APPELLANT

versus

MAHIM CHANDRA MALLICK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 91—Public right, obstruction to, suit relating to, by private individual—Special damage, allegation of—Pleadings.

Where in a suit relating to the obstruction of a public right the plaintiff relies upon special damage, he must allege special damage in the plaint giving particulars and details of the special damage which has accrued to him. A mere general allegation in the plaint that the plaintiff has suffered inconvenience owing to the obstruction complained of does not amount to an allegation of special damage. Where in such a suit special damage is not alleged in the plaint it is not open to the plaintiff subsequently to say that the other side could have got the necessary information if they had chosen to ask for the particulars of the special damage alleged to have accrued to the plaintiff by reason of the obstruction. [p. 729, col. 2.]

Appeal against a decree of the Officiating Subordinate Judge, First Court, Faridpur, dated the 15th of February 1923, reversing that of the Munsif, First Court at Bhanga, dated the 1st of December 1921.

Babu *Surja Kumar Guha*, for the Appellant.

Babu *Bhagirath Chandra Das*, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by plaintiff No. 1 against a decision of the Subordinate Judge of Faridpur reversing a decision of the Munsif, First Court at Bhanga. The plaintiff and two other persons sued together for a declaration of the existence of a public right of passage for boats in the rainy season over a certain channel and they also claimed that there was a right in the villagers of certain villages to pass this channel. In addition the plaintiff claimed an easement over the channel in question. The suit was not appropriately constituted for the declaration of the public right of way for such a suit it would be necessary to frame the proceedings under the provisions of s. 91 of the C. P. C. Accordingly, it was necessary for the plaintiff if he desired to succeed under this head to allege and prove that he had suffered special damage as a member of the public by reason of the obstruction caused by the defendants in the right of passage for boats alleged in the plaint. The First Court held that there was a public right of passage during the rainy season over the way in question and that it was only plaintiff No. 1 who established special damage and that he was the only person who was entitled to a decree. Accordingly, the First Court passed a decree on this ground against defendants Nos. 1 to 3 and no relief was given to the other plaintiffs in the suit. Both sides appealed to the lower Appellate Court, the defendants on the ground that there was no averment in the plaint of special damage having accrued to plaintiff No. 1 whereas the plaintiff in his cross-appeal contended that there should have been a decree on the facts in favour not only of himself but also of his co-plaintiffs, plaintiffs Nos. 2 and 3. Before this Court the only question that has been raised by the appellant is that there was a sufficient allegation in the plaint of special damage which had accrued to plaintiff No. 1. So far as the question of the right of the villagers is concerned and of the claim for easement this was not pressed before us having regard to the fact that one of the defendants had died pending the appeal and no substitution had been effected in his place. In para. 6 of the plaint it is alleged that there is no other passage for going out towards the east and west from the plaintiffs' houses except the one marked "A". We are told that there was some evidence given on behalf of the plaintiffs that they had to pass by a more circuitous road for the purpose of harvesting their crops and that they also had incurred additional expense from being compelled to go by this circuitous way. But what we have got to decide is whether the lower Appellate Court was wrong in saying that the allegation in the plaint to which we have referred, was not sufficient. In my opinion, the lower Appellate Court was right. We think, if as here, the plaintiff relies on special damage he must allege special damage in the plaint giving particulars and details of special damage which has accrued to him. The mere general allegation such as is contained in para. (*b*) of the plaint is, in my opinion, not sufficient and the plaintiff in a case of this nature is not entitled to say, as the learned Vakil urged before us, that the other side could have got the necessary information if they had chosen to ask for particulars of the special damage said to have accrued to the plaintiff by reason of the obstruction.

In this view of the case we think the decision of the lower Appellate Court is right and this appeal fails and is dismissed with costs.

Cuming, J.—I agree.

M. B. *Appeal dismissed.*

Z K.

MADRAS HIGH COURT.

STAMP REGISTER No. 12829 OF 1924.

April 29, 1925.

Present :—Mr. Justice Devadoss and Mr. Justice Wallace.

In re LAKSHMI AMMAL—PLAINTIFF APPELLANT.

Court Fees Act (VII of 1870), as amended by Madras Act (V of 1922), ss. 7 (iv) (A), 12—Plaint accepted by Trial Court—Deficiency in Court-fees—Appeal—Appellate Court, power of, to demand deficit Court-fees on plaint—Suit for cancellation of sale-deed—Court-fee payable.

A Court of Appeal, when admitting an appeal is entitled to demand under the provisions of cl. (2) of s. 12 of the Court Fees Act, proper Court-fees payable in the Appellate Court as well as in the Trial Court. [p. 732, col. 1.]

Where according to the practice prevailing in a Court, the Chief Ministerial Officer of the Court, whose duty it is to see that proper Court-fee is paid on plaints, receives and files a plaint and the Court acts on the footing that the proper Court-fee has been paid, the act of the Ministerial Officer amounts to a decision of the Court within the meaning of cl. (1) of s. 12 of the Court Fees Act that the Court-fee paid is proper. [*ibid.*]

Plaintiff purchased some property for Rs. 2,300 under a sale-deed executed by the defendant and paid him Rs. 1,000 in cash and executed in his favour a mortgage-deed for the balance of the consideration for the sale. Plaintiff subsequently brought a suit against the defendant alleging that the defendant had practised fraud upon the plaintiff by suppressing important facts in connection with the sale and praying for a declaration and for a return of the sum of Rs. 1,000 paid to the defendant and for damages:

Held, (1) that, inasmuch as the plaintiff could not demand the return of the cash consideration for the sale paid to the defendant without getting the sale cancelled, the suit must be treated as one substantially for the cancellation of the sale; [p. 732, col 2; p. 733, col. 1.]

(2) that, therefore, the suit fell within the purview of s. 7 iv (A) of the Court Fees Act as amended by Madras Act V of 1922 and that Court-fees must be paid on the amount of Rs. 2,300 which was the value of the property conveyed by the sale-deed. [p. 733 col. 1.]

Appeal sought to be preferred against a decree of the City Civil Court, Madras, in O. S. No. 512 of 1922.

Mr. *Rangasami Iyenger*, for the Appellant.

Mr. *C. V. Ananta Krishna Iyer* (Government Pleader), for the Crown.

ORDER.

Devadoss, J.—The appellant purchased some property for Rs. 2,300 under a sale-deed executed by the defendant and paid him Rs. 1,000 in cash and executed in favour of the defendant and his minor sons a mortgage-deed for the balance of consideration for the sale. She brought a suit in the City Civil Court against the defendant alleging that the defendant had played a fraud on her by suppressing important facts and praying for a declaration that the sale-deed and the mortgage-deed were invalid and for the return of the Rs. 1,000 paid by her and for Rs. 300 as damages. The City Civil Judge dismissed the plaintiff's suit and the plaintiff has preferred this appeal to the High Court. She paid Court-fee on Rs. 1,300 being the amount claimed by her from the defendant. The Taxing Officer of this Court held that the Court-fee paid was insufficient and that the Court fee on Rs.2,300 should be paid on the ground that the substantial relief asked for by the plaintiff was the cancellation of the sale deed. The appellant paid the additional Court fee. The Taxing Officer further demanded the difference between the Court fee paid by her in the City Civil Court and the Court fee payable by her according to his view. The appellant's Vakil objected to paying this difference and hence the reference to this Court.

This being a matter of considerable importance, we gave notice to the Government Pleader to appear on behalf of the Government. The 1st contention raised by Mr. Rangaswami Iyengar, the appellant's Vakil, is that there was no decision by the City Civil Judge under s. 12 of the Court-Fees Act as to the proper Court-fee payable on the plaint and that only in cases where there is a decision by the lower Court, the Appellate Court has power under s. 12, cl. 2, to require a party to pay the additional Court fee which the Appellate Court may consider to be the proper fee payable on the plaint. The contention amounts to this; that when a plaint is received and filed by the Court without the Presiding Officer of the Court giving his decision as to the amount of the proper Court-fee payable, there is no decision of the Court under s. 12. In order to be certain as to the practice prevailing in the City Civil Court we called for a report from the City Civil Judge. The learned Judge reports:

"The principal ministerial officer attached to this Court, *viz.*, the *sheristadar*, himself personally receives all plaints and affixes the date stamp on them as soon as they are received. He then goes through the plaints and scrutinizes them carefully to ascertain whether they have been presented in time and whether they have been properly framed or stamped.....It is only in cases where the principal ministerial officer feels any doubt and puts up the cases for formal orders by the Judge, that the Judge applies himself to the question and gives his personal decision. This is the uniform course of proceeding that has been adopted during my time and I understand during the time of my predecessors as well."

So far as we are aware, this is the practice obtaining in all *Mofussil* Courts. Plaints and petitions are received by the Chief Ministerial Officer who files them if he is

atisfied that they are properly stamped. If he finds that they are not properly stamped he draws the attention of the Pleader concerned to the fact and the deficiency is made up. If there is a difference of opinion between the chief Ministerial Officer and the Pleader concerned, the matter is placed before the Judge or the Presiding Officer of the Court who decides what the proper Court-fee is. If objection is taken by the opposite side as to the correctness of the valuation, or Court-fee, an issue is raised as regards that, and the Court decides what the proper valuation is and what Court-fee should be paid. The construction contended for by Mr. Rangaswami Iyengar is not supported by the wording of s. 12. Section 12 (1) is in the these terms :—

"Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this Chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit".

He places reliance upon the words "shall be decided by the Court". This does not mean that an issue shall be raised and decided by the Court. All that it means is that the Court, either the Presiding Officer or the Ministerial Officer who is charged with that duty, has to determine what the Court-fee is. Where the Chief Ministerial Officer's decision is demurred to, the Judge or the Presiding Officer decides in open Court after hearing the party concerned or his Pleader, what the proper Court-fee is. It cannot be said that when the Ministerial Officer, whose duty it is to check the pleadings filed in Court and whose duty it is to see whether proper Court-fee is paid or not, decides what the proper fee is, his decision is not a decision of the Court. Mr. Rangaswami Iyengar places reliance upon the decision in *Kala Chand Sen* v. *Anand Kristo Bose* (1) in support of his contention. In that case the plaintiff paid a certain Court-fee on his plaint. The suit was decreed in favour of the plaintiff. The defendant appealed and paid the same Court-fee on his memorandum of appeal as was paid by the plaintiff on his plaint. When the appeal came on for hearing, the appellant raised the objection that the proper Court-fee was not paid on the plaint and, therefore the plaint ought to have been rejected. The Subordinate Judge took the extraordinary course of requiring both the appellant and the respondent to pay deficient stamp duty, and on the failure of both to do so, he ordered both the plaintiff's suit and the appeal to be dismissed. The plaintiff preferred a special appeal to the High Court. The High Court set aside the order of the Subordinate Judge as it practically amounted to allowing the appeal inasmuch as he dismissed the plaintiff's suit. In the course of the judgment the learned Judges observe:

"It seems to us, therefore, that the Subordinate Judge ought not to have allowed to be raised on this occasion a question which neither had been raised in the First Court where, if necessary, the amount of additional stampt might have been at once paid, nor in the grounds of appeal".

The question raised here was not specifically raised there. Considering the course that the case took, the learned Judges thought that the defendant was in a way estopped from raising the question of Court-fee, inasmuch as he himself paid the same Court-fee on his appeal as was paid by the plaintiff on his plaint, and the order of the Subordinate Judge practically amounted to allowing the appeal which he could not have done when he found that the proper Court fee was not paid for the appeal. In *Shajan Bibi* v. *Earsin Dawan* (2) the question before us was not specifically raised. There the question was whether the suit was properly valued under the Suits Valuation Act and the High Court held that any objection as to valuation should have been raised in the Court of first instance as required by s. 11 of Act VII of 1887 (Suits Valuation Act). In that case the lower Appellate Court raised the question *suo motu* when it was not taken either in the Court of first instance or in the memorandum of appeal. The lower Appellate Court held that the suit was not properly valued and directed the plaint to be returned to the Court of first instance as insufficiently stamped. The valuation of the appeal was the same as that in the first Court. The learned Judges observe at page 47*:

"Without, therefore, expressing any opinion on the merits of the case, we hold that the learned Judge was not, in law, entitled to raise the objection and to decree

(1) 22 W. R. 433.

(2) 16 Ind. Cas. 46.

*Page of 16 Ind. Cas.—[*Ed.*]

the appeal on that ground".

These two cases have no application to the present case. In the present case the question is whether the Court of Appeal, when admitting an appeal, is entitled to demand under the provisions of s. 12, cl. 2, proper Court-fee payable in this Court as well as in the Court below by reason of the Judge in the Court below not having given a decision as to the proper amount of the Court-fee.

Our attention is drawn by the learned Government Pleader to the case in *Shama Soondary* v. *Hurro Soondary* (3). In that case the District Judge on appeal held that before he could go into the merits of the case, he must, under s. 12 of Act VII of 1870, require the plaintiff to pay any such additional amount as would make up the fee payable on the suit. The High Court upheld the decision of the District Judge. There the learned Judges declined to follow the ruling in *Kala Chand* v. *Anund Kristo Bose* (1), holding that the expression of opinion relating to s. 12 of the Court Fees Act was an *obiter dictum* and could not be regarded as an authoritative declaration of law. They observe at page 351 *:

"No plaint can be accepted and registered until these preliminary questions of valuation and sufficiency of stamp have been determined by the Court, and, therefore, it seems to us that it would be straining the language of s. 12 to say that the question relating to valuation therein mentioned has only reference to a question raised as a distinct issue, and decided by the Court of first instance in the presence of, and as between, the parties to the suit."

It follows that where the Court accepts the plaint as properly valued, it must be taken that the Court has given its decision that the proper Court-fee has been paid. So long as the Court acts upon the footing that the proper Court-fee has been paid, its act amounts to a decision under s. 12, cl. 1, of the Court Fees Act. If the Court is not satisfied that the proper Court-fee has been paid, it certainly would have insisted upon the proper Court-fee being paid. Where it receives a plaint, petition, or other pleading as properly stamped, its act must be taken to fulfil the requirements of s. 12, cl. 1. This view is supported by the observations of Carnduff, J., in *Surendra Nath* v. *Sitanath Das* (4). The learned Judge observes at page 944*:

"It is true that there is on the record of this case no express decision that the fee of Rs. 7-8-0 was sufficient; but it seems to me that such a decision is implied by the action of the Court in receiving the application on a stamp of Rs. 7-8-0, and passing any order upon the prayer contained in it." We hold that when a Court receives a plaint, petition, or any other pleading and files it as properly stamped, its act amounts to a decision that the proper Court-fee has been paid. If according to the practice prevailing in the Courts the Chief Ministerial Officer files a plaint, or a petition, or other pleadings, as being properly stamped or that proper Court-fee has been paid, his act is an act of the Court within the meaning of s. 12, cl. 1.

The next contention is that in this case the proper Court-fee has been paid. Mr. Rangaswami Iyengar contends that the plaintiff asked for the return of Rs. 1,000 inasmuch as she was led into accepting the sale-deed owing to the fraudulent conduct of the defendant, and the contract of sale being invalid, she is entitled to the return of the money paid by her. This contention overlooks the plain fact that the plaintiff could not get back the money paid by her without setting aside the sale. The transaction is not merely a contract but a conveyance. The plaintiff has acquired title to the property under the conveyance executed in her favour. The return of the consideration for the conveyance to the vendee could only be after setting aside the conveyance. So long as the plaintiff has the title to the property in her she cannot reasonably ask for the return of the purchase money paid. She can claim damages for breach of guarantee, or breach of covenant or title, but that is not the prayer in the plaint. The plaintiff prays that the sale-deed and the mortgage-deed dated 22nd October 1921 might be declared invalid and not binding on her. This prayer can only be granted on her valuing the suit as if for the cancellation of the sale deed and by paying the proper Court-fee. If the transaction were a mere contract and not a conveyance, the plaintiff would be entitled to get back the amount paid by her on the ground that she entered into the contract owing to the fraud of the defendant. But, where the property has

(3) 7 C. 348; 4 Shome. L. R. 147; 8 C. L. R. 528; 3 Ind. Dec. (N. S.) 773.

*Page of 7 C.—[*Ed.*]

(4) 21 Ind. Cas 943.

*Page of 21 Ind. Cas.—[*Ed.*]

actually passed from one party to the other, the vendee cannot claim the amount paid by him without setting aside the sale. It is urged that under s. 7, cl. iv (*c*), the plaintiff is entitled to value the relief sought at Rs. 1,300 as that is the amount she claims. The main relief claimed is really the setting aside of the conveyance and the claim for money is only ancillary to it. To such cases s. 7, cl. iv (*c*) has no application.

The Court Fees Act has been amended by Act V of 1922 (Madras Act) and the following clause has been enacted:

"In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value,

according to the value of the subject-matter of the suit, and such value shall be deemed to be

if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed."

Here the plaintiff claims relief in respect of what was conveyed under the document. This new clause applies to the present case and I hold that the decision of the Taxing Officer of this Court is correct.

We are indebted to Mr. Anantakrishna Iyer, the learned Government Pleader, for the valuable assistance he gave us in this matter.

Wallace, J.—I agree.

The scheme of s. 12 of the Court Fees Act is to see that the revenue is not defrauded, that the proper fee payable to Government as the "price" of the trial of the suit has been paid. It is difficult to see how a decision on that point can rest upon the option of parties, or to say that the Act deliberately restrains Courts from interfering on behalf of the revenue unless the parties themselves, whose interests are in the main opposed to any increase in the Court-fee paid, move in the matter. It is obvious that the section is intended to permit the Taxing Officer of a Court to raise the question *suo motu*, whether the parties have raised it or not. The Privy Council has clearly laid down in *Rachappa Subrao* v. *Shidappa Venkatrao* (5) that "The Court-Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State. This is evident from the character of the Act and is brought out by s. 12, which makes the decision of the First Court as to value final as between the parties and enables a Court of Appeal to correct any error as to this, only where the First Court decided to the detriment of the revenue."

The wording of the section offers no difficulty since, in any case, the Trying Court must decide the question of Court-fee implicitly or explicitly, before it can proceed to try the suit. If the Court is not satisfied that the plaint is properly stamped it must dismiss the suit unless the proper stamp is paid. See O. VII. r. 11 (*c*) if the question is not explicitly raised and the Court proceeds with the trial, the Court has implicitly decided that the stamp is sufficient. If the parties or the Taxing Officer specifically raise the point, then the Court gives an explicit decision thereon. In either case, there is a decision of the Court; but while, when the parties have raised the point, the express decision of the Court will be final between *them*, the section permits the Appellate Court *suo motu* to raise the point in the interests of the revenue. This is the view laid down in *Shama Soondary* v. *Hurro Soondary* (3) with which I respectfully agree; and the same view underlies the decisions in *Narain Singh* v. *Chaturbhuj Singh* (6) and *Surendra Nath* v. *Sitanath Das* (4) (the Calcutta High Court), and the decision of the Madras High Court in *Tekana Kavandan* v. *Alagiri Kavandan* (7) and it is not opposed to that of the Full Bench in *Amjad Ali* v. *Muhammad Israil* (8). The case reported as *Shajan Bibi* v. *Earsin Dewan* (2) raised and decided a question of jurisdiction only.

As to the second point it is clear that the mere declaration that the sale-deed is not binding on the plaintiff will not enable the Court to decree the return of Rs. 1,000. The plaintiff is not entitled to have the sale-deed remain in being and the return of the Rs. 1,000 also. If the defendant is to pay her the Rs. 1,000 the defendant must also be put in *status quo ante* the sale, that is, the sale must be cancelled. The sale

(5) 50 Ind. Cas. 280; 43 B. 507 at p. 518; 17 A. L. J. 418; 25 M. L. T. 298; 36 M. L. J. 437; 29 C. L. J. 452; 21 Bom. L. R. 489; 10 L. W. 274; 24 C. W. N. 33; 1 U. P. L. R. (P. C.) 83; 46 I. A. 24 (P. C.).

(6) 20 A. 362; A. W. N. (1898) 72; 9 Ind. Dec. (N. S.) 592.

(7) 25 Ind. Cas. 506.

(8) 20 A. 11; A. W. N. (1897) 157; 9 Ind. Dec. (N. S.) 367 (F. B.).

is a bilateral contract, and one party cannot get rid of it merely by a declaration that it is not binding on her. She must release the other party also and place in *status quo ante*. Hence the petitioner's suit is misconceived. She can have the declaration without the return of the money or she can have the money if the decree also cancels the sale-deed. Her chief concern is the return of the money, and that she cannot have unless and until the sale is cancelled. Her suit is, therefore, one in effect for the cancellation of a sale-deed and s. 7 iv (A) of the Court Fees Act applies.

By the Court.—Time for paying the deficient Court-fee will be one week after the re-opening of this Court.

V. N. V.
Z. K. *Order accordingly.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 535 OF 1923.

July 20, 1925.

Present :—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

HARIHAR ROY—DEFENDANT—APPELLANT

versus

SARAT CHANDRA BASU CHOWDHURI —PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 30 (b), *39, 50 —Landlord and tenant—Tenant holding under holder of* chaukidari chakran *tenure—Resumption of tenure —Suit by landlord for enhancement of rent—Payment of rent to holder of* chakran *tenure, rate of, proof of, whether admissible to establish status as fixed rate tenant—Enhancement of rent—Duty of Court to refer to price lists.*

Tenancy rights created by the holder of a *chaukidari chakran* tenure come to an end on the resumption of the land by Government, and consequently, evidence of the rate of rent paid by the tenant to the holder of the *chaukidari chakran* tenure before its resumption cannot be availed of by the tenant to prove that he is a tenant at a fixed rate of rent and that his rent cannot be enhanced. [p. 734, col. 2.]

Where enhancement of rent is claimed under cl. (*b*) of s. 30 of the Bengal Tenancy Act, it is the duty of the Court to refer to the price lists prepared under s. 39 of the Act, irrespective of the fact whether the parties to the suit produce such lists or not. [p. 735, col. 1.]

Appeal against a decree of the Subordinate Judge, Midnapore, dated the 14th of September 1922, reversing that of the Munsif, Midnapore, dated the 30th of May 1921.

Mr. *Amarendra Nath Bose* and Babu *Apurba Charan Mukherjee*, for the Appellant.

Babu *Gopendra Nath Das*, for the Respondent.

JUDGMENT.—The plaintiff brought this suit for recovery of arrears of rent at a *jama* of Rs. 12-15-6. He also claimed enhancement of rent either under s. 7 or under s. 30 (*b*) of the Bengal Tenancy Act. The defendant alleged that his *jama* was Rs. 6-6-0 and that he was a *raiyat* holding at fixed rate of rent, so his rent could not be enhanced. The First Court decided in the defendant's favour on both points. The lower Appellate Court has held that the rental is that claimed by the plaintiff and that the defendant is a *raiyat* with right of occupancy and that his rent is liable to be enhanced under s. 30 (*b*) of the Bengal Tenancy Act, but has refused a decree for enhancement of rent on the ground that there is no evidence to prove the claim. The defendant has preferred a second appeal and the plaintiff has taken a cross-objection to the refusal to pass a decree for enhancement of rent.

The defendant's case was that he was a tenant under the previous holders of a *chaukidar chakran* tenure which included the land in suit, and that he paid rent regularly to them since 1287 at the rate of Rs. 6-6. The lower Appellate Court has held that the rights created by the *Paiks* who held the *chakran* tenure came to an end on the resumption of the land by Government and that consequenly the evidence as to the rent paid to the *Paiks* is of no help to the defendant. The case relied on by the Subordinate Judge *Satyendra Nath Banerjee* v. *Krishnasakha Kar* (1) supports his decision.

It is contended that as the defendant was a settled *raiyat* at the time of resumption, although his tenancy terminated, his right as settled *raiyat* remained, and that, therefore, he is entitled to rely on his previous rate of rent Rs. 6-6. How the previous payments would help him after his tenancy has come to an end we are unable to understand. But the appeal must fail on the findings of fact. The lower Appellate Court has held that the *pottah* on which the defendant relied and which was accepted by the Munsif has not been proved to relate to the land which is the subject of the suit. It is further found that the rent was

(1) 69 Ind. Cas. 7; 35 C. L. J. 185; (1922) A. I. R. (C.) 189.

paid to the plaintiff by the defendant at the rate now claimed and that there must have been settlement with the defendant at a rate of rent higher than the rent he paid to the *Paiks*. On these findings we cannot hold that there was any error of law in deciding that the presumption in the plaintiff's favour as to the correctness of the rate of rent entered in the *khatian* has not been rebutted. Though the lower Appellate Court has found that the entry that the defendant is a tenure-holder is incorrect that would not by itself rebut the presumption as to correctness of the entry of the rent. The lower Appellate Court is also right in holding that the provisions of s. 115 of the Bengal Tenancy Act prevent the defendant relying on the presumption of s. 50 even if it be held that he was paying rent at the same rate from 1287 until the land was resumed.

The plaintiff's cross-objection must prevail. We are told that there is some oral evidence to support the plaintiff's claim for enhancement of rent. But apart from this in a case of claim for enhancement under cl. (*b*) of s. 30 it is the duty of the Court to refer to the price lists prepared under s. 39 whether the parties to the suit produced them or not, *Nabi Chandra Shah* v. *Kula Chandra Dhar* (2).

The result is that the appeal is dismissed with costs. The cross-objection is allowed with costs and the case will be remanded to the lower Appellate Court for determination as to whether on the evidence on the record and of the price lists published in the Gazette the plaintiff is entitled to enhancement of rent under cl. (5) of s. 30 of the Bengal Tenancy Act, and if so to what extent the rent should be enhanced.

M. B. *Appeal dismissed;*
Z. K. *Case remanded.*

(2) 6 Ind. Cas. 506; 37 C. 742; 14 C. W. N. 914.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 18 OF 1925.
July 15, 1925.
Present:—Justice Sir B. K. Mullick, KT., Acting Chief Justice, and Mr. Justice Kulwant Sahay.
BHUPAL MISSIR AND OTHERS—PLAINTIFFS—APPELLANTS
versus
SARBAN LAL—DEFENDANT—RESPONDENT.

Landlord and tenant—Fruit trees, rent of—Burden of proof—Record of Rights, entry in—Appeal, second—Finding of fact—Interference by High Court.

Ordinarily a tenant has the right to cut, but the landlord has the right to appropriate the timber of trees standing on the holding of the tenant. In the absence of a special contract to the contrary, the landlord has no right at all in the fruit of trees standing on the holding. [p. 736, cols. 1 & 2.]

In a suit between a landlord and a tenant the Court of first appeal made a decree declaring the liability of the tenant to pay to the landlord half the fruit of certain trees standing on the holding of the tenant. There was an entry in the Record of Rights declaring that the tenant and the landlord had half share each in regard to the mango, beal and palm trees standing on the holding. This was followed by an entry that there were certain mulberry, guava, palm and lemon trees on the land. Against these trees there was no entry that the landlord had any title:

Held, (1) that if the Record of Rights was a document of title it was open to the High Court in second appeal to construe that document; [p. 736, col. 1.]

(2) that it was a reasonable construction of the entry in the Record of Rights that it related only to the timber and not to the produce of the trees; [*ibid*.]

(3) that even if the Record of Rights was not a document of title and was merely a document of evidence, it was open to the High Court to interfere with the decision of the Court of first appeal which was based upon the Record of Rights, inasmuch as the decision was based on something which the Record of Rights did not contain. [p. 736, col. 2.]

In a suit to recover rent the onus is upon the tenant to show that rent is not payable in respect of the land in suit. If the tenant proves that the holding is rent-free and the landlord claims a share in the produce of fruit trees, the onus is shifted on to the landlord to show that there is a special contract by which rent is payable in respect of the fruit trees. [*ibid*.]

Letters Patent Appeal against the judgment of Mr. Justice Das, in Appeal from Appellate Decree No. 831 of 1922, dated the 18th December 1924, and printed as 86 Ind. Cas. 1016.

Mr. *S. N. Sahay*, for the Appellants.
Mr. *L. N. Singh*, for the Respondent.

JUDGMENT.

Mullick, Actg. C. J.—This is an appeal against a judgment of a learned Judge of this Court setting aside a decree made by the District Judge of Bhagalpur.

The suit out of which the appeal arises was one for the rent of the fruit of certain trees in a holding belonging to the defendant which had been held rent-free for a considerable time.

The Munsif found that the land was not assessable with rent but that the tenant was liable to pay half the share of the produce of 3 mango trees, one bael, 10 palm, 1 mulberry, 1 guava, 1 plum and 1 lemon tree. He assessed the value of the fruit for the years 1324 to 1327 *Fasli* and gave the plaintiffs a decree.

In appeal the District Judge has come to the same conclusion.

In second appeal Mr. Justice Das found that there was no liability to pay the value of a half-share in the fruit and he dismissed the suit altogether.

In the present appeal under the Letters Patent, it is contended that the learned District Judge's judgment is conclusive because it is based on a finding of fact.

It is admitted that the land contains the homestead of the defendant and that he has been in occupation for many years. In his written statement the defendant pleaded that he had never paid rent. There is no clear finding upon this point in any of the Courts below but the learned Munsif meets the allegation by saying that even if rent has not been paid the defendant is not free from the liability to pay the rent claimed in the present suit.

The learned Munsif finds that as the defendant holds the land under the plaintiffs, the relationship of landlord and tenant arises and except for the special contract to the contrary, rent would be payable for the land. But as the special contract does not cover the trees he holds, that the defendant is liable for the produce of the trees. He further finds that the Record of Rights records the liability of the defendant to pay half the price of the fruit.

The District Judge does not set out his reasons in detail for agreeing with the Munsif as to the relationship of landlord and tenant, but it would appear that he agrees with the Munsif's construction of the Record of Rights and that his decree is principally based upon this finding.

If the Record of Rights is a document of title obviously it was open to Mr. Justice Das in appeal to construe that document, and I cannot say that his construction is wrong. It is to be noticed that in regard to the mango, beal and palm trees it is stated that the *raiyat* and the *malik* have a-half share each. Then comes the entry that there is one mulberry, one guava, one palm and one lemon tree on the land. Against these trees there is no entry that the landlord has any title. I think it is a reasonable construction that the entry regarding title relates only to the timber and not to the produce of the trees. Moreover, the entry must be read with due regard to the existing law. The tenant has the right to cut, but the landlord has the right to appropriate the timber By the Common Law the landlord has no right at all in the fruit unless it can be held that the object of the entry was clearly to record a special contract cutting down the landlord's rights in the timber. If it had intended to cut down the *rayiat's* rights in the fruit the entry would have said so.

If, however, it be held that the Record of Rights is not a document of title but merely a document of evidence, even then it was open to the learned Judge in second appeal to interfere with a decision based upon the Record of Rights, if the decision was founded on something which the Record of Rights did not contain. Now the Munsif with whom the learned District Judge agrees states that the Record of Rights declares that the plaintiffs are entitled to the fruit. There is no such declaration and, therefore, the learned District Judge's finding is based upon no evidence and is liable to be challenged in second appeal.

In either view of the case the Record of Rights cannot be called in aid by the plaintiffs to support their claim.

The Munsif rightly threw the onus upon the defendant to show that rent was not payable for the land. When the defendant proved that the holding was rent-free the onus was shifted upon the plaintiffs to show that there was a special contract by which the rent became payable for the fruit. The Record of Rights does not help them to discharge that onus.

There remains to be considered a reference in the learned District Judge's judgment to a document marked as Ex. 5. This was a judgment apparently not *inter partes* regarding another holding and it recites that rent was payable for the trees upon homestead lands held by the tenant in that suit. Whether that homestead land was rent-free is not clear, and there is also nothing in the learned Judge's judgment which shows that this document was admissible in evidence in the present trial. The learned Judge's finding is that rent has been realised from the tenants of the village in respect of fruit from trees standing on homestead land. That finding is of course conclusive in second appeal but the finding does not go far enough and show that any inference can be drawn from it in favour of the plaintiffs for the purposes of the present suit.

The result, therefore, is that there were no materials before the District Judge upon which he could come to a decision in the plaintiff's favour, and the learned Judge of this Court was right in holding that the decree was wrong and that the suit should be dismissed.

We are asked to direct a remand if we find that the evidence is not sufficient to support the decree of the District Judge. But having regard to the fact that this case has reached the stage of a Letters Patent Appeal we do not think that we should give the plaintiffs another opportunity of adducing evidence which they ought to have adduced in the Trial Court.

The result, therefore, is that this appeal will be dismissed with costs throughout.

Kulwant Sahay, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 525 OF 1924.

March 4, 1925.

Present:—Mr. Justice Devadoss.

V. S. R. RAJAGOPALA IYER—DEFENDANT—PETITIONER

versus

V. S. K. MUTHURAMIER—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, r. 10—Interest, claim of—Valuation of suit—Order directing return of plaint for presentation to proper Court—Court, whether entitled to decide material issue in order to determine jurisdiction.

A Court should not for the purpose of considering whether it has or has not jurisdiction to entertain a suit decide a material issue in the suit. [p. 737, col. 2.]

When a plaintiff comes into Court claiming damages or interest he can put the amount of damages or interest at any figure he likes and the mere fact that the claim is untenable is not a sufficient reason for the Court to say that the claim is an inflated claim and that the suit should have been filed in a Court of lower pecuniary jurisdiction. [p. 737, col. 2; p. 738, col. 2.]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order, dated the 1st February 1924, of the District Court, Madura, in C. M. A. No. 20 of 1923, preferred against that of the Court of the Subordinate Judge, Madura, dated the 23rd March 1923, in O. S. No. 2 of 1923.

Messrs *B. Sitarama Rao* and *S. R. Muthuswamy Iyer*, for the Petitioner.

Mr. *K. Rajah Iyer*, for the Respondent.

JUDGMENT.—This is an application to revise the order of the District Judge of Madura, who reversed the order of the Subordinate Judge of Madura directing the plaint to be returned to the plaintiff to be filed in a Court having jurisdiction to try the suit. The plaintiff valued his claim at Rs. 3,078 and filed it in the Subordinate Judge's Court at Madura. The defendant contended that the suit was overvalued and the Court had no jurisdiction to entertain it. In support of his contention he produced a letter of demand written by the plaintiff to the defendant on 21st November 1922 claiming interest at 12 per cent. per annum in case the defendant was not willing to transfer the 20 shares alleged to have been contracted to be sold to the plaintiff. Relying upon this, the Subordinate Judge held that the claim for interest at 18 per cent. was not a *bona fide* claim and that the suit was purposely overvalued for the purpose of giving jurisdiction to the Sub-Court. On appeal the District Judge held that the plaintiff had a right to value the suit at any figure he liked and the question whether the interest claimed was legitimate or not was one of the issues in the case and should not have been decided for the purpose of considering the question of jurisdiction. It is urged by Mr. Muthuswamy Iyer that the plaintiff purposely overvalued the suit in order to give jurisdiction to the Sub-Court. It looks as if the plaintiff claimed 18 per cent. interest in the plaint in order to bring the suit within the cognizance of the Subordinate Judge's Court of Madura. But the question is whether the Court for the purpose of considering whether it has jurisdiction or not, could decide a material issue in the case. In order to find out whether the claim of the plaintiff is *bona fide* or not, when a plaintiff claims two items of property and the defence is that there is some dispute as regards one item of the property and the other item has been included in the plaint only to give jurisdiction to a higher Court, would the Court be justified in deciding whether the plaintiff has a title to the other item, and whether the Court would have jurisdiction if the other item was excluded. When a plaintiff comes into the Court claiming damages he can put the amount of damages at any figure he likes. The mere fact that the claim is untenable, is not a sufficient reason for the Court to say that the claim is an inflated claim and the suit

should have been filed in a Court of lower monetary jurisdiction. The observations of the learned Judges in *Koti Pujari* v. *Manjaya* (1) apply to this case. The learned Judge observed:—

"These are the very questions connected with the proper valuation of the subject-matterof the suit. Very grave inconvenience and confusion would result if pleas raised by the defence as to the right of the plaintiii to portions of the relief sought by him and which he would be entitled to on establishing the allegations of the plaint, were allowed to be treated as preliminary questions affecting the valuation of the suit, and which ought to be determined in order to ascertain the Court in which the suit should be brought".

The facts in *Lakshman Bhatkar* v. *Babaji Bhatkar* (2) are distinguishable from the facts in *Mirza Hyder Alli Sahib* v. *Hussain Raza Sahib* (3). In *Lakshman Bhatkar* v. *Bahaji Bhatkar* (2) it was held that the plaintiff had intentionally valued the claim too high in order to being the suit within the higher jurisdiction. In *Mirza Hyder Alli Sahib* v. *Hussain Raza Sahib* (3) a certain relief was asked for, which was neither incidental nor necessary to the main relief in the case. Mr. Justice Bakewell held that that relief was purposely put in to oust the jurisdiction of the City Civil Court. In this case it cannot be said that the claim for interest at 18 per cent. is on the face of it a false claim. It may be an untenable claim. It may be that the plaintiff will not be able to substantiate hisclaim for interest at that figure but that should not weigh with the Court in determining whether the plaint is properly valued or not. I, therefore, consider that the order of the District Judge is correct and there is no reason to interfere with his order.

The petition is dismissed with costs.

V. N. V.

Z. K. *Petition dismissed.*

(1) 21 M. 271 at p. 273; 7 Ind. Dec. (N. S.) 547.
(2) 8 B. 31; 4 Ind. Dec. (N. S.) 395.
(3) 24 Ind. Cas. 316; 1 L. W. 398.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 211 OF 1923.

August 5, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Gregory.

BENGARAM CHANGA AND ANOTHER —DEFENDANTS—APPELLANTS

versus

BEJOY GOVINDA ROY AND OTHERS— PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 105, 109—Civil Procedure Code (Act V of 1908), s. 11—Landlord and tenant—Application for enhancement of rent—Application by tenant for reduction of rent—Suit for rent—Plea of abatement of rent, whether can be taken—Finding in previous suit that there has been no diminution in area of tenancy—Res judicata.

The defence taken by a defendant in a rent suit that there has been a diminution of the area of the tenancy and that he is consequently entitled to an abatement of rent is neither an application nor a suit within the meaning of s. 109 of the Bengal Tenancy Act, and such a defence cannot, therefore, be held to be barred by the provisions of that section even where it had been brought forward in proceedings under s. 105 of the Bengal Tenancy Act and had not been given effect to. [p. 739, col. 1.]

Where in answer to a suit for rent the tenant raises the plea that there has been a diminution in the area of the tenancy and that he is, therefore, entitled to an abatement of rent and there is a finding that there has been no diminution in the area of the tenancy, the finding operates as *res judicata* in a subsequent suit for recovery of rent of the same holding, and it is not open to the tenant to put forward the same plea in answer to the subsequent suit. [p. 740, col. 1.]

Appeal against a decree of the Subordinate Judge, Fourth Court, Mymensingh, dated the 29th August 1922, reversing that of the Munsif, Pinga, dated the 30th September 1921.

Babus *Mukunda Behari Mullick* and *Mohendra Kumar Ghose*, for the Appellants.

Mr. *Gopal Chandra Das* and Babu *Bhuban Mchan Saha*, for the Respondents.

JUDGMENT.

Cuming, J.—This appeal arises out of a suit for rent. The plaintiffs sued the defendants for rent of a certain parcel of land for the years 1325 to 1327. The rent claimed was at the rate of Rs. 14-14-6 per annum. The defence was that the area now was 6 *pakhis* and that there had been diminution of the area of the tenancy and hence the defendants were entitled to an abatement of rent.

The first Court gave effect to this contention of the defendants and held that there had been decrease in the area and gave a decree for a proportionate amount of rent.

The plaintiffs appealed to the District

Court and before the District Court it was argued first that the question of any abatement of rent to be allowed for decrease in the area was *res judicata* between the parties and *secondly* that s 109 of the Bengal Tenancy Act was a bar to this question of abatement of rent being considered in the present rent suit. The lower Appellate Court decided this question of *res judicata* against the appellant and held that this question as to whether ony abatement was allowable to the defendants was not *res judicata*. But he held that the defence of the defendants that there had been a diminution of area and for that reason they were entitled to abatement of rent was barred by s. 109 of the Bengal Tenancy Act.

The defendants have appealed to this Court and in appeal the learned Vakil for the defendants-appellants contend that s. 109 of the Bengal Tenancy Act is not a bar to the present proceedings. The facts so far as this question is concerned are these: During the settlement operation the landlords first of all applied under s. 105 on the 25th October 1915 for an enhancement of rent of the suit land. This application, however, was withdrawn. Defendant No. 2 then applied for an abatement of rent on the ground that there had been a decrease in area. One of the landlords who was impleaded was dead and as the result of this the application was dismissed. When the suit was tried the defendants took the defence that there had been a decrease in area. The learned Subordinate Judge held that this defence must be deemed to be an application for reduction of rent and hence s. 109 of the Bengal Tenancy Act was a bar to its being raised in any subsequent proceedings. Section 109 provides that "subject to the provisions of s. 109-A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted, or proceedings taken under ss. 105 to 108 both inclusive." I do not think that the defence taken by the defendants in the suit can be considered as either an application or a suit. Therefore s. 109 is no bar to the defendants contending that there had been a decrease in area and hence they were entitled to an abatement of rent even though they had brought forward the same contention in the proceedings under s. 105 of the Bengal Tenancy Act. This point is decided in favour of the appellants.

The respondents, however, contend that under O. XLI, r. 22, they are entitled to support the decree on grounds decided against them, namely, the question of *res judicata*. This contention of the respondents is, I think, correct and they are entitled to ask the Court to decide whether the question of *res judicata* has been correctly decided by the lower Appellate Court. The question of *res judicata* arises in the following way. The plaintiffs brought a suit against the defendants for the rent of 1323 and 1324. This suit was No. 480 of 1918 in the Court of the Munsif of Pinga. The material portion of the judgment of the learned Munsif is as follows: "The defendant No. 2 contended that defendant No. 1 had no title. That is a matter which need not be looked into in a rent suit. The main defence is that there has been a reduction in a rent. There is no reliable evidence on the point. The defendant does not know the origin of the tenancy; whether there was any measurement at all and what was the standard of measurement. Decrees, Exs. 1 to 3, would show that the plaintiffs are realising rent from the defendants at the rate claimed for many years without any protests. No reduction in area has been shown. The claim is proved and the suit is decreed with costs." Now, the learned Advocate for the respondents argued that the defendants had raised in this suit the identical question which had been raised and decided against them in the former suit, namely, Suit No. 480 of 1918, namely, as to whether there had been any reduction in area and whether in view of this reduction in area they were entitled to any abatement of rent and this point was decided against the defendants the learned Subordinate Judge finding that no reduction of area had been shown. He contends that the point now raised is identically the same as was raised in Suit No. 480 of 1918 and, therefore, the matter is *res judicata*. The learned Vakil for the appellants has referred us to the case of *Nil Madhub Sarkar* v. *Brojo Nath Singha* (1) as an authority for the proposition that a previous decision as to the question of the area of a tenancy is not *res judicata* in a subsequent suit between the parties. In disposing of this case the learned Judges remarked,

(1) 21 C. 236, 10 Ind. Dec. (N. S.) 789.

"We cannot say that the questions which the defendant raises in this suit were heard and finally determined in the suit of 1888." In that view of the matter clearly the question is not *res judicata* because it had not been heard and finally determined and that is all that that authority decides. On the other hand there is the case of *Nobo Doorga Dossee* v. *Foyzbux Chowdhry* (2). In that case the plaintiff had obtained a *patni* lease of certain villages from the defendant in 1861 at an annual rent and in 1865 was evicted from a portion of the property: She took no step to obtain abatement; but inasmuch as she did not pay any rent for the year 1871 the defendant brought a suit against the plaintiff for rent of that year. The plaintiff set up the defence that she was entitled to an abatement of Rs. 155 from her rent, the Rs. 155 representing the annual value of the property which she had lost in consequence of the eviction. In that suit it was decided that the amount of abatement she was entitled to was Rs. 42. No appeal was made against that decision. In a suit brought by the plaintiff for the purpose of obtaining a permanent abatement of her rent she claimed the precise measure of abatement, *viz*, Rs. 155 which she had claimed in the suit brought against her by the defendant. Held, that the question was *res judicata* it having been raised and decided in the former suit. It seems to me that the principle of this decision applies to the present case. The question was raised in the former suit as to whether there had been any reduction in the area. This suit it may be noted was instituted shortly after the settlement proceedings. It was not alleged, so far as I can ascertain that there had been any change in the area subsequent to the settlement proceedings. The claim for abatement was apparently based on the fact that the settlement record shows an area considerably less than the area for which the tenancy was held. That point was decided by the learned Munsif in the Suit No. 480 of 1918 holding that no reduction of the area had been shown. As far as I can see an identical question was raised in the present suit as to whether there had been any reduction in area. In that view of the matter I think that this question of reduction of the area of the tenancy is *res judicata* by virtue of the Suit No. 480 of 1918.

(2) 1 C. 202; 24 W. R, 403; 1 Ind. Dec. (N. S.) 129.

The result is that the appellants succeed upon one point but they fail on the question of *res judicata*. The result, therefore is that the appeal must be dismissed with costs.

Gregory, J.—I agree.

Z. K. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPLICATIONS NOS. 132 AND 133 OF 1923.

October 30, 1924.

Present:—Mr. Kennedy, J. C. and Mr. Raymond, A. J. C.

NARUMAL MULCHAND AND OTHERS—APPLICANTS

versus

JAGATMAL THARUMAL AND OTHERS—OPPONENTS.

Hindu Law—Joint family—Decree against father, when can be executed against family property.

Where a decree is passed against a Hindu father who is the manager of a joint Hindu family and it appears that the decree was passed against him in his capacity as representative and manager of the family, the decree can be executed against the family property. It is not necessary in such a case that the decree should state in express terms that it is passed against the defendant as the manager of the joint family.

Applications for leave to appeal to Privy Council against the judgment of Mr. Kaincaid, J. C., and Mr. Aston, A. J. C., dated the 24th April 1924, printed as 82 Ind. Cas. 739.

Mr. *Kimatrai Bhojraj*, for the Applicants.

Mr. *Sri Kishindas Lulla*, for the Opponents.

JUDGMENT.—These are two applications to be allowed to appeal to the Privy Council and in the applications several points of law are raised but they are all abandoned with the exception of one. It remains to be seen whether that ground is substantial ground for allowing the applicants to appeal to the Privy Council.

The whole question turns upon this, whether when a decree is passed against the father who is the manager of an undivided Hindu family, before it can be executed, it is necessary that the decree should specifically be obtained against him in that capacity, that is to say, whether the said decree should clearly and unmistakably express that it is obtained against such

father and manager, not only in his own personal capacity, but also in his representative capacity. But we think on the authorities all that is necessary is that it should appear that such a decree was, as a matter of fact, passed against the father in his capacity as representative and managar, and that it is not necessary that the decree should be so drawn in express terms. But as regards the question whether this particular decree was passed against the father in his representative capacity, there is no doubt *de facto* that it was so passed and it has been held so to be passed by three Courts at least. There will thus appear no substantial ground of law on which appeals to the Privy Council can be based.

We, therefore, dismiss these applications with costs.

Z. K. *Applications dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 670 OF 1925.

August 5, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Gregory.

Shaikh BELAIT ALI AND OTHERS—PETITIONERS

versus

HARI PROSAD MOITRA AND OTHERS—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), s. 141, O. IX, r. 13—Bengal Tenancy Act (VIII of 1885), s. 95—Common manager, appointment of, application for—*Ex parte *order—Application to set aside order, whether maintainable.*

A proceeding under s. 95 of the Bengal Tenancy Act for the appointment of a common manager is in the nature of a suit and r. 13 of O. IX of the C. P. C., therefore, applies to such a proceeding by virtue of the provisions of s. 141 of the Code.

Rule against an order of the District Judge, Birbhoom, dated the 20th May 1925, re-hearing Case No. 14 of 1925, in Mis. Judicial Case No. 2 of 1924.

Dr. *Jadunath Kanjilal* (with him Babus *Purna Chandra* and *Ramesh Chandra Pal*), for the Petitioners.

Mr. *Amarendra Nath Bose* and Babu *Lalit Mohan Sanyal*, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order of the learned District Judge of Birbhum refusing to entertain an application under O. IX, r. 13, C. P. C., on the ground that O. IX, r. 13 had no application to proceedings for the appointment of a common manager under s. 95 of the Bengal Tenancy Act. The facts appear to be these —the opposite party applied to the District Judge of Birbhum for the appointment of a common manager under s. 95 of the Bengal Tenancy Act. The petitioner wishing to file objections to the application engaged a certain Pleader to appear for him. The learned Pleader was unable to appear for the petitioner as he gave up his practice in Birbhum and went to the Sub-Division of Kissengunge in the District of Purnea where he began to practice. The petitioner then endeavoured to instruct another Pleader but was unable to instruct him in time. As no time was granted to him the matter was decided *ex parte* against him on the 25th March 1925. He then filed an application under O. IX, r. 13, C. P. C., on the 17th April 1925 for a review of the order of the 25th March. The learned District Judge rejected this application on the ground that O. IX, r. 13 had no application to proceedings for the appointment of a common manager.

The petitioner has obtained the Rule and one of the grounds on which this Rule was issued was that O. IX, r. 13 does apply to the case. Whether O. IX, r. 13 does or does not apply to such proceedings would depend upon whether such proceedings come within the purview of s. 141 of the C. P. C. If s. 141 does apply to such proceedings then obviously O. IX, r. 13 will also apply. As to whether proceedings in connection with the appointment of a common manager under s. 95 of the Bengal Tenancy Act do or do not come within the purview of s. 141 the question is concluded by authority. It is sufficient to refer to the case of *Asad Ali Chowdhury* v. *Mahammad Hossain Chowdhury* (1) which decides that such proceedings are proceedings of the nature of a suit and come within the purview of s. 141. That being so it is quite clear that O. IX, r. 13 does apply to such proceedings.

In this view of the case the Rule is made absolute and the case will be sent back to the learned District Judge to be dealt with under the provisions of O. IX, r. 13, C. P. C. The petitioner is entitled to the costs of this application. Hearing-fee one gold *mohur*.

Z. K. *Rule made absolute.*

(1) 36 Ind. Cas. 177; 43 C. 986; 20 C. W. N. 1009.

MADRAS HIGH COURT.

CIVIL APPEAL No. 420 OF 1922.

December 19, 1924.

Present:—Justice Sir Charles Gordon Spencer, KT., and Mr. Justice Odgers.

GARIMELLA ANNAPURNAYYA—PLAINTIFF—APPELLANT

versus

MUNSUNURI VENKATASUBRAHMANYAM AND OTHERS—DEFENDANTS NOS. 1 TO 6—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Minor plaintiff Compromise by next friend, whether binding on minor Failure to take technical plea—Gross negligence.

Plaintiff sued for a declaration that he was the adopted son of one *B* and that a gift by the latter of certain properties in favour of his wife was invalid and for recovery of the property. A previous suit had been instituted by the natural father of the plaintiff as his next friend during his minority for the same reliefs. That suit was compromised by the next friend of the plaintiff accepting a small portion of the property for the minor and surrendering the rest of his claims. The Court had given leave to the next friend to enter into the compromise upon the certificate of his Pleader that the terms were beneficial to the minor. It was contended in the present suit that the next friend of the minor plaintiff had been guilty of gross negligence in not pleading in the prior suit the invalidity of the gift in favour of *B*'s wife on the ground that a certain item of property had been improperly included in the deed of gift so as to give jurisdiction to a particular Sub-Registrar to register the deed, and that consequently the deed was not duly registered; and also, that the plaintiff's natural father had no right to represent the plaintiff in the former suit and to compromise the suit on his behalf:

Held, (1) that since the prevailing view of the law at the time of the compromise decree was not to regard the registration of a deed in the circumstances recited as being invalid there was no negligence on the part of the next friend in not putting forward that plea and that, in any case, there was a fair settlement of the matters in dispute which was binding on the plaintiff; [p. 743, col 2.]

(2) that the natural father of the plaintiff was the proper person to assert his rights as adopted heir against the adoptive parents. [*ibid.*]

Nirvanya v. *Nirvanya*, 9 B. 365; 5 Ind. Dec. (N. S.) 243 and *Keesara Venkatapayya* v. *Nayani Venkataranga Rao*, 59 Ind. Cas. 978; 43 M. 288 at p. 308; 38 M. L. J. 149, followed.

Per *Spencer, J.*—The next friend of a minor plaintiff cannot be accused of negligence in not knowing the law better and in failing to take a point which is not obvious. [*ibid.*]

Per *Odgers, J.*—It is a question of fact whether the next friend of a minor was justified in entering into a compromise. [p. 744, col. 2.]

The next friend of a minor cannot be charged with gross negligence in that he did not foresee that the law would change. [*ibid.*]

Appeal against a decree of the Court of the Additional Subordinate Judge, Cocanada, in O. S. No. 27 of 1921.

Mr. *C. Rama Rao*, for the Appellant.

Messrs. *P. Somasundaram* and *P. Satayanarayana*, for the Respondents.

JUDGMENT.

Spencer, J.—The plaintiff sued in this case for a declaration that he was adopted son of the late G. Bhimmayya and that the gift made by Bhimmayya on 5th June 1906 in favour of his wife Seethamma was invalid and for recovery of the property from the persons in possession.

Original Suit No. 39 of 1908 on the file of the Subordinate Judge of Cocanada was a suit instituted by the natural father of this plaintiff as his next friend during his minority for the same reliefs as those asked for in the present case. It was compromised by the plaintiff's taking 2 acres and a house site and surrendering the rest of his claims. The Court gave leave to the next friend of the plaintiff to enter into this compromise upon the certificate of his Pleader that the terms were beneficial to the minor. Under that compromise the minor plaintiff gave up his claim to the rest of the properties of the late Bhimmayya. The Subordinate Judge has held in the present suit on a preliminary issue that the compromise decree in O. S. No. 39 of 1908 was not vitiated by any fraud, collusion or gross negligence on the part of the plaintiff's next friend (who is the 4th defendant) in the suit and, therefore, the present suit was not maintainable as the plaintiff was not entitled in the absence of fraud, collusion or negligence on the part of his next friend, to get the compromise decree set aside and have a fresh decision upon the same points which were at issue in the former case.

In appeal it is urged that the Subordinate Judge was in error in not deciding the other issues in the suit, especially issue (7) which was whether the two cents of land in Konkuduru village, Bikkavole Taluk, belonged to the donor and were really meant to be conveyed in the gift deed or were nominally inserted in order to give jurisdiction to the Bikkavole Sub-Registrar. The plea of fraud and collusion on the part of the plaintiff's next friend in the prior suit was given up at the trial. It is now urged that the next friend's failure to plead the invalidity of the gift deed on account of the fraud upon the Registration Law committed by inserting two cents of land in Konkuduru which did not belong to the donor for the purpose of getting the document registered in the Bikkavole Sub-Registrar's office was an act of gross negligence

which vitiated the whole proceedings and made the decree not binding on the minor plaintiff. *Secondly* it is urged that the plaintiff's natural father had in consequence of the adoption lost his right to represent the minor plaintiff in the former suit and consequently he had no power to compromise the suit on the minor's behalf.

On the first point I feel clear that it is not necessary for the purpose of this case to decide issue (7).

In order to determine whether the plaintiff's next friend in the former suit was or was not guilty of gross negligence, it is not necessary to decide whether the gift in favour of the plaintiff's adoptive mother was really invalid by being registered in a Registration Office which had no jurisdiction over the properties gifted. The real issue that had to be decided was whether the plaintiff's next friend acted *bona fide* in consenting to take 2 acres of land and a house site instead of continuing the litigation and attempting to get more by pleading that the gift deed was altogether invalidated by collusion between the donor and the donee in the matter of registration. At the time when the compromise was entered into (3rd September 1909) the decision of the Privy Council of 1914 in *Harendra Lal Roy Chowdhury* v. *Hari Dasi Debi* (1) to the effect that a collusive act of including a small portion of land not belonging to the mortgagor in a mortgage-deed which was to be registered was a fraud upon the Registration Law had not then been pronounced. The law as laid down by this Court in *Veerappa Chetty* v. *Kadiresan Chetty* (2) which was decided on 2nd April 1913 was to the effect that the wrong acceptance of a document for registration in an office of a Sub-Registrar within whose sub-district, no portion of the property concerned was situate was not to be regarded as rendering the registration invalid. Earlier decisions of 1879 and 1881 of other High Courts in *Sheo Shunkur Sahoy* v. *Hirdey Narain Sahu* (3) and *Har Sahai* v. *Chunni Kuar* (4) were to a similar effect. The minor's next friend would have been justified in 1908 or 1909 in assuming that what this Court decided afterwards in 1913 was good law on the point of a defect in the registration of documents or at any rate he cannot be accused of negligence in not knowing the law better and in failing to take this point which was not an obvious one and even if he had raised it, the suit might have ended in a compromise on the same terms from considerations of what would be a fair settlement. The plaintiff's next friend, therefore, cannot be charged with neglect for not putting in the foreground that plea in defeasance of the right of the plaintiff's adoptive mother and if he was not negligent in this respect, the decree is binding on the plaintiff as *res judicata* and the present suit will not lie. It is not now alleged that the plaintiff's next friend was negligent in any other manner.

Again the suit having been brought against the plaintiff's adoptive mother and other defendants who derived a title from her, the adoptive father being already dead, his natural father was the most suitable person to represent his interest as next friend. This principle was established in *Nirvanya* v. *Nirvanya* (5), where it was held that the natural father of a minor was his proper guardian to assert his right as adopted heir against rival claimants and this has been followed in *Keesara Venkatapayya* v. *Nayani Venkataranga Rao* (6). I am of opinion that the Subordinate Judge's finding on the preliminary issue was correct and in this view it was unnecessary to try the other issues. The suit failed and the appeal also must be dismissed with costs.

Odgers, J.—In this case the plaintiff admittedly cannot succeed unless he can show that the compromise decree in O. S. No. 39 of 1908 on the file of the Court of the Subordinate Judge of Cocanada is not binding on him. His case is that he was informally adopted by his uncle Garimella Bhimmayya in December 1901 when he was a few weeks old; it was not till 1907 that a registered adoption deed was executed. Meanwhile in 1906 Garimella Bhimmayya made a gift deed of all the properties in favour of his wife. In 1908 by the suit above mentioned, the natural father of the plaintiff, the 4th defendant in this case,

(1) 23 Ind. Cas 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.).

(2) 20 Ind. Cas. 385; 24 M. L. J. 664; (1913) M. W. N. 525; 14 M. L. T. 237.

(3) 6 C. 25; 5 C. L. R. 194; 3 Ind Dec. (N. S.) 17.

(4) 4 A. 14; A. W. N. (1881) 105; 6 Ind. Jur. 379; 2 Ind. Dec. (N. S.) 594.

(5) 9 B 365; 5 Ind. Dec. (N. S.) 243.

(6) 59 Ind. Cas. 978; 43 M. 288 at p. 308; 38 M. L. J. 149.

brought a suit on plaintiff's behalf for the recovery of Garimella Bhimmayya's properties after setting aside the deed of gift This was compromised on 3rd September 1909 (Ex. II, *b*) the adoptive father having died in January 1908. By the compromise the plaintiff got 2 acres of land and a dwelling house. In the present suit he alleges that the gift deed was executed by Garimella Bhimmayya by fraud and coercion that the gift deed included 2 cents of lands in Konkuduru village which did not belong to Garimella Bhimmayya and which were included in order to give jurisdiction to Bikkavole Sub-Registry, further, that the natural father had no right to represent the plaintiff in suit O. S. No. 39 of 1908 and that he was fraudulent and negligent in conducting the suit. This issue as to the binding character of the compromise decree and the representation by the natural father was treated as a preliminary issue by the Subordinate Judge and on his finding against the plaintiff, he dismissed the suit. Hence the appeal. Two points are argued before us —that the natural father ceases to be the natural guardian after adoption. This is so, but here he was, in my opinion, a fit and proper person to represent the plaintiff. The gift by the adoptive father was in question and the adoptive mother was the donee under it. It is quite plain that neither of these persons could properly represent the adopted son. Representation for a plaintiff needs no order of Court. A minor's next friend may be any suitable person, even a natural father [*Nirvanya* v. *Nirvanya* (5) and *Keesara Venkatapayya* v. *Nayani Venkataranga Rao* (6)]

The important point taken is that the guardian *ad litem* (natural father) of the plaintiff in O. S. No. 39 of 1908 did not take a point in his plaint on which he was certain to succeed and there would, therefore, have been no need for a compromise. The point in question is as to the 2 cents of land in Konkuduru village. It is said that had that point been taken, the gift deed must have been held to be invalid and inoperative. The question was only raised in the present suit after amendment of the plaint : see para. (6) (*a*) and even then only with reference to the validity of the deed of gift and not with respect to the neglect of the guardian in O. S. No. 39 of 1908 whose alleged fraud, collusion, etc., are set out in para. 8 of the plaint. This is really enough to dispose of the point, especially as the Subordinate Judge remarks that the alleged fraud and collusion were given up before him. The law is, however, also against the appellant. The older view was that registration in an office in which no partion of the property is situated did not render the registration invalid[*Veerappa Chetty* v. *Kadiresan Chetty* (2)] This was the prevailing view in 1908. It is only since it has been altered [*Harendra Lal Roy Chowdhuy* v. *Hari Dasi Debi* (1)] and even then it must be shown that there was collusion between the parties [*Venkata Lakshmikantaraju Garu* v. *Peda Venktata Jagannadharaju Garu* (7) and *Biswanath Prasad* v. *Chandra Narayan Chowdhury* (8).]

I do not think a guardian can be charged with gross negligence in that he did not foresee that the law would change. Even if this is to be imputed to him as I have stated the charge is limited to a certain state of facts not proved to exist here. It is a question of fact whether a guardian is justified in entering into a compromise [*Baboo Lekraj Roy* v. *Baboo Mahtab Chand* (9).]

Here we have the permission of the Court which considered the circumstances.

A further point was raised about the house, Sch. B, sold to the natural father by the adoptive mother (Ex. C) it is said at a nominal price and as a bribe to induce him as guardian to enter into the compromise. The price was Rs. 700 the value put on the house by the plaintiff in his present plaint. It was valued at Rs. 400 in the plaint in O. S. No. 39 of 1908 (Ex. B) and in the decree. The value is now really double. The Subordinate Judge finds that the house was purchased for consideration and it could not be rented. There is, therefore, nothing wrong about that.

The appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

(7) 77 Ind. Cas. 464; 46 M. L. J 12; (1924) M. W. N. 125; 33 M. L. T. 243; (1924) A. I. R. (M.) 281.

(8) 63 Ind. Cas. 770; 48 C. 509 at p. 516; 48 I. A. 127 (P. C.).

(9) 14 M. I. A. 393; 17 W. R. 117; 10 B. L R. 35. 2 Suth. P. C. J. 536; 3 Sar. P. C. J. 43: 20 E R. 833.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 205 AND 216 OF 1923.

December 12, 1924.

Present:—Mr. Justice Wallace and Mr Justice Madhavan Nair.

RAMASWAMI CHETTIAR—PETITIONER

versus

VENKATARAMA IYER AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 15—Arbitration—Power conferred on arbitrators to sell property—Rules for conduct of sale, power to make—Dispute as to interpretation of rules—Arbitrators, whether entitled to adjudicate on dispute—Misconduct—Award made without jurisdiction, validity of—Procedure—Award, whether must be remitted to arbitrators.

Where a reference to arbitration confers a power upon the arbitrators to sell the properties belonging to the parties, such power would naturally carry with it the power to make rules for the conduct of the sale and such rules subscribed to by the bidders, would, in the case of such parties to the reference as subscribed to these rules, extend to the arbitrators authority to sell according to these rules, but would not extend to them any power to act outside these rules, or, any power to decide in a case of controversy whether or not these rules had been complied with. [p. 746, col. 1.]

Where the terms of the reference or of the sale do not imply any consent by the parties to submit to the arbitrators the decision of their own conduct of the sale or re-sales, such consent cannot be considered to be inherent in a consent to have the sale or re-sale conducted according to the rules laid down by the arbitrators. [p. 746, cols. 1 & 2.]

On an application to set aside an award made by an arbitrator in a pending suit the finding of the Judge as to whether there has been misconduct on the part of the arbitrator or not is final and cannot be attacked in appeal or revision. [p. 747, col. 2.]

Gulam Khan v. *Muhammad Hussain*, 29 C. 167; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.), *Kali Charan Sirdar* v. *Sarat Chunder Chowdhry*, 30 C. 397; 7 C. W. N. 545 and *Batcha Sahib* v. *Abdul Gunny*, 21 Ind. Cas. 308; 38 M. 256; 14 M. L. T. 314; 25 M. L. J. 507; (1914) M. W. N. 142, followed.

But a party to a reference is entitled to be protected by the law against a decision by the arbitrators on points not referred to them at all, as well as against a decree of Court based on such a decision. [p. 747, col. 2; p. 748, col. 1.]

Misconduct in respect of the existence of which the Judge's decision is final must be misconduct in carrying out the terms of the reference and within the scope of it. Anything beyond that is action without jurisdiction whether or not it may amount also to misconduct. [*ibid.*]

If an award is beyond the jurisdiction of the arbitrators, and, therefore, made without jurisdiction, the decree which embodies it is also made without jurisdiction. [*ibid.*]

Where an award is beyond the jurisdiction of the arbitrators the duty of the Court is to remit the award to the arbitrators under the terms of para. 14 of Sch. II to the C. P. C. [*ibid.*]

Petitions, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the District Munsif, Mayavaram, dated the 22nd January 1923, in I. A. No. 284 of 1921, in O. S. No. 505 of 1919.

Messrs. *T. R. Rama Chandra Iyer* and *S. Ramaswamy Dikshit*, for the Petitioner in No. 205 of 1923.

Mr. *K. Bhashyam Iyangar*, for the Petitioner in No. 216 of 1923.

Messrs. *S. Venkatachari*, *K. V. Krishnaswamy Iyer* and *S. Krishnamachariar*, for the Respondents.

JUDGMENT.—These two civil revision petitions are presented against the order of the District Munsif of Mayavaram confirming an award in the matters in dispute in O. S. No. 505 of 1919 on his file, dismissing petitioners' objections and granting the respondents a decree in accordance therewith. The petitioners challenge the order on various grounds, the chief contention being that the arbitrators decided two matters beyond the scope of the reference and, therefore, beyond their jurisdiction, and, therefore, the lower Court, in accepting their decision on these points and incorporating it in its decree, has exceeded its jurisdiction. The arbitration was in the matter of the dissolution of partnership between the six plaintiffs in the suit and the defendants, who were jointly working a mill concern. The reference to arbitration, Ex. A, gave the arbitrators authority, *inter alia*, to sell the property, moveable and immoveable, by public auction to the highest bidder, whether he be a partner or a stranger, to collect the sale-proceeds and to distribute them among the partners according to the interests they had in the concern. The arbitrators were also to sell book debts and outstandings, but among the partners only. The final amounts due to the various partners were then to be settled and adjusted with reference to any liability incurred by any partner who may have been a successful bidder at any of the sales. The arbitrators held a public sale of the mill itself and its machinery on 30th May 1920 and they were knocked down to the 4th plaintiff, one of the petitioners, for Rs. 28,000. One of the conditions of the sale, see Ex. D, was that the bidders should deposit Rs. 1,000 as soon as the sale was knocked down. The 4th plaintiff was able to deposit only Rs. 500. Under a further condition, any bidder who thus made default in paying

his deposit, had to run the risk of a re-sale, his own sale being cancelled and he being responsible for any loss arising out of the re-sale. Accordingly a re-sale was held on the same terms on 19th July 1920, at which the highest bidder was one M. K. V. Kandasami Pillai for Rs. 20,000, see. Ex. U. He had deposited Rs. 100 before bidding and before the sale was closed was asked to pay up the balance of Rs. 900 to make up the initial deposit of Rs. 1000. This was *prima facie* a clear breach of the rules. He went away saying that he had no money. The property was, therefore, not knocked down to him but was again put up to auction, and this time one Ramachandra Iyer bought it for Rs. 14,950. The arbitrators in their award have taken Rs. 14,950 as the sale-proceeds and, in their adjustment, have debited plaintiffs Nos. 4 to 6, the present petitioners, with the difference between that figure and Rs. 28,000, the amount for which the property was knocked down to 4th plaintiff at the first sale.

Three points are hereon raised by the petitioners: first, that the arbitrators had no jurisdiction to break their own rules of sale and refuse to knock down the 2nd sale to Kandasami Pillai, because he had not paid up the full Rs. 1,000 and thus make petitioners responsible for a deficit of Rs. 28,000 minus Rs. 14,950 instead of Rs. 28,000 minus Rs. 20,000; secondly, that the arbitrators had no jurisdiction to adjust this deficit in calculating the amounts due to each partner; and thirdly, that, in any case, they had no jurisdiction to debit the shares of plaintiffs Nos. 5 and 6 with any portion of this deficit. We are of opinion that all these points are valid. The reference, Ex. A, empowers the arbitrators to sell and carry over to the general adjustment the sale-proceeds. The power to sell would, no doubt, naturally carry with it the power to make rules for the conduct of the sale and such rules, embodied in Ex. D and subscribed to by the bidders, would, in the case of such parties to the reference as subscribed to these rules, extend to the arbitrators authority to sell according to these rules, but would not extend to them any power to act outside these rules, or, and this is the important point, any power to decide in a case of controversy whether or not these rules had been complied with. Neither the terms of the reference nor the terms of the sale imply any consent by the parties to submit to the decision of the arbitrators on any controversy regarding the arbitrator's own conduct of the sales or re-sales, and such consent cannot be considered to be inherent in a consent to have the sale or re-sale conducted according to the rules laid down by the arbitrators. One would require a very definite and specific term in the reference before concluding that the parties to it agreed to be bound, in a matter of the arbitrator's own conduct of the sale, by the arbitrators' own decision. We are clear that the arbitrators, in deciding that there had been no sale to Kandaswami Pillai and that, therefore, the petitioners were liable for the difference between Rs. 28,000 and Rs. 14,950, were acting outside the scope of their reference.

As to the second point, the reference itself contains no provision for adjusting the deficit on a re-sale against a partner. If it is within the scope of the arbitrators' jurisdiction, it can only be so under the rules of sale consented to by the bidders and would only bind the subscribers to it. Now, the 6th plaintiff did not subscribe to Ex. D at all, and so, it cannot bind him. The 4th and 5th plaintiffs subscribed to a condition in Ex D that "for the loss arising from the re-sale we will be responsible," and again that" in case the plaintiff in the said suit buys at the auction, we agree to pay the remaining amount out of the remaining sum that ought to be paid excluding the share amount that is due for the balance according to the terms of the agreement". But neither of these conditions implies to our minds any surrender by the partner subscribers of the right possessed by them, as much as by stranger subscribers to have the opportunity of challenging the arbitrators' conduct in the matter of re-sale and contending that the amount fixed by them as a deficit on the re-sale was not owing at all or was owing only in part. None of the documents concerned with the reference and the sale draws any distinction in this matter of a possible deficit on a re-sale between the position of the partner and that of the stranger-purchaser and, therefore, the arbitrators have no greater power of dealing with such deficits in the case of a partner than they have in the case of a stranger. On this point we have the admission of one of the arbitrators himself R. W. No. 3 that "it does not appear from the reference petition that we can award damages but we thought we had such

power. The parties did not tell us to award damages against this or that person. We did what we thought proper. If any stranger was the last bidder in the first sale of the mill and he had made default we would have written in the award that the said bidder was liable to pay damages and that the parties should file a suit against him to recover that amount". It seems clear from that statement that the arbitrators themselves recognised the true position and that they had exceeded their jurisdiction in thus awarding damages.

As to the third point, namely, debiting the shares of the plaintiffs Nos. 5 and 6 with a portion of this deficit, their lack of jurisdiction seems to be still more obvious. As the arbitrators cannot enforce in these proceedings the collection of the deficit from the purchaser, 4th plaintiff, still less can they enforce it against the plaintiffs Nos. 5 and 6 who were not purchasers at all. The only reason put forward by them is that plaintiffs Nos. 4 and 6 held one share in the business among themselves and that, in objecting to the re-sale, plaintiffs Nos. 5 and 6 associated themselves, with the 4th plaintiff, see Ex. J. One of the arbitrators examined as R. W. No. 6 before the District Munsif on this point said, "None of the parties requested us to collect the damages from Ramsami Chettiar and his brother and nephew, plaintiffs Nos. 4 to 6. We did not question Ramswami Chettiar and his people why damages should not be allowed against them. There was no enquiry about the matter. As Ramaswami, Kesava and Govindan, that is, plaintiffs Nos. 4 to 6 are members of the same family and as they were doing everything about the mill together we decreed damages against the last two also. We did not enquire whether they were divided", which amounts merely to saying that the arbitrators believed among themselves that the 4th plaintiff was binding also for plaintiffs Nos. 5 and 6; but as to the grounds for their belief their statements are particularly vague. Even if the reference permitted, which we doubt, the arbitrators to make a roving enquiry as to who was the real purchaser in the final sale, it certainly does not authorise them to make such an enquiry as to who was the real purchaser at a sale, subsequently cancelled, and therefore, not a sale at which "sale proceeds" available for distribution by the arbitrators were realised. It is also quite clear that at the time of sale the arbitrators did not treat plaintiffs Nos. 5 and 6 as the purchasers. The property was not knocked down to them, nor were their signatures taken as the highest bidders; nor did the arbitrators give any notice to plaintiffs Nos. 5 and 6 in the terms of the notice Ex. G which they sent to the 4th plaintiff. On this point no subsequent evidence or statements in the nature of admissions by the 5th plaintiff in his evidence before the District Munsif can be relevant to validate a preceding decision in the award which was invalid, at the time of the award. It is quite clear that at the time of the sale the person accepted by the arbitrators as the purchaser was the 4th plaintiff and the 4th plaintiff alone. We are satisfied, therefore, that, in fastening the damages of the deficit at the re-sale on plaintiffs Nos. 5 and 6 also, the arbitrators were clearly exceeding the terms of their reference.

It is not necessary to go into the other points raised, on some of which the lower Court has dilated at great length. It is obvious that, if the arbitrators have decided matters outside the scope of their reference, the Judge was not entitled to include such matters in his decree. It is no part of the Judge's business to decide whether the plaintiff's objection to the arbitrators' conduct in the re-sale and the allocation of the deficit is justified or not by the facts proved in evidence before him. The only point that he has to consider is whether the disposal of such objections was within the scope of the reference or not, and, if it was not, then he has nothing to do with it at all. The Judge has treated the case far too much as if it was an appeal against the arbitrators' findings. That is not a proper point of view at all. He seems to regard the case at its worst, as raising merely questions of misconduct of the arbitrators on which, of course, if there is no question of lack of jurisdiction, or material irregularity in the exercise of it, his finding is final and cannot be attacked either by way of appeal or revision. See *Gulam Khan* v. *Muhammad Hussain* (1), *Kalicharan Sirdar* v. *Sarat Chunder Chowdhry* (2) and *Batcha Sahib* v. *Abdul Gunny* (3). But a party is entitled to be protected

(1) 29 C. 167; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(2) 30 C. 397; 7 C. W. N. 515.

(3) 21 Ind. Cas. 308; 38 M. 256; 14 M. L. T. 314; 25 M. L. J. 507; (1914) M. W. N. 142.

by the law against a decision by arbitrators on points not referred to them at all, and against a decree of Court based on such a decision, all the more because he has no right of appeal: see *Merali Visram* v. *Sheriff Devji* (4). The real point at issue here is the question of lack of jurisdiction for the arbitrators. It is in fact contended by the respondent that all that has been urged by the petitioners is mere misconduct on the part of the arbitrators and not want of jurisdiction. The distinction has, no doubt, to be kept in mind but there is no doubt in our minds in this case about the answer. Misconduct must be misconduct in carrying out the terms of the reference and within the scope of it. Anything beyond that is action without jurisdiction whether or not it may amount also to misconduct. If the arbitrators' award is then beyond their jurisdiction and, therefore, was made without jurisdiction, then obviously the decree which embodies it is also made without jurisdiction. The duty of the lower Court, when an award sent to it is beyond the jurisdiction of the arbitrators, was not to pass a decree in accordance therewith but to remit it back to the arbitrators under the terms of s 14 of Sch. II of the C. P. C.

The order of the lower Court cannot, therefore, be supported. We must hold that it is without jurisdiction and we must set it aside. No other grounds of attack on the lower Court's jurisdiction have been urged before us. In the circumstances we set aside the lower Court's order and direct it to pass an order in accordance with law.

Plaintiffs Nos. 4, 5 and 6 will have their costs (one set). Past and future costs in the lower Court will abide the result.

V. N. V. *Order set aside.*

Z. K.

(4) 12 Ind. Cas. 687; 36 B. 105; 13 Bom. L. R 1017.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2143 OF 1923.

July 28, 1925.

Present:—Mr. Justice Chakravarti.

SURMAN SHAIKH KAZI—DEFENDANT—APPELLANT

versus

NAFAR CHANDRA PAL CHOUDHURY—PLAINTIFF—RESPONDENT.

Landlord and tenant—Death of tenant—Tenancy recorded in name of some heirs of deceased, effect of—Decree for rent obtained against recorded tenants, nature of.

The question as to whether one heir or some of the heirs of a deceased tenant represent the tenancy is primarily a question of fact. [p. 749, col. 2.]

Where a *raiyat* dies it very often happens that the male members of the family are allowed to represent the tenancy. So far as the landlord is concerned they are recorded as tenants in the landlord's *sherista*. The recorded tenants pay the rent for the whole holding and the landlord recognizes them as the sole tenants of the holding so far as he is concerned. Such an arrangement does not, however, extinguish the right of the other heirs of the tenant. If they are ignored they have a right to establish their rights against the usurpers and may ask the landlord to record them also as joint tenants. But until that is done the landlord has a right to institute suits for rent against the recorded tenants and the decree which the landlord obtains in such a suit would have the character of a rent-decree although it is obtained against one or some of the heirs of a deceased tenant, the principle being that the landlord is not bound to go beyond his books to find out who the tenants are. [p. 749, col. 2; p. 750, col. 1.]

Appeal against a decree of the District Judge, Nadia, dated the 23rd of April 1923, reversing that of the Munsif, Second Court, at Krishnagar, dated the 7th of February 1919.

Mr. *Manmatha Nath Roy* and Babu *Surja Kumar Aich*, for the Appellant.

Mr. *Amarendra Nath Bose* and Babu *Radhika Ranjan Guha*, for the Respondent.

JUDGMENT.—This second appeal is by the defendant and arises out of a suit for rent brought by the plaintiff for a period commencing from 1321 down to 1324 at the rate of Rs. 25-12-5 gandas annually andalso for cesses. The suit was based upon a *kabuliyat* executed by the defendant on the 25th November 1910.

The defence of the defendant was that Forong the father of the defendant who was the original tenant left a widow and also a daughter who were alive and that as the widow and the daughter had not been made parties to the suit, the suit for rent was not maintainable. The defendant further pleaded that the *kabuliyat* was vitiated by fraud and collusion. The defendant also pleaded

tender of the rent which was not accepted. Defendant further pleaded that before the *kabuliyat* was executed the rent paid by his father was at the rate of Rs. 22-14-10 gandas and that the rent was paid at that rate.

The Court of first instance found that the *kabuliyat* was vitiated by fraud and, therefore, was not binding upon the defendant and that, therefore, the rent payable by the defendant was at the rate of Rs. 22-14-10 gandas and gave a decree at that rate. That Court further held that the decree granted to the plaintiff was merely a money decree as the other two heirs of Forong were not made parties to the suit.

On appeal by the plaintiff the learned District Judge found that there was no fraud practised in taking the *kabuliyat* from the defendant and that the defendant fully understood the terms of the contract and the reason for the enhancement of the rent by the *kabuliyat* from Rs. 22-14-10 gandas to Rs. 25-12-5 gandas. The learned District Judge further found that the defendant represented the tenancy after the death of his father and, therefore, the suit for rent was properly constituted against the recorded tenant and, therefore, the decree would be a rent decree under the law. Upon these findings the learned District Judge made a decree for the amount claimed by the plaintiff; and against that decree the present appeal has been filed by the defendant.

The only point raised before me was that the finding of the learned District Judge that the defendant represented the tenancy was not based upon evidence upon which such a finding can be sustained. It was further contended that as Forong admittedly left two other heirs and the defendant did not represent the tenancy the decree made by the learned District Judge could not have the effect of a rent decree. In order to understand this argument it is necessary to state a few facts. It appears that the tenancy admittedly belonged to one Forong who died in the year 1907 or 1908 leaving behind him a widow a daughter and the defendant as his only son. The defendant, as I have already stated, executed a *kabuliyat* on the 25th of November 1910 in favour of the landlord with respect to the tenancy which Forong had left and by that *kabuliyat* agreed to pay an enhanced rent at the rate of Rs. 25-12-5. It appears that no question was raised by the widow or the daughter all these years as to their share of the *jote* left by Forong. The defendant continued in possession of the holding and paid rent fixed by the *kabuliyat*; and not only that along with the execution of the *kabuliyat* he executed a *kistibandi* bond in favour of the landlord for all the arrears of rent due before the execution of the *kabuliyat*. In the year 1914 the plaintiff brought a suit for rent against the defendant and it was decreed *ex parte* against him on the 2nd June 1914. An application was made by the defendant to set aside the *ex parte* decree but that application failed. The present suit for rent was brought against the defendant on the 20th April 1918. It is unnecessary to follow the chequered career of this litigation as we are not concerned with the earlier decisions in this case. I have already stated what the findings of the two lower Courts in the present trial are.

As to the first point the answer is a very simple one and that is this—the question as to whether one heir or some of the heirs of a deceased tenant represent the tenancy is primarily a question of fact. If any authority is needed for a proposition like this I would refer to the case of *Gagan Sheik* v. *Abajan Khatun* (1). The learned District Judge has referred to a number of circumstances and the conduct of the parties in arriving at the conclusion that to the knowledge of the other heirs the defendant alone was allowed to hold the tenancy; and on the findings in the present case it appears that the defendant held the tenancy not only for himself but also on behalf of the other heirs of his father. The learned District Judge found that the mother and the sister acquiesced in the arrangement under which the defendant alone was allowed to execute the *kabuliyat* and to represent the tenancy in the *sherista* of the landlord.

As to the second question it appears to me that mere absence of some of the true and real heirs of a deceased *raiyat* from a suit for rent does not necessarily make it a suit only against some of the heirs of the deceased tenant. It is a suit against the tenant who represents the tenancy when the suit for rent is brought. When a *raiyat* dies it very often happens that the male members of the family are allowed to represent the tanancy. So far as the land-

(1) 10 Ind. Cas. 116; 14 C. L. J. 180.

lord is concerned they are recorded as tenants in the landlord's *sherista*. The recorded tenants pay rent for the whole holding and the landlord recognizes them as the sole tenants of the holding so far as he is concerned. Such an arrangement does not really extinguish the right of the other heirs. If they are ignored they have a right to establish their rights against the usurper and may ask the landlord to record them also as joint tenants. But until that is done the landlord has a right to institute suits for rent against the recorded tenants and the decree which the landlord obtains in such a suit would have the character of a rent-decree although it is obtained against one or some of the heirs of a deceased tenant, the principle being that the landlord is not bound to go beyond his books to find out who the tenants are. That such a decree has the effect of a rent-decree has been repeatedly held by this Court for a long time. I shall refer to only one or two cases where the question was discussed and decided. In the case of *Afraz Mollah* v. *Kulsumannessa Bibi* (2) Mr. Justice Mukherji in his judgment at page 179* says as follows "If *A* and *B* are joint tenants of a tenure and if by an arrangement amongst themselves and the landlord, *A* above is recorded in the books of the latter, *A* must be taken as between the landlord and his tenants to represent the tenancy completely..... This is a perfectly intelligible principle, because, as pointed out in the case of *Rupram Nama Sudra* v. *Iswar Namasudra* (3), the recorded tenant represents the ownership of the whole tenure with the consent of his cosharers". The same principle was also laid down by Mr. Justice Mukherji in the case of *Gagan Sheikh* v. *Abejan Khatun* (1) to which I have already referred. Where the tenant recorded in the landlord's *sherista* is so recorded either with the consent of the other heirs or in the absence of the other heirs who do not take any interest in the tenancy or are not prepared to undertake the responsibility for paying rent as between the landlord and the tenant, the recorded tenant represents the tenancy. If the conduct of the landlord is free from any fraud or collusion and if the recorded tenant without any objection by the other heirs continues to pay rent to the landlord, I think the landlord is justified in treating the recorded tenant as the tenant of the holding and in seeking his remedy for rent against such recorded tenant, because, as I have already stated the recorded tenant in the landlord's books represents the tenancy and the landlord is not bound to go beyond his books to find out the tenants of the holding. As I have already stated such representation of the tenancy before the landlord by some of the heirs does not, in any way, affect the rights of the other heirs and until such rights are enforced the landlord is not bound to recognize them.

In the present case the original tenant Forong died in 1907. The only heir of Forong who came forward, (and it was quite natural that the son should come forward) and took the responsibility of paying the rent due under the tenancy and executed a *kabuliyat* agreeing to pay an enhancement of rent was the present defendant. Not only that, it was he who alone undertook the responsibility of executing a *kistibandi* bond for arrears of rent for the years down to the date of the *kistibandi* bond. The rent was all along paid by the defendant and as I have already stated he did so without any objection until the present suit was brought. In fact so far as the landlords and the defendant was concerned it was a new tenancy. It is in the present suit that for the first time the landlord was met with the plea of that there were other heirs who inherited Forong's tenancy along with the defendant. It would be extremely difficult, if not impossible, for the landlords of agricultural holdings to find out on the death of a *raiyat* who the heirs are and when some of the heirs without any objection by the other heirs get themselves recorded in the landlord's *sherista* and undertake to pay the rent payable for the tenancy the position may be looked at either as one or some of the heirs represent the whole tenancy in the interest of the other heirs or as one of new arrangement between the landlord and the heirs who get themselves recorded in the place of the deceased *raiyat*. An arrangement like this cannot be resiled from either by the landlord or by the recorded tenant unless and until some of the other heirs establish their right against the recorded tenant and the landlord.

In this view of the law I think it is quite clear that the defendant is bound to pay the entire rent due for this tenancy and the

(2) 10 C. W. N. 176; 4 C. L. J. 68.
(3) 6 C. W. N. 302.

*Page of 10 C. W. N.—[*Ed.*]

decree which the landlord will obtain will have the character of a decree for rent. On this ground I hold that the judgment of the learned District Judge is correct and this appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL SUIT No. 105 OF 1923.

(SUIT No. 12554 OF 1922, ON THE FILE OF THE SMALL CAUSE COURT).

November 11, 1924.

Present:—Justice Sir Kumaraswami Sastri, KT.

W. M. VARADARAJA MUDALIAR—PLAINTIFF

versus

M. ARUMUGAM PILLAI—DEFENDANT.

Presidency Small Cause Courts Act (XV of 1882), ss. 39, 40—Letters Patent (Mad.), cl. 13—Court Fees Act (VII of 1870), s. 4—Original Side Rules of Madras High Court—Suit of value less than Rs. 1,000 transferred to High Court—Court-fee payable

Suits below the value of Rs. 1,000 do not come within the purview of ss. 39 and 40 of the Presidency Small Cause Courts Act, and where such a suit is transferred to the High Court for trial the transfer must be treated as one under powers vested in the High Court under cl. 13 of the Letters Patent and the jurisdiction of the High Court to try such a suit would be its Extraordinary Original Jurisdiction conferred by the Letters Patent.

The fees rules framed by the Madras High Court apply only to cases coming before it in the exercise of its Ordinary Original Jurisdiction or of its Civil Jurisdiction, *viz.*, Admiralty, Vice-admiralty, Testamentary, Intestate and Matrimonial Jurisdiction. There are no rules framed by the High Court in respect of suits transferred to it for trial under its Extraordinary Original Jurisdiction under cl. 13 of the Letters Patent. To such cases, therefore, s. 4 of the Court Fees Act would be applicable and the fees payable in respect of such a suit would be the fees prescribed in the First and Second Schedules to the Court Fees Act.

Mr. *V. S. Govindachari*, for the Plaintiff.

Mr. *V. Radhakrishnayya*, for the Defendant.

JUDGMENT.—The question raised in this matter relates to the institution fees payable in respect of a suit of a value less than Rs. 1,000 which has been transferred to this Court in order that it may be tried with another suit in this Court involving the same question. There can be little doubt that suits below Rs. 1,000 in value do not come within ss. 39 and 40 of the Presidency Small Cause Courts Act. The transfer to the High Court will be under powers vested in it under s. 13 of the Letters Patent and the jurisdiction of the High Court to try such a suit would be Extraordinary Original Jurisdiction conferred by the Letters Patent. *Sreenivasier* v. *Balakrishna Devai* (1) is clear authority for this position. If the suit was over Rs. 1,000, in value, s. 40 would have applied and the fees payable would be the ordinary fees leviable on the Original Side; but, as the suit is below Rs. 1,000 in value, ss. 39 and 40 do not apply. So far as the fees on the Original Side are concerned, the fees rules framed by the High Court apply only to cases coming before the High Court in the exercise of its Ordinary Original Jurisdiction and also of its Civil Jurisdiction, *viz.*, Admiralty, Vice-admiralty, Testamentary, Intestate and Matrimonial Jurisdiction. It is, therefore, clear that the High Court has framed no rules in respect of suits transferred under the Extraordinary Original Jurisdiction of the Court conferred either by cl. 13 of the Letters Patent or s. 24 of the C. P. C. In such cases I think in the absence of any rules framed the Court Fees Act would apply and s. 4 of that Act applies to cases coming before it in its Extraordinary Original Jurisdiction. The fees payable are the fees prescribed in the First and Second Schedules to the Act. In this case the difference between the *ad valorem* fee payable under the Court Fees Act and the fee actually paid will be paid by the plaintiff. I see no reason to hold that, where a suit is so transferred, the defendant is to pay the deficiency of Court-fee; and I think the Registrar is right in his note that any deficiency, if payable, must be paid by the plaintiff. I say nothing here as to whether, when a suit is tried in the Extraordinary Jurisdiction, the hearing, translation and other fees would be payable or not. That is a matter which does not arise before me for consideration. At present I am only concerned with the institution fees. The office will levy the deficiency payable from the plaintiff; and it will be paid within one week from the date, when the office makes a demand.

As regards Rs. 300, paid in Court in pursuance of my order, the plaintiff will be

(1) 13 Ind. Cas. 860; 22 M. L. J. 187; (1912) M. W. N. 150; 11 M. L. T. 159.

entitled to draw it, on furnishing one surety.

V. N. V. *Order accordingly.*

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 2047, 2048 AND 2198 OF 1922.

June 1, 1925.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice Graham.

IN NOS 2047 AND 2048 OF 1922.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

IN NO. 2198 OF 1922.

KHAGENDRA NANDA ASRAM *Shebait* OF *Sree Sree* ISWAR BRINDABAN CHANDRA JEW THAKUR—DEFENDANT—APPELLANT

versus

NEMAI CHAND MUKHERJEE AND OTHERS—DEFENDANTS—RESPONDENTS IN ALL.

Fishery, right of—River bed, shifting of—Beel *formed in old bed—Grantee, right of, to fish in* beel.

The bed of a river is that portion of the river which is in the ordinary and regular course of nature covered by the water of the river. It need not be constantly covered, if in the ordinary course of things it is habitually covered. [p. 753, cols. 1 & 2.]

The grantee of a fishery right in a river is entitled to fish in all waters comprised within the banks of the river, and the fact that a particular sheet of water may, during a part of the year, be disconnected from the flowing stream or permanent current does not affect the rights of the grantee. A *jalkar* so situated in the river bed is an essential part of the river, and the fish contained therein may properly be deemed fish of the river. Where the right of fishery is in a river, the Court has to decide on a consideration of all the material facts and conditions whether it can fairly and reasonably be said that the waters over which the fishery is claimed are a part of the river. [p. 753, col. 2.]

When a river shifts its course and a *beel* forms in the old river-bed, the question whether the right of fishery in the *beel* remains the property of the grantee of the exclusive right of fishery in the river, depends upon whether the *beel* forms part of the river. If the *beel* is so separated from the river that it no longer froms part of it, the fact that during the rains the *beel* overflows and joins the river does not give the grantee of the exclusive right of fishery in the river any right of fishery in the *beel*. But if the *beel* remains part of the river the right of fishery in the *beel* belongs to the owner of the fishery rights in the river even though the *beel* is disconnected from the river except in the rains. [p. 753, col. 2; p. 754, col. 1.]

[Case-law discussed.]

Appeals against the decrees of the District Judge, Hooghly, dated the 9th May 1922, affirming those of the Subordinate Judge, Second Court of that District, dated the 28th November 1919.

Babu *Asitaranjan Ghose*, for the Appellant in No 2198.

Moulvi *Nuruddin Ahmed*, for the Appellant in Nos. 2047 and 2048.

Dr. *Bijan Kumar Mukherjee*, for the Respondent in No. 2198.

Babu *Asitaranjan Ghose*, for the Respondent in Nos. 2047 and 2048.

JUDGMENT.

Graham, J.—These appeals are from decrees of the District Judge of Hooghly confirming decisions of the Subordinate Judge, Second Court, Hooghly, and arise out of three suits brought by the plaintiffs-respondents for declaration of their title to certain *beels* on the allegation that they form part of their *jalkar* Bankipore, and for recovery of possession thereof.

The plaintiffs claimed that the said *jalkar* of the river Hooghly with all its *beels*, canals, water-courses, waterways, etc., appertaining to, connected with, and forming part thereof formed one of the *mouzahs* of the permanently settled estate known as *huda barabahorkuli*, being *Touzi* No. 46 of the Burdwan Collectorate, that they, and their predecessors had been in possession thereof since the time of the Decennial Settlement, and that they had been dispossessed by the defendants in these suits on certain dates in the years 1914 and 1915. They claimed title both by virtue of settlement as well as by adverse possession.

The defendants, while not disputing the plaintiff's title to *jalkar* Bankipore, contested the suits on various grounds, the main defence being that the *beels* in suit formed no part of *jalkar* Bankipore, that they are not situated in the old bed of the river, but are far away from it with cultivable lands intervening between them and the river, that the plaintiffs never exercised any fishery rights therein, and that their rights, if they ever had any, had become barred by limitation. The Court of first instance found the issues in favour of the plaintiffs and gave them decrees in all three suits. On appeal the District Judge confirmed the decisions of the Subordinate Judge and dismissed the appeals. The defendants then appealed to this Court.

The learned Vakils for the appellants have not attacked the finding in the Courts below on the issue of limitation, and the main contention which has been urged before us is that of the facts and circum-

stances of the present case the Courts ought to have held that the disputed *beels* do not form part of the river, and the plaintiffs can have no right of fishery therein. It was argued that the mere fact that the *beels* are connected with the river only during a part of the year, when that river is swollen, is not sufficient to warrant the granting of a decree, that the plaintiffs claimed the *beels* as appertaining to their permanently settled estates, and that the question was whether they were entitled to follow the river when it became separate from the *beels*. The defendants, it was urged, did not dispute the plaintiffs' right of fishery in the main stream, but the *beels* have no connection with the main river, and it was incumbent upon the plaintiffs to establish the connection between the *beels* and the river. In Appeal No. 2198 the learned Vakil for the appellants contended further that the Courts below had from the beginning misconceived the law on the subject and argued that it was essential to come to a finding that the *beels* are within the high banks of the river. It may be observed in passing that this is precisely what both Courts appear to have found. There are concurrent findings of fact in the Courts below (and the correctness of the findings of the Trial Court on this point was not assailed before the District Judge) that the *beels* in suit are situate within the high banks of the river Hooghly or Bhagirathi. Both Courts having arrived at this finding then proceeded, relying mainly on the case of *Bibi Ahmadi Begum* v. *Tarak Nath Ghose* (1) and *Sri Nath Roy* v. *Dinabandhu Sen* (2) to hold that the plaintiffs were entitled to succeed.

In my judgment they have rightly so held. So far as this Court is concerned we are bound by the finding of fact arrived at in the Courts below that the *beels* are within the high banks of the river, in other words that they form part of the river, and when once that is accepted the only question which remains is what the effect of that finding is having regard to the authorities on the subject. In the case reported as *Bibi Ahmadi Begum* v. *Tarak Nath Ghose* (1) it was held that the bed of a river is that portion of the river which is in the ordinary and regular course of nature covered by the waters of the river, that it need not be constantly covered, if in the ordinary course of things it is habitually covered. It was further held that the grantee of a fishery right in a river is entitled to fish in all waters comprised within the bank of the river, and the circumstances that a particular sheet of water may during part of the year be disconnected from the flowing stream or permanent current, does not affect the rights of the grantee: that a *jalkar* so situated in the river-bed is essentially part of the river, and the fish contained therein may properly be deemed fish of the river. It was further observed that, where the right of fishery is in a river, the Court has to be satisfied on a consideration of all the material facts and conditions whether it can fairly and reasonably be said that the waters over which the fishery is claimed are a part of the river.

The case of *Sri Nath Roy* v. *Dinabandhu Sen* (2) was decided by their Lordships of the Privy Council about a year after the case referred to above, and in their judgment the whole series of decisions on the subject in Bengal from 1807 to 1905 was reviewed and discussed. The following passage which occurs at page 520* may be quoted: "It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the up-stream and down-stream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long established bed, or whether the soil is still in a riparian proprietor as being the site of the rivers recent encroachment."

As already stated the Courts below have found that the *beels* in question are within the high banks of the river, in other words that they form part of the river, and, that being so, it was rightly held that the plaintiffs in these suits were entitled to succeed.

In the result the appeals fail and are dismissed with costs.

Newbould, J.—I agree with the judgment that has just been delivered by my learned brother. The question to be decided is whether when a river shifts its

(1) 21 Ind. Cas. 233; 18 C. L. J. 399; 17 C. W. N. 1173.

(2) 25 Ind. Cas. 467; 42 C. 489; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 Bom. L. R. 901; 41 I. A. 221 (P. C).

*Page of 42 C.—[*Ed.*]

course and a *beel* forms in the old river bed, the right of fishery in the *beel* remains the property of the grantee of the exclusive right of fishery in the river. The answer depends on the question of fact whether the *beel* forms part of the river. If the *beel* is so separated from the river that it no longer forms a part of it, the fact that during the rains the *beel* overflows and joins the river does not give the grantee of the exclusive right of fisery in the river a right of fishery in the *beel*. But if the *beel* remains part of the river the right of fishery in the *beel* belongs to the owner of the fishery rights in the river even though the *beel* is disconnected from it except in the rains. The first proposition is supported by the case of *Bhaba Prasad* v. *Jagadindra Nath Roy* (3) the case on which the appellants mainly relied at the hearing of this appeal. The second proposition is supported by the cases of *Bibi Ahmadi Begum* v. *Tarak Nath Ghose* (1) and *Srinath Roy* v. *Dinabandhu Sen* (2). Here there is a clear finding by the lower Appellate Court that "all the *beels* can fairly and reasonably be said to be a part of the river Hooghly or Bhagirathi in which the plaintiffs have admittedly got an exclusive right of fishery between Guptipara and Chakda".

It is not suggested that this finding is vitiated by any error of law and on this finding which we must accept in second appeal the plaintiffs are entitled to the decrees which they have obtained.

Z. K. *Appeals dismissed.*

(3) 33 C. 15; 9 C. W. N. 934.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1471 OF 1922.

November 7, 1924.

Present:—Mr. Justice Devadoss.

KAKARAPARTI PUNNAYYA—DEFENDANT No. 2—APPELLANT

versus

CHILAKALAPUDI VENKATAPPA RAO—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 36, 132—Transfer of Property Act (IV of 1882), s. 54—Mortgage of house—Sale of house—House pulled down and materials utilized by vendee—Sale, whether of immoveable property—Liability of vendee—Suit to enforce mortgage—Limitation.

A house which is built on a site with foundations laid in it is "immoveable property" within the meaning of Art. 132 of Sch. I to the Limitation Act. [p. 755, col. 1.]

Where a house is sold for the purpose of enjoyment as a house with an option to pull it down if the vendee likes, the sale is a sale of immoveable property for the purposes of the Transfer of Property Act. [p. 755, cols. 1 & 2.]

In order to determine whether a sale is of moveable or immoveable property the Court must see in what state the property sold was at the time of the sale. What the parties intended should be done with the property after the sale should not be taken into consideration in deciding whether the sale was of moveable property or of immoveable property. [p. 755, col. 2.]

The mere fact that mortgaged property exists in a different shape from that in which it was at the time of the mortgage would not extinguish the mortgagee's right against the property in its converted state, and if the person who has converted it has appropriated it to his own use, either in the shape of money, or in the shape of materials, he would still be liable as a mortgagor. [p. 756, col. 1.]

Where a vendee of a mortgaged house pulls down the house and utilizes the materials for other buildings or otherwise deals with them, he cannot escape his liability in respect of the mortgage as vendee of the mortgaged property and the period of limitation for the enforcement of such liability is the usual period of limitation applicable to the case of a mortgage. The proper Article applicable to such a case is Art. 132 of Sch. I to the Limitation Act. [p. 756, col. 2.]

Appeal against a decree of the District Court, Kistna, Masulipatam, in A. S. No. 101 of 1921, preferred against a decree of the Court of the District Munsif, Masulipatam, in O. S. No. 376 of 1920.

Mr. *V. Krishna Mohan*, for the Appellant.

Mr. *K. Krishnamachariar*, for the Respondent.

JUDGMENT.—The plaintiff's suit is on a hypothecation bond executed by the 1st defendant on the 16th May 1908. The 2nd defendant is impleaded on the ground that he purchased the hypothecated house after the date of the hypothecation bond. Both the lower Courts have given a mortgage decree in favour of the plaintiff against both the defendants. The 2nd defendant pleaded in his written statement that the 1st defendant sold only the house to his father and not the site for a debt due by the 1st defendant to his father. It is unnecessary for the purposes of this case to consider whether the purchase of the house was by the 2nd defendant or by his father.

The contention of Mr. Krishna Mohan for the appellant is that the suit is barred by limitation inasmuch as it is brought more than three years from the date of the sale to the 2nd defendant's father. His argument is that the 2nd defendant's father purchased only the materials of the house and that Art. 36 of the First Schedule of the Limitation Act is the proper Article appli-

cable to the case. Before considering the contention it is necessary to make it clear what was it that was actually sold by the 1st defendant to the 2nd defendant's father. Exhibit 1 is the document under which the sale was effected. It is dated 12th January 1910. It is headed sale deed of moveable property for a sum of Rs. 500. What was conveyed under the document was the site and "all the wood materials, brick, walls, foundation etc., belonging to the house of 14 full *gadees* built of brick—walls herein and the different kinds of materials belonging to the said house." In the body of the document the recital is: "Therefore, hence forward you, your heirs and representatives may enjoy the said property as you please and we, our heirs and representatives will never raise any disputes in respect of the same". Reading the document as a whole it is quite clear that which was conveyed under it was the house and not the materials of the house after it was pulled down. It is admitted that when the sale deed was executed, the house was standing on the site. The 2nd defendant's contention is that it was pulled down after the purchase and the materials were sold or utilised by him. When the house was sold, granting that under the document the superstructure alone was sold, the sale was a sale of immoveable property, for the house was built on foundations laid in the earth, and the house, therefore, is immoveable property even though it was conveyed apart from the site on which it stood. The expression immoveable 'property' is defined in the General Clauses Act thus:—"Immoveable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." According to the Indian Registration Act XVI of 1908 immoveable property includes land, buildings . . . . . and things atttached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass." In the Transfer of Property Act immoveable property does not include standing timber, growing crops or grass. It is clear from the definition of the expression "immoveable property" in the three Acts that a house which is built on a site with foundations laid in it is immoveable property. A house which is sold for the purpose of enjoyment as a house with an option to pull it down if the vendee likes, is immoveable property for the purposes of the Transfer of Property Act.

Mr. Krishna Mohan's argument is that the object of the sale was for the purpose of allowing the vendee to remove the materials of the house by pulling it down and, therefore, the sale is of moveable property. I am not satisfied that that was the intention of the parties to Ex-1. Granting for argument's sake that the intention of the parties was that the house should be pulled down and the materials should be removed by the vendee even then, what was sold was the house and not the materials and, therefore, the property that was sold was immoveable property at the time of the sale. In the case of a sale or any other contract we must see in what state the property sold or dealt with under a contract was at the time of the sale or contract. What the parties intended should be done with the property after the sale or contract should not be taken into consideration in deciding whether the sale or contract is of moveable property or of immoveable property. Mr. Krishna Mohan relies upon the decision in *Surapudi Muniappa* v. *Nookala Seshayya* (1), as supporting his contention. The facts in that case were 1st defendant mortgaged certain immoveable property with casuarina plantation on it. After some time the casuarina trees became fit for cutting and they were cut and sold. Defendants Nos. 12 and 13 were impleaded on the ground that they purchased the casuarina plantation. It was held in that case by Coutts-Trotter and Srinivasa Ayangar, JJ., that so far as defendants Nos. 12 and 13 were concerned the suit was barred after 3 years from the date on which the casuarina trees were cut. This case has no application to the present case. In that case it was found that the casuarina trees were grown for the purpose of being cut, and Srinivasa Ayangar, J., held that the mortgagor had a right to fell the casuarina trees for they were planted and grown only for the purpose of being cut for fuel. The finding was that the land was mortgaged and not the trees. Though in the case of a mortgage of land trees also are included, yet it was held there was no separate mortgage of the trees. The provisions of the Transfer of Property Act do not apply to a sale of casuarina trees, for, according to the definition of the

(1) 32 Ind. Cas. 901; 3 L. W. 341.

expression "immoveable property" in the Act standing timber, growing crops or grass are not immoveable property. It was also held in that case that defendants Nos. 12 and 13 were in no sense alienees of the security or a portion of it and the learned Judges were of opinion that what the defendants Nos. 12 and 13 did, only amounted to a tort and the proper period of limitation was the one applicable to the case of a tort. Srinivasa Ayangar, J., was of opinion that Art. 36 was the more appropriate Article applicable to the facts of the case. The principle of the decision is that, if trees which are not the subject of a mortgage are sold and the vendee cuts them down, the mortgagee cannot proceed against him on the ground that he is the alienee of the mortgage property. The case is distinguishable from the present. In the first place, the trees were not mortgaged and in the second place defendants Nos. 12, and 13 were not the alienees. In this case the 2nd defendant's father was the alienee of the property and the property which was sold was immoveable property at the time of the sale.

If the 2nd defendant or his father pulled down the house and utilised the materials for other building or otherwise dealt with them, they cannot escape their liability as vendees of the mortgaged property. The mere fact that the mortgaged property exists in a different shape from that in which it was at the time of the mortgage would not extinguish the mortgagee's right against the property in its converted state, and if the person who has converted it has appropriated it to his own use either in the shape of money or in the shape of materials he would still be liable as a mortgagor. Supposing a person mortgages his house without mortgaging the site on which it stands, if he pulls it down and sells the materials, can he reasonably contend that the mortgagee should only sue the mortgagor as a tort-feasor? Section 66 of the Transfer of Property Act prohibits a mortgagor from committing waste or from injuring the mortgaged property. But the period of limitation available to the mortgagee to proceed against the mortgaged property is not reduced to 3 years by reason of the mortgagor pulling down the house, and selling the materials. The mortgagor would be liable for the mortgage debt if he destroys the mortgaged property, and the period of limitation is not in any way curtailed by the mere fact that the mortgagor wilfully destroys the mortgaged property. If the vendee from a mortgagor destroys or pulls down the mortgaged property, the liability will still attach to him, and the period of limitation in such cases is the usual period of limitation applicable to the case of a mortgage.

I have held in a recent case, *Krishnaswami Bhagavathar* v. *Thirumalai Iyer* (2), that a person who attached and realized in execution of a money-decree the surplus sale proceeds in Court was liable to pay back the amount in order to satisfy the claim of the subsequent mortgagee who was not a party to the mortgage decree in execution of which the sale proceeds were realized. As observed by Sir John Edge in delivering the judgment of their Lordships of the Privy Council in *Barhamdeo Prasad* v. *Tarachand* (3). "The surplus moneys of that sale represented the security which the plaintiffs had under their mortgage of the 19th September 1887 and did not cease to represent that security owing to the fact that Ram Barhamdeo Prasad and Rama Sumran Prasad had wrongfully and in fraud of the plaintiffs drawn them out of the Court in which they had been deposited." In this case the mere fact that the 2nd defendant or his father pulled down the house, sold the materials or used the materials for building another house would not take away the right of the plaintiff to proceed against the 2nd defendant as being in possession of the mortgaged property. The proper Article of Limitation Act applicable to such a case is Art. 142.

The direction in the decree that the sale-proceeds of the hypothecation in the hands of the 1st defendant should be applied in discharge of the mortgage-debt and the balance, if any, should be recovered by the plaintiff from the 2nd defendant's property, is a proper direction.

In the result the second appeal fails and is dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

(2) 90 Ind. Cas. 410.

(3) 21 Ind. Cas. 961; 41 C. 654; 15 M. L. T. 62; (1914) M. W. N. 38; 12 A. L. J. 82; 18 C. W. N. 345; 19 C. L. J. 132; 16 Bom. L. R. 89; 26 M. L. J. 243; 41 I. A. 45 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1323 OF 1923.

June 10, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

MAHIM CHANDRA DEY—PLAINTIFF—APPELLANT

versus

RAMDAYAL DUTTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Registration Act (XVI of 1908), s. 17—Mortgage, discharge of—Payment—Release—Oral evidence to prove release, whether admissible.

A mortgage is discharged either by payment of the full amount of the debt or by release of the debt itself. A discharge of the debt by payment may be proved by oral evidence. A release may also be effected by parol, but if it is in writing it should be registered, if it falls within the provisions of s. 17 of the Registration Act. There is, therefore, nothing in law which excludes oral evidence of the discharge of a mortgage-bond when it is pleaded that the discharge was effected partly by payment of money and partly by release of the debt. [p. 757, col. 2; p. 758, col. 1.]

Appeal against a decree of the Second Additional District Judge, Mymensingh, dated the 2nd December 1922, affirming that of the Munsif, First Court at that place, dated the 23rd December 1921.

Dr. *Radhabenode Pal* and Babu *Hemkumar Bose*, for the Appellant.

Babu *Annoda Charan Karkoon*, for the Respondents.

JUDGMENT.

Ghose, J.—This appeal arises out of a suit brought on a mortgage-bond. Both the Courts below found that the mortgage debt was discharged by the defendants depositing Rs. 600 and odd with the landlord with the consent of the plaintiffs. The mortgage-debt on that date came up to Rs. 673-7. Upon the finding that the mortgage-debt was discharged as aforesaid both the Courts below dismissed the plaintiff's suit. The plaintiff appeals and the sole contention on his behalf is that oral evidence is not admissible to prove the discharge of the debt, inasmuch as it imports an agreement to relinquish Rs. 73 odd of the mortgage-debt. In support of this contention reliance has been placed upon two cases. The first of these, is the case of *G. P. Mallapa* v. *Matura Nagu Chetty* (1). The head-note of the case runs thus "A subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and if, it has to be proved, oral evidence is inadmissible under s. 92, proviso 4 of the Indian Evidence Act". In that case, however, it was held that the defendant was exonerated from the liability of proving the agreement, because it was admitted by the plaintiff. Under s. 58 of the Evidence Act, such plea was taken into consideration and given effect to. The case only lays down the rule enacted under s. 92 of the Evidence Act and can hardly be said to be an authority for the proposition advanced on behalf of the appellant. The next case relied on is that of *Jagannath Kashiram* v. *Shankar Ganpat Shimpi* (2). That case seems to be in point. There the debtor had alleged that he had paid a sum of money in full discharge of the mortgage-debt although a larger sum was due on the mortgage-bond. Sir Norman Macleod, C. J., observed at page 58* thus: "But the argument before us has been that there has not been a subsequent oral agreement to rescind or modify the mortgage, but there has been an actual discharge, and that oral evidence was admissible to prove a discharge. In my opinion there is no substance in that argument. The defendant's case must be that the mortgagee agreed to receive Rs. 800 in full satisfaction of the much greater amount which was due on the mortgage, and although he might have said when receiving Rs. 800 'I now discharge you from the mortgage' there was nonetheless an agreement which modified the original agreement of mortgage." With all respect I am unable to accept the reasoning of the learned Chief Justice. A mortgage is discharged either by payment of the full amount of the debt or by release of the debt itself. It has never been doubted that a discharge of the debt by payment may be proved by oral evidence. This point is not contested on behalf of the appellant. The cases in support of this will be found referred to in *Ariyaputhira Padayachi* v. *Multhukomaraswami Padayachi* (3). Oral evidence of such discharge is not excluded by any provision of s. 92 of the Evidence Act. A release of a debt also may be effected by parol, but if it is in writing it should be registered, if it falls within the provisions of s. 17 of the Registration Act. The release

(1) 48 Ind. Cas. 158; 42 M. 41; 8 L. W. 522; (1918) M. W. N. 719; 35 M. L. J. 555; 24 M. L. T. 400.

(2) 54 Ind. Cas. 689; 44 B. 55; 22 Bom. L. R. 39.

(3) 15 Ind. Cas. 343; 37 M. 423; 12 M. L. T. 425; 33 M. L. J. 339; (1912) M. W. N. 854.

*Page of 44 B.—[*Ed.*]

for value is not a transfer of ownership, and though it is true a person who releases a security without consideration may be said to make a gift of it, the transaction does not fall under Ch. VII of the Transfer of Property Act which deals only with gifts of tangible property. There is nothing in the law which requires a writing for a release of the debt by the creditor. What then is there to exclude oral evidence of the discharge of a mortgage-bond when it is pleaded that it was made partly by payment of money and partly by release of the debt? If the creditor says to the debtor "I now discharge you from the debt" or if he says "I make a free gift to you of the money you owe me" I do not think that this can be called an agreement as there is neither any promise to perform anything in future nor is there any consideration for it. Nothing has been left to be done and the transaction is completed at the moment when the release is made. Such a transaction does not fall within proviso (4) to s. 92 of the Evidenced Act and I do not think that oral evidence of it is excluded by that proviso. The fear expressed by the learned Chief Justice that it would be an extremely dangerous precedent if oral evidence were allowed of such a transaction does not also impress me and I think that the danger may be the other way. Such evidence has seldom been excluded in this province. It is common knowledge that when a debtor makes payment of his debt amicably to his *mahajan* a remission is often made of a part of the interest due on account of the mortgage-bond. If it be held that this release cannot be proved by oral evidence, the mortgagee may sue his debtor for the amount remitted years after the debt was fully discharged: and this he may do, not withstanding that he had returned the mortgage-bond to the debtor on obtaining full satisfaction, for nothing but a proper document would prove the remission. This, however, would be a position which cannot be contemplated. I, therefore, think that oral evidence may be admitted to prove that a mortgage-bond has been discharged partly by payment and partly by release of the debt and there is nothing in s. 92 of the Evidence Act to prevent such evidence being admittted.

On this ground, I would dismiss the appeal with costs.

Greaves, J.—I agree.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 720 OF 1922.

March 11, 1925.

Present:—Mr. Justice Odgers.

BAPANNA SITAYYA—PLAINTIFF—APPELLANT

versus

PARUCHURI RAMASWAMI AND ANOTHER—DEFENDANT NO. 3 AND HIS LEGAL REPRESENTATIVE—RESPONDENTS.

Contract Act (IX of 1872), s. 64—Limitation Act (IX of 1908), s. 6 (3)—Hindu Law—Minor—Alienation of minor's property by guardian—Death of minor—Reversioner, suit by, to set aside alienation, whether competent—Reversioner, whether bound to refund consideration.

The guardian of a Hindu minor sold certain property belonging to the minor in consideration of a cash payment and in exchange of certain properties conveyed by the vendee to the minor. The guardian subsequently sold the properties obtained in exchange. After the death of the minor the next reversioner of the minor brought a suit to set aside the alienation of the minor's properties by the guardian:

Held, (1) that inasmuch as the guardian of the minor had sold away the properties obtained in exchange for the minor's properties and the benefit of the exchange had not been obtained by the reversioner, the latter could not be compelled to refund the value of such properties to the defendant as a condition precedent for obtaining possession of the properties of the minor;

(2) that after the death of the minor the reversioner was entitled to enforce the minor's right to set aside the alienation of his property by his guardian.

Second appeal against a decree of the Court of the Subordinate Judge, Masulipatam, in Appeal Suit No. 134 of 1921, preferred against that of the Court of the District Munsif, Avanigadda, at Masulipatam, in O. S. No. 517 of 1917.

Messrs. *C. S. Venkatachariar* and *A. Venkatachalam*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—In this appeal there is only one question argued and that relates to Item No.3 of the properties in the suit. Item No. 3 has been found by both the Courts to have been alienated by Venkamma, mother and guardian of Sriramulu, the minor proprietor, in favour of the 3rd defendant not for any necessity, or for purposes binding on the minor. This question is not argued before me. But what is argued is the award of Rs. 600 to the third defendant, which is made a condition of the plaintiff's (who is a reversioner to the estate of the minor Sriramulu) recovery of item No.3. Now this item of property was alienated to the 3rd defendant by the widow on the 16th of May 1912 by Ex. VIII. On the same day

the vendee, 3rd defendant, executed to Venkamma the exchange of 91 cents of property as against 96 cents. contained in Ex. VIII and he also paid her Rs. 180 to equalise matters. This land, received in exchange under Ex. VIII (*a*) was subsequently alienated by Venkamma in 1913 under Ex. III, and subsequently alienated by the alienee under Ex. III, by Ex. IX. Now the question is whether the 3rd defendant is to be paid Rs. 600 as a condition for his relinquishing the land in favour of the reversioner. The question depends partly on s. 64 of the Contract Act, but chiefly on equitable considerations. The lower Appellate Court has held that, although a part of the consideration consisting of cash payment of Rs. 180 has in no way benefited the minor's estate, there is no justification for depriving the 3rd defendant of his right of reimbursement merely because the property has been alienated subsequently by the guardian; and Mr. P. Somasundaram for the respondents has argued that, as a matter of fact, some benefit has been received by the minor's estate in that for a period of 17 or 18 months, the exchanged land received under Ex. VIII (*a*) was, in fact, in the hands of the guardian on behalf of the minor. Now the law seems to have been clearly laid down in *Modhoo Dyal Singh* v. *Golbur Singh* (1) by a Full Bench of the Calcutta High Court to this effect, "If it is proved to the satisfaction of the Court that the purchase money was carried to the assets of the joint estate and that the son had the benefit of his share of it, he could not recover his share of the estate without refunding his share of the purchase money".

That, of course, was a suit by a son to recover the ancestral property from a purchaser from his father to whom it had been improperly sold. But in my opinion the same considerations will apply to the case of a reversioner. It is obvious that no consideration of equities, if any, enjoyed by the 3rd defendant can arise unless and until the alienation to him has been set aside. The benefit mentioned in the cases must, therefore, in my opinion, be benefit arising not at the time of the transaction [in this case the time of Ex. VIII (*a*)] but at the time when the reversioner has a right to receive the property of the last mail-holder and with regard to this Item No. 3 his right to receive it accrues when a decree in his favour is passed. Reference has also been made to the case in *Chinnaswami Reddi* v. *Krishnaswami Reddi* (2). In that case lands were sold by the guardian and other lands were purchased with the proceeds. The question was whether the produce of these lands could be said to be the benefit which the defendants received in respect of the sale by their mother. It was held that the benefit received should be part of the same transaction and should be direct, and that in the case before them the learned Judges held that it was not so. With regard to the case in *Bachan Singh* v. *Kamta Pershad* (3) there, to a certain extent it was held that the minor's estate had been benefited and he was given a decree on condition of re-paying a portion of the consideration. Here there is no question of partial re-payment. Mr. Somasundram has filed a memorandum of objections and the point raised is that the suit is *ab initio* not maintainable, *i. e.*, that, although the minor might have sued to set aside the alienation of his mother as guardian, he having died under age, his right to sue is not heritable by the reversioner as his legal representative. There seems to be direct authority in *Muhammad Husain* v. *Khushalo* (4) to the contrary; and this view finds further support in the Limitation Act, s. 6, sub-s. 3, and Trevelyan's Book on Minors, 202.

I am, therefore, of opinion that the memorandum of objection fails.

The appeal, for the reasons stated above, must be allowed and the decree of the lower Appellate Court in so far as it awards compensation to the 3rd defendant is reversed. Under my decision the plaintiff will be entitled to mesne profits from the date of suit. In other respects the decree is confirmed with costs.

The memorandum of objections is dismissed without costs.

V. N. V.

Z. K. *Appeal allowed.*

(1) 9 W. R. 511; B. L. R. Sup. Vol. 1018.

(2) 48 Ind. Cas. 856; 42 M. 36; 35 M. L. J. 652.

(3) 5 Ind. Cas. 585; 32 A. 392 at p. 396; 7 A. L. J. 337.

(4) 19 A. 131; A. W. N. (1886) 322; 5 Ind. Dec. (N. S.) 519.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 319 OF 1923.

May 12, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Pearson.

G. L. SITARAM—CREDITOR No. 1—APPELLANT

versus

R. M. REDDEN—INSOLVENT—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 41—Order of discharge, conditional—Creditor withdrawing money, whether can appeal—Discharge, when to be granted.

The over-riding intention of the Legislature in all Insolvency Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood and having the ordinary inducements to industry. Sometimes it is not right that the insolvent should be free immediately; he must pass through a period of probation and theoretically there may be cases in which he ought not to be free at all, but *prima facie* he has to give up everything of his and on doing that he is to be a free man. [p. 760, col. 2.]

Where an order of discharge of an insolvent is made conditional on the insolvent making certain payments to his creditors, the mere fact that a creditor takes out moneys already paid by the insolvent which were available for distribution among the creditors would not debar him from preferring an appeal against the order of discharge. [p. 761, col. 1.]

Appeal against an order of the District Judge, Midnapur, dated the 7th July 1923.

Dr. *Sarat Chandra Basak* and Babu *Chandra Sekhar Sen*, for the Appellant.

Babu *Gopendra Nath Das*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the District Judge of Midnapore granting the insolvent a conditional discharge under s. 41 of the Provincial Insolvency Act V of 1920. The insolvent in this case R. M. Redden is a guard employed in the Bengal Nagpur Railway. At the time of his application in insolvency that is on the 27th October 1919 his total pay with allowances was Rs. 248. His total debts as shown in the application were Rs. 3,619. Except his pay and allowances he had no other assets. On the 21st February 1920 the Court made an order directing him to pay Rs. 25 a month. This amount was paid more or less regularly up to July 1923. In the meantime he made two applications for his discharge. The first was refused on the 29th August 1922. His second application, on which was passed the order against which this appeal is preferred, was made on the 10th April 1923. The order that is passed was that he should get a conditional discharge on condition that he pays the creditor No. 1 Rs. 30 a month for one year. This creditor No. 1 is the appellant before us. At the time this order was passed the Court also passed an order that the appellant should get the money at present in deposit in Court.

A preliminary objection has been taken that this appeal is not maintainable since the appellant has taken advantage of this order. In our opinion there is no substance in this objection. The money had been paid into Court before the order was made and was available for distribution among the creditors. The Court in distributing this sum among the creditors passed the order for payment to the appellant independently of any order made on the respondent's application for discharge. By taking money out of Court the appellant did nothing which could in any way prevent him either by equity or estoppel from appealing against an independent order of conditional discharge.

But on the merits we can see no ground for interfering with this order. Under cl. (2) sub-cl. (*e*) of s. 41 of the Act the order passed was one which the Court had full power to pass, and we are unable to say that in passing this order he did not exercise a proper judicial discretion. The principles on which an order of discharge should be granted or postponed have been set out by Lord Justice Vaughan Williams in the case of *Gaskell, In re Gaskell Ex parte* (1). "After all, the overriding intention of the Legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood and having the ordinary inducements to industry. Sometimes it is not right that the bankrupt should be free immediately, he must pass through a period of probation, and theoretically there may be cases in which he ought not to be free at all, but *prima facie* he is to give up every thing he has, and on doing that he is to be made a free man. Now what is the position of the bankrupt in this case? If I thought that there was any tangible expectation of his receiving a larger income than that which is necessary for his support in his position of life as an officer in the army, then I should see the propriety of suspending his discharge for a longer period, or even of setting aside some portion of his income. I see no reason to suppose that a suspension of his dis-

(1) (1901) 2 K. B. 478 at p. 482; 73 L. J. K. B. 656; 91 L. T. 221; 11 Manson 125; 20 T. L. R. 469.

charge for two years will not meet the justice of the case". If in this case we substitute for the words "officer in the army" the words "guard of the Railway with a large family" and for two years we substitute five years as the period of postponing the discharge the remarks apply equally to the present case.

The argument on behalf of the appellant is that since the application in insolvency was made the respondent has had an increase of pay and also that he has no longer to make the monthly payment of Rs. 31 odd on account of one of the monthly deductions shown in his petition. But that, in our opinion, is no ground for further delaying the respondent's discharge *prima facie* on his giving up the whole of his property he was entitled to become a free man. The period for which the decharge should be suspended as the punishment for his misconduct in incurring debts beyond his means is not to be measured by the amount of his debts. He has now paid a considerable sum and his discharge has been postponed for about five years. We are informed that the total amount directed to be paid by the conditional order has now been paid and though it was not paid within the period prescribed the lower Court when his attention was drawn to the failure of the insolvent to make some payment was satisfied with his explanation. His order of the 13th December 1923 is not very clearly worded but his meaning obviously is that the time for payment is extended and that the insolvent will be entitled to an order of discharge when 12 payments of Rs. 30 have been duly made.

On a consideration of the circumstances of the case we hold that the order passed was a proper order and the discretion of the learned District Judge was properly exercised. The appeal is accordingly dismissed with costs. We assess the hearing fee at 3 gold *mohurs*.

Appeal dismissed.

M. B.
Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 615 OF 1923.

July 23, 1925.

Present :—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

RAFAT SHEIK AND OTHERS—DEFENDANTS—APPELLANTS

versus

SACHINDRA KUMAR LAHIRI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Possession, suit for—Defendant holding land under plaintiff—Burden of proof.

Because a defendant in a suit for the recovery of possession of land is found to be a tenant of some land under the plaintiff, the burden is not thereby cast upon the plaintiff to establish that the land he seeks to recover is outside the tenancy of the defendant. [p. 761, col. 2; p. 762, col. 1.]

Appeal against a decree of the Officiating Subordinate Judge, First Court, Pabna and Bogra, dated the 27th October 1922, affirming that of the Munsif Additional Court, Serajganj, dated the 15th May 1922.

Mr. *Amarendra Nath Bose* and Babu *Arun Chandra Bose*, for the Appellants.

Babu *Bireswar Bagchi*, for the Respondents.

JUDGMENT.—The only point urged in this second appeal is that the lower Appellate Court was wrong in holding that the onus was on the defendants to prove that the lands in suit were included in their tenancy. In this case the plaintiffs are admittedly the superior landlords of the lands in suit, these lands having fallen to their share of the estate after partition. For the appellants it is contended as was contended before the lower Appellate Court that it being admitted that they have tenancy under the plaintiffs it is for the plaintiffs to prove that the suit lands are out side the tenancy. The authorities are against this contention. It is sufficient to cite three cases reported as *Gopini Debi* v. *Lokenath Tewari* (1), *Protap Chandra Roy* v. *Judhister Das* (2) and *Manners* v. *Harihar Dutt Koer* (3). The passage most in point will be found in the head note of the second of these cases. At page 144* it is stated, "It is not the law that because a defendant is found to be a tenant of some land under the plaintiff, the burden is thereby cast upon the plaintiff to establish that the

(1) 11 Ind. Cas. 695; 19 C. W. N. 110.
(2) 23 Ind. Cas. 69; 19 C. W. N. 143; 19 C. L. J. 408.
(3) 22 Ind. Cas. 563; 19 C. W. N. 149.

*Page of 19 C. W. N.—[*Ed.*]

land he seeks to recover is outside the tenancy of the defendant" It is contended on behalf of the appellants that these cases are distinguishable, because in them the landlord was the owner of a whole *mouza* or *touzi*. We find nothing in the rulings to indicate that anything turned on that point. The law is equally applicable in the case of a landlord holding *zemindari* interest, whether he is the owner of a *mouza* or is the owner of a specific portion of the lands of a *mouza* after partition.

The appeal is dismissed with costs to the respondents who appear.

M. B. *Appeal dismissed.*

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2567 OF 1924.

April 23, 1925.

Present:—Mr. Justice Jai Lal.

RAM CHAND—DEFENDANT—APPELLANT

versus

NANAK CHAND AND OTHERS—RESPONDENTS.

Mortgage—Redemption suit—Mortgage-deed, proof of—Covenants contained in mortgage-deed, whether proved—Burden of proof—Interest, compound, whether penalty—Contract Act (IX of 1872), s. 74.

Where in a suit for redemption of a mortgage, the mortgage-deed is produced by the mortgagee and is duly proved, all the conditions contained in the mortgage-deed must be taken to have been proved. If either party wants to impugn any condition contained in the mortgage-deed it is his duty expressly to raise a plea to that effect and to establish that plea by evidence. In the absence of such a plea and evidence to support the plea, the plaintiff is bound to pay to the mortgagee the full amount which is recoverable on the basis of the mortgage-deed.

A covenant in a mortgage-deed providing for the payment of compound interest at the rate of Re. 1-8-3 per cent. per mensem does not by itself amount to a penalty.

Second appeal from a decree of the District Judge, Attock, dated the 16th June 1924.

Mr. *Mukund Lal Puri*, for the Appellant.

Mr. *C. L. Gulati*, for the Respondent.

JUDGMENT.—On the 10th of July 1913 one Darab mortgaged the house in suit for Rs. 49 to Ram Chand. The condition in the mortgage-deed was that the mortgaged land was to be given possession of to the mortgagee in lieu of interest on Rs. 19 and that Rs. 30 was to bear compound interest at the rate of Re. 1-8-3 per cent. per mensem. The mortgagor and sons subsequently sold the land to Nanak Chand and Ram Lal, plaintiffs. On the sale-deed it was stated that the house was mortgaged to Ram Chand for Rs. 50 and that the mortgagors would redeem the mortgage. The purchasers, Nank Chand and Ram Lal, instituted this suit on the 31st of July 1923 against the mortgagee and their vendors for possession of the house. The mortgagee claimed Rs. 3,349 on the basis of his mortgage. The mortgage-deed was produced in Court and duly proved by witnesses, but no question was asked by either party as to the considertion about the compound interest as contained in the mortgage-deed. Both the lower Courts have agreed in awarding a decree to the plaintiffs on payment of Rs. 184-10-0 and hold that as the witnesses did not expressly mention the condition of compound interest, therefore, such interest was not claimable. In my opinion the view of the lower Courts is erroneous. The mortgage-deed was produced by the mortgagee and duly proved, and consequently all the conditions contained in the mortgage-deed must be taken to have been proved. If either party wanted to impugn any condition contained in the mortgage-deed it was his duty expressly to raise a plea to that effect and to establish that plea. No. such plea was raised nor was any evidence produced by the mortgagor or by the plaintiffs. The plaintiffs were bound to pay to the mortgagee the full amount which was recoverable on the basis of the mortgage-deed and it is admitted before me that according to the conditions contained in the mortgage-deed the amount due to the mortgagee would exceed Rs. 884-10-0. The mortgagee in his appeal to the District Judge having claimed only Rs. 700 in addition to the sum decreed in his favour is entitled to recover that amount only. A feeble plea was raised by the learnd Counsel for the respondents before me that the interest was penal and the bargain was unconscionable. This plea is fully met by the judgments of their Lordships of the Privy Council reported as *Aziz Khan* v. *Duni Chand* (1) and *Balla Mal* v. *Ahad Shah* (2).

(1) 48 Ind. Cas. 933; 101 P. R. 1918; 23 C. W. N. 130 165 P. W. R. 1918 (P. C.).

(2) 48 Ind. Cas. 1; 124 P. R. 1918; 35 M. L. J. 614; 25 M. L. T. 55; 16 A. L. J. 905; 23 C. W. N. 233; 180 P. W. R. 1918; 29 C. L. J. 165; 21 Bom. L. R. 558; 1 U. P. L. R. (P. C.) 25 (P. C.).

Accepting the appeal I vary the decrees of the lower Courts by raising the amount payable by the plaintiffs to the mortgagee-appellant from Rs. 184-10-0 to Rs. 884-10 0. The appellant will have his costs throughout.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2002 TO 2005 OF 1922.

July 9, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

CHUNDY CHURN LAW—

PLAINTIFF—APPELLANT

versus

BALARAM GOPE AND OTHERS—

—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 105—Suit to recover rent for additional area—Measurement, accuracy of—Presumption—Deductions from rent, when can be made.

Ordinarily measurements made by Settlement Officers are accepted as scientifically made and correct, but measurements made by the landlord are not so scientifically made and it may be that such measurements may be open to challenge in a suit to recover rent for additional area but unless such measurements are challenged as inaccurate, *prima facie* they ought to be accepted as correct. Where in answer to a suit to recover rent for additional area a plea is taken that the measurements are not correct, and the Court finds from the circumstances that there are reasons to believe that the previous measurements were inaccurate the Court ought, upon the circumstances and evidence in each case, to find whether the previous measurements were or were not, as a matter of fact, accurate. If they are found to be inaccurate the Court should make such a deduction from the rent as would, in the circumstances of the case, give an approximate and accurate result. But in the absence of any case that the previous measurements are inaccurate, the Court is not justified in making a deduction from the rent. [p. 764, cols. 1 & 2.]

Appeals against the decrees of the Additional Special Judge, Tipperah, dated the 21st of March 1922, modifying those of the Assistant Settlement Officer, Comilla, dated the 17th of June 1920.

Mr. *Narendra Chandra Bose* and Babu *Satyendra Nath Mitter*, for the Appellant.

JUDGMENT.

IN No. 2002 OF 1922.

Chakravarti, J.—This is an appeal by the plaintiff—the landlord—against a judgment of the Special Judge of Tipperah, dated the 21st of March 1922. This appeal arises out of an application made by the landlord under s. 105 of the Bengal Tenancy Act for a settlement of fair and equitable rent and also for additional rent for additional area held by the *raiyats*. The only question which is now before us relates to the question as to additional rent for additional area claimed by the plaintiff.

It appears that the tenants, the defendants, held under a written and registered *kabuliyat*. The *kabuliyat* mentions the area for which the rent was fixed. The landlord after the Record of Rights had been prepared contended that the area now found was more than the area for which the defendants—the *raiyats*—were paying rent. The defence of the defendants was a total denial of the fact that the *kabuliyat* was executed after any measurement at all. They further contended that the standard of measurement adopted at the time of the initial measurement was not the standard of measurement which the plaintiff claimed but that the standard was different. No question it appears was raised that the area stated in the *kabuliyat* was inaccurate. The defendants did not raise the question that the area stated in the *kabuliyat* was arrived at by a measurement which was inaccurate. The Settlement Officer found that there was additional area. In calculating the additional area the Settlement Officer made a deduction from the area of 10 per cent.

On appeal the plaintiff challenged the finding of the Settlement Officer as to the deduction of 10 per cent. The lower Appellate Court in disposing of that contention stated as follows: "His next contention is that a 10 per cent. allowance for closeness of survey should not have been made in calculating the excess land where additional rent was allowed, firstly because that is not in the contract, secondly because the statement of area in the *kabuliyat* should be taken as an admission and conclusive against the tenant. There is force in these arguments but I cannot myself see why in interpreting the measurements of the present settlement to discover excess area, the empiric rule laid down by the survey people themselves should not be followed. I accordingly agree herein with the lower Court."

Now, as I have already stated, the present appeal is by the plaintiff and the learned Advocate for the appellant has contended that the lower Appellate Court was wrong

in allowing a 10 per cent. deduction simply on a certain empiric rule laid down by the Survey Officers. The question as to whether there should be a deduction from the ascertained area or not as allowed here was raised in a case reported as *Lakhi Narain Sarongi* v. *Sri Ram Chandra Bhunyal* (1) and their Lordships in deciding that question said as follows: "Here however, as we have already stated, it is specifically known that the area was ascertained by scientific methods, consequently the only inference which could be legitimately drawn was that the lands measured and described as lying within certain boundaries were let out to the tenants" Then, later on, their Lordships said: "On behalf of the landlord-respondent two cross-objections have been urged. It has been contended in the first place that under s. 52 the landlord is entitled to additional rent for all lands proved by measurement to be in excess of the area for which rent has been previously paid by the tenant and that consequently the Courts below were not entitled to allow a reduction of 10 per cent. from the area as ascertained by measurement. *Prima facie* this contention appears to be well founded, but upon a closer examination it turns out to be unsubstantial. The Special Judge has held in effect that although on a previous occasion the lands were measured the measurement was not absolutely accurate and he has practically made a deduction of 10 per cent. to allow for possible errors in the measurement." In the present case the area was stated in the *kabuliyat* executed by the tenants. *Prima facie* that statement would be accepted as correct unless it was challenged by the defendants as incorrect. In the present case no such plea has been taken by the defendants. The rule as was indicated in the case to which I have referred was also adopted in *Baidya Nath Dutt* v. *Jawahir Mandal* (2) decided on 20th March 1914 by Mr. Justice Coxe and Mr. Justice Imam. It appears to us that there is no reason to allow any deduction from a scientific measurement or any other measurement unless it is shown that either of those two measurements was inaccurate. Ordinarily the measurements made by Settlement Officers are accepted as scientifically made and correct but the measurements made by the landlord are not so scientifically made and it may be that such measurements may be challenged, but unless such measurements are challenged as inaccurate *prima facie* they ought to be accepted as correct. When any such plea is taken and the Court finds from the circumstances, as was found in the case of *Lakhi Narain Sarongi* v. *Sri Ram Chandra Bhunyal* (1), to which I have just referred, that there are reasons to believe that the previous measurement was inaccurate, in such a case the Court ought, upon the circumstances and evidence in each case, to find whether the previous measurement was or was not accurate. If it is found to be inaccurate then the Court would make certain deductions as would, in the circumstances of that case, give an approximate and accurate result. But, in the absence of any case that the previous measurement was inaccurate, I do not see on what principle of law a deduction of 10 per cent. can be made. In the present case, as I have already stated, the previous measurement was not challenged as inaccurate. That being so, I do not find any reason given by the learned Special Judge upon which the landlord is not entitled to claim rent for the difference between the area which was stated in the *kabuliyat* and the area now found by the Settlement Officer. In this view, I think, that the decree of the learned Special Judge ought to be varied by allowing the plaintiff to get rent for the whole of the area without any deduction of 10 per cent. Therefore, the plaintiff would be entitled to additional rent for the area shown to be in excess without any deduction of 10 per cent.

The result, therefore, is that the decree of the lower Appellate Court is modified as stated above. The appellant is entitled to his costs in this Court; hearing fee one gold *mohur*.

This decision governs Appeals Nos. 2003, 2004 and 2005 of 1922. The hearing fee is assessed at one gold *mohur* in each case.

Cuming, J.—I agree.

By the Court.—We are informed that the sole respondent in Second Appeal No. 2004 of 1922 which was disposed of by us on the 19th May 1925 died more than three months before the disposal of the appeal. Our judgment of the 19th May 1925 is, therefore, of no

(1) 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146.

(2) 23 Ind. Cas. 794.

effect as regards this appeal which has abated.

M. B.
Z. K.

Appeal allowed.
Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 649 OF 1924.

August 5, 1925.

Present:—Mr. Justice Phillips.

PASUMARTI SEETHANNA—DEFENDANT No. 2—APPELLANT

versus

THAMANDRA YASIKALAPPA—PLAINTIFF—RESPONDENT.

Contract—Breach of contract—Advance, whether liable to be forfeited—Intention of parties.

Where a sum of money is paid in advance on account of a contract as a deposit and the person making the deposit commits a breach of contract, the other party is entitled to retain the full amount of the deposit as damages for breach of contract. Every payment, however, made by a party to a contract as an advance towards the contract is not in the nature of a deposit and is not liable to be forfeited if the party making the deposit violates the contract. It is incumbent upon the Court to endeavour to ascertain the real intention of the parties from all the terms of the contract. Whether an advance is given as security for performance of the contract or merely in part-payment is a question of the intention of the parties and where it is found that the advance is not in the nature of a deposit or a security for performance of the contract, the party to whom the advance has been made is not entitled to retain the amount of the advance unless it has suffered damage to an equivalent or greater sum owing to the default of the party making the advance. p. 765, col. 2.]

Second appeal against a decree of the Court of the Subordinate Judge, Kistna at Ellore, in A. S. No. 176 of 1923, preferred against that of the Court of the Principal District Munsif, Ellore, in O. S. No. 43 of 1922.

Mr. *P. Venkataramana Rao*, for the Appellant.

Mr. *B. Somayya*, for the Respondent.

JUDGMENT.—The lower Appellate Court has found that the plaintiff committed default in respect of a contract to purchase 1501 bags of rice from the first defendant. The plaintiff paid a sum of Rs. 6,000 in advance and the lower Appellate Court has held that the plaintiff is entitled to return of this money after deducting certain sums which the defendant is entitled to retain. The second defendant (widow of first defendant) now appeals and contends that she is entitled to retain the whole Rs. 6,000 on the ground that it was paid as deposit. This question of whether it was paid as a deposit has not been raised in either of the lower Courts; but the appellant relies on certain cases for the proposition that whenever money is paid in advance on account of a contract, the vendor is entitled on breach of contract to retain the whole sum. That is the effect of the rulings cited where the money has been paid as deposit. In *Roshan Lal* v. *Delhi Cloth and General Mills Co., Ltd., Delhi* (1) where earnest money was paid and in *Bishan Chand* v. *Radha Krishna Das* (2) where a deposit was paid, it was held that the vendor was entitled to retain the money deposited on breach of the contract. The Full Bench decision in *Natesa Aiyar Appavu* v. *Padayachi* (3) relates to a contract in which there was a specific clause of forfeiture and does not appear to be applicable here. In *Habibulla* v. *Arman Dewan* (4) the law on the point has been reviewed with great care and the conclusion arrived at is that "the deposit, if nothing more is said about it, is, according to the ordinary interpretation of businessmen, a security for the completion of the purchase, so that in the event of the contract being performed it is brought into account, but if the contract is not performed by the payer, it is forfeited to the payee. But every payment made by the purchaser to the vendor is not in the nature of a deposit liable to be forfeited if the purchaser violates his contract. It is incumbent on the Court in each case to ascertain the real intention of the parties from all the terms of the contract." This with all respects appears to me to be the correct interpretation of the law on the subject. Whether an advance is given as security for performance or merely in part-payment is a question of the intention of the parties. It may well be that in a certain contract, the purchaser may, to oblige the vendor, pay some of the purchase-money, in advance, can it be said in that case that he paid that money as a security for performance of the contract? If he did not pay it as security, there is no reason why the vendor should retain such money

(1) 7 Ind. Cas. 794; 33 A. 166; 7 A. L. J. 1019.
(2) 19 A. 489; A. W. N. (1897) 123; 9 Ind. Dec. (N. S.) 316.
(3) 19 Ind. Cas. 462; 38 M. 178; (1913) M. W. N. 341; 24 M. L. J. 488; 13 M. L. T. 391.
(4) 53 Ind. Cas. 875; 24 C. W. N. 40; 30 C. L. J. 113.

unless he has himself suffered damage to an equivalent or greater sum owing to the purchaser's breach. The question has not been raised at all in the present proceedings. There is no definite written contract from which the intention of the parties can be ascertained, but so far as appears from the lower Appellate Court's judgment it was not the intention of the parties to treat this money as a deposit. It is found that the defendant wanted ready money to pay to his vendors and also that the defendant actually returned a portion of the deposit when the contract came to an end. Without a finding or some evidence from which it may be inferred that this advance was in the nature of a security deposit, I cannot allow the objection to be taken now.

A further objection is taken by the appellant as to the damage sustained, but this appears to be purely a question of fact which the lower Appellate Court was entitled to decide finally and this objection must be disallowed.

The respondent has filed a memorandum of objections in which he first of all objects to the lower Appellate Court's finding that he was guilty of breach of contract. This is a question of fact and it appears to me that on the facts found by the lower Appellate Court, namely, that certain rice was available for delivery to the plaintiff and the plaintiff refused to accept it on some excuse or other not having the cash ready to pay for delivery, it has rightly found that the plaintiff committed default. The argument that there is no finding that the defendant had rice ready for delivery does not appear to me to be correct in view of the statement that the plaintiff made some excuse, or other to avoid taking delivery.

A further point is raised by the respondent and that is that interest should have been allowed to him from the date of the plaint to the date of the first Court's decree. On reading the judgment of the lower Appellate Court, I think this contention is correct and that the omission to provide for this interest in the decree is a mistake. This mistake apparently could not be corrected in the lower Appellate Court because this appeal was filed before an opportunity could be obtained.

The objection is allowed and the decree will be modified to the extent of allowing interest at 6 per cent. from the date of plaint 20th September 1920 till payment. In the result the second appeal is dismissed with costs and the memorandum of objections, subject to the modification above is dismissed, respondent paying and receiving proportionate costs.

V. N. V.

Z. K. *Decree modified.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 12 OF 1923.

August 29, 1924.

Present:—Mr. Kennedy, J. C., and Mr. Aston, A. J. C.

ASSARMAL AND ANOTHER—APPELLANTS

versus

HUNDOMAL AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 12—Accounts, examination of—Commissioner, appointment of—Instructions—Duty of Court.

Where a Commissioner has to be appointed in a suit to examine books of account, it is better for the Court itself to settle the exact terms of the order to the Commissioner and ask him to report on certain definite lines and not to leave those points for decision by the Commissioner, that is, not to make him a sort of inferior Judicial Officer. [p. 767, col. 1.]

It is generally the business of the Court itself to ascertain which books are true or false, which party is or is not keeping back the books, what documents are relevant and the like, and it is desirable that these matters should be decided before a Commissioner is appointed. [*ibid.*]

Appeal against the judgment and decree of the District Judge, Sukkur.

Mr. *Kimatrai Bhojraj*, for the Appellants.

Mr. *Kundanmal Dayaram*, for the Respondents.

JUDGMENT.—This is a very deplorable suit which has been wandering on since 1920 and we have had a reasonable hope that it had been disposed on a side issue.

The suit was one by a capitalist partner against his *gumashta* partners who are present respondents. Various issues were decided and it was held that the parties were partners and all that remained was to ascertain what is due from one side to the other on taking accounts of the partnership. There was very apparently, as a matter of fact, no books of partnership forthcoming. We have not the preliminary judgment of the Trial Court before us, there-

fore, it is difficult to ascertain what the reference to the Commissioner was or how he was to take account if there were no accounts forthcoming. As a general rule, it is better for the Court itself to settle the exact terms of the order to the Commissioner and ask him to report on certain definite lines and not to leave those points for decision for the Commissioner, that is not to make him a sort of inferior Judicial Officer. It is generally the business of the Court to ascertain which books are true or false, which party is or is not keeping back the books, what documents are relevant and the like, and it is, as a general rule, desirable that these matters should be decided before a Commissioner is appointed.

In the present case however it appears that among the other duties of the Commissioner it was assigned to him to report or ascertain who was in possession of the partnership books.

The enquiry was to take place at Jacobabad and the Commissioner appointed was a Pleader from Shikarpur. The Commissioner fixed 8 o'clock on a morning on a Sunday for the enquiry. At 10 minutes past 8 A. M. no body appeared on behalf of the plaintiff and it also appears that neither party had asked for any witnesses to be summoned. The Commissioner appears, therefore, to have come to the conclusion that there was no intention to proceed with the matter. He was not anxious to spend an idle Sunday at Jacobabad. He thought if this enquiry was not to be held he had better return to Shikarpur for which place the train left from Jacobabad at 8-30 A. M. He, therefore, hastily wrote his report that nothing was due to the plaintiff on account of the partnership, his finding being based on the fact that no evidence had been called before him, and no arguments addressed to him on the day of the hearing. He went to the Judge's bungalow and handed his report over to him. He then went off to Jacobabad Station where he was caught by the plaintiff and his Pleader. Then, of course, it was too late for him to do anything in the matter inasmuch as he had concluded his function as a Commissioner.

Thereon the plaintiff raised objections to the report of the Commissioner but the Trial Court disallowed these objections and refused to order further consideration the result being that the suit was dismissed.

The matter went on appeal to the District Judge who held the same and the plaintiff now comes here in appeal.

Reluctant as we are, further, to extend these proceedings, anxious as we are, that the persons should act with due promptness and diligence, it does not seem to us to be made out that the proceedings before the Commissioner were such that the Court should have acted on them. No doubt the Commissioner had *prima facie* been under the belief that there was no intention on the part of the plaintiff to proceed. So far that went, the conclusion of Commissioner was wrong. Had he not so hurriedly come up to the station, plaintiff would have in a few moments appeared before him. Wha would have happened then, we cannot say He might have found that there were no materials for arriving at a conclusion for his report other than those already before him. On the other hand, there having been no further proceedings, it is not feasible for us to say that these proceedings would have been infructuous. All that we do say is that we consider that the Commissioner acted with too great haste. Although the Commissioner was no way bound to sit all Sunday waiting for persons who did not choose to attend, yet a reasonable margin must be given to litigants particularly when litigants are dependent on legal assistance from outside. And if this consideration is not shown, then unless it is clearly shown that even had the Commissioner acted in a less hasty manner, the result would have been the same, it is impossible to say that the Commissioner's report is satisfactory.

We, therefore, think that the Sub-Judge was wrong in accepting it. As it stood he should have made further enquiry. That is the order we now pass on condition, that the plaintiffs should pay into Court within a month costs incurred by the defendants at the infructuous meeting before the Commissioner the fees of the Commissioner of the infructuous hearing and also a further sum for the fresh sitting of the Commissioner.

No costs allowed for either side in this second appeal. The rest of the costs to be costs in the cause.

Before returning the papers again to the Commissioner it is recommended that the Sub-Judge should himself ascertain on what the Commissioner is to proceed. That is to say, *inter alia* who is keeping back the books or if any such books existed

who is responsible for their destruction and his order should indicate clearly and precisely to the Commissioner on what he is to submit his report and on what lines his enquiry should proceed.

We shall thus set aside both the orders of the District Judge and the Sub-Judge in respect of the Commissioner's report, and as regards Civil Suit No. 443 of 1920 will direct further trial of the appropriate issue but should the costs be not paid as aforesaid then this appeal will be dismissed.

Z. K. *Order set aside.*

PATNA HIGH COURT.

PRIVY COUNCIL APPLICATION No. 14 OF 1925.

July 21, 1925.

Present:—Mr. Justice Das and Mr. Justice Adami.

Srimatya GENDAMONI DEBYA—APPELLANT

versus

RAGHUNANDAN SINGH AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109—Probate proceedings—Appeal to Privy Council—Caveator, whether entitled to appeal.

A person who had filed a caveat in the Court of first instance opposing a grant of Probate and who was impleaded as a respondent in the High Court in an appeal arising out of the proceedings is entitled to maintain an application for leave to appeal to His Majesty in Council against the decision of the High Court in appeal.

Application for leave to appeal to His Majesty in Council.

Mr. *Subal Chandra Mazumdar*, for the Appellant.

Messrs. *S. M. Mullick*, *B. N. Mitter*, *L. Bannerji*, *S. N. Banerji*, *Nabadwip Ch. Ghosh*, *L. N. Singh* and *N. C. Ghosh*, for the Respondents.

ORDER.—This is an application for leave to appeal to His Majesty in Council.

The judgment of this Court reversed that of the Court below and the decree involves the claim or question to or respecting property of the value of over Rs. 10,000. The case, therefore, complies with the requirements of ss. 109 and 110 of the Code and the applicant would ordinarily be entitled to leave as a matter of course.

But, it is contended on behalf of the opposite party that the applicant has no *locus standi* to present the present application. The applicant is the widow of the predeceased son of the testator. The question at issue between the parties was whether Probate could be granted of the alleged Will of the testator. Various questions were raised in the proceedings between the parties and this Court differing from the learned District Judge in the Court below, directed that no Probate should issue.

It is contended on behalf of the opposite party that *Srimatya* Gendamoni Debya, the applicant before us, has no *locus standi* since in no event is she entitled to succeed to the estate of the testator. In my opinion we are not competent in this Court to enter upon the question whether the applicant has any *locus standi* to maintain the application. She undoubtedly filed a caveat in the Court of first instance. The opposite party did not apply to have that caveat discharged. In other words the opposite party recognized that the applicant was a proper party to the Probate proceedings. The opposite party was the appellant in this Court and he made *Srimatya* Gendamoni Debya a party respondent to the appeal. That being so, *Srimatya* Gendamoni Debya is, in our opinion, entitled to maintain the application for leave to appeal to His Majesty in Council.

The application succeeds. Issue the usual certificate.

The petitioner is entitled to the costs of this application. Hearing fee five gold *mohurs*.

Z. K. *Application granted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1644 OF 1923.

July 21, 1925.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice B. B. Ghose.

BIRAJ BOYED AND OTHERS—DEFENDANTS—APPELLANTS

versus

Raja BEJOY SINHA DUDHURIA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 97, 120—Execution of decree—Rateable distribution—Property sold recovered by third person—Suit to recover amount paid out to decree-holder—Limitation, commencement of.

Plaintiff obtained a decree against one *C*, in execution of which he put up for sale certain properties as belonging to *C*. The properties were purchased

by the plaintiff. Defendant, who had also obtained a decree for money against *C*, applied for rateable distribution of the sale-proceeds and obtained a certain portion of the purchase-money. *C*'s wife subsequently obtained a decree for possession of some of the properties which had been sold in execution of the plaintiff's decree on the ground that the properties belonged to her and not to *C*. In a suit by the plaintiff to recover from the defendant a proportionate share of the price paid by the plaintiff for the properties which had been recovered by *C*'s wife:

Held, that limitation for the suit began to run from the date of the decree in favour of *C*'s wife and not from the date on which possession of the properties was actually taken by her in execution of her decree from the plaintiff. [p. 770, col. 2.]

Appeal against a decree of the District Judge, Murshidabad, dated the 1st of March 1923, modifying that of the Subordinate Judge, Berhampore, dated the 22nd of December 1921.

Dr. *Dwarka Nath Mitter*, Mr. *Sachindra Nath Ghose* and Babu *Charu Chandra Ganguli*, for the Appellant.

Babu *Jogesh Chandra Roy* for Mr. *Mahendra Nath Roy* and Babu *Ramani Mohan Chatterjee*, for the Respondent.

JUDGMENT.

Ghose, J.—This is an appeal against the judgment and decree of the District Judge of Murshidabad modifying the decree passed by the Subordinate Judge. The plaintiff had obtained a decree against one Chatrapat Singh in 1907 in execution of which he put up for sale certain properties as belonging to his judgment debtor. The properties were sold in different lots and they were all purchased at the auction sale by the plaintiff on the 19th of November 1907, the total value of the properties being Rs. 14,050. The predecessor of the defendants had also obtained a decree for money against the same judgment-debtor, and he applied for rateable distribution of the sale-proceeds under the provisions of the C. P. C. and obtained Rs. 2,800 and odd out of the money in deposit under an order of the Court on 15th February 1908. The wife of the judgment debtor Mina Kumari Bibi commenced a suit in 1907 against the plaintiff, in which the judgment-debtor was also made a party, for declaration of her title to and for possession of some of the properties which were sold in execution of the plaintiff's decree. She eventually succeeded in establishing her claim to those properties on appeal to the Privy Council and the order in Council was dated the 11th December 1916. Mina Kumari took possession of the properties on the 20th September 1917. The plaintiff commenced the present suit on 4th September 1920 against the defendants for recovery from them of a proportionate share of the price paid by the plaintiff for those properties which the predecessor of the defendants had taken out of Court under the order for rateable distribution. The Subordinate Judge allowed the plaintiff a sum of Rs. 2,605 11-0; but did not give him any interest. The appeal of the defendants was dismissed by the District Judge, who allowed the cross-objections of the plaintiff with regard to interest which he allowed from the date of dispossession of the plaintiff of the properties. The defendants appeal to this Court against that decree.

Several questions were raised on behalf of the appellants, but the principal question which requires consideration is that of limitation. It was assumed by both parties before us that Art. 97 of the Limitation Act applies to the present case, and it was so held by the Court of Appeal below. It may be a question whether this is a suit for money paid upon an existing consideration, as it can hardly be said that the plaintiff paid money for any consideration from the defendants. As, however, the question was not argued before us, I do not think it necessary to pursue the matter beyond stating that we do not decide that such a case as this falls within Art. 97. The controversy before us turned upon the point as to the time from which the period of limitation began to run. It is contended by the appellants that it runs from the date of the decision of the Privy Council that the properties belonged to Mina Kumari and not to the judgment-debtor, while the respondent contends that the consideration failed only from the date when the plaintiff was deprived of possession of the properties and limitation should commence to run from the date. Several cases were cited before us in support of the contention of each party but most of them do not require consideration in detail as they arose out of suits by purchasers at voluntary sales against their vendors for the purchase-money as the vendors failed to secure them in possession of the properties sold on account of defect of their title. The cases proceeded either on the basis of the covenant for quiet enjoyment or on the ground that the sale was only voidable at the instance of third parties. Those cases do not appear to me to be of any assistance in the present

case. The case principally relied on by the appellants is *Hukum Chand Boid* v. *Pirthichand Lal Chowdhury* (1). In that case a purchaser of a *patni* under Regulation VIII of 1819 brought his suit for recovery of the purchase-money from the *zemindar* as the sale of the *patni* had been set aside on the suit of a *darpatnidar*. The date of the decree of the Court of first instance setting aside the sale and not of the appellate decree affirming the first decree was held to be the time from which limitation began to run. But it was contended before the Judicial Committee that the period of limitation began to run when possession was lost. With reference to this contention their Lordships observed: "There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run, but that is not the case here. The quality of the possession acquired by the present purchaser excludes the idea that the starting point is to be sought in a disturbance of possession or in any event other than the challenge to the sale and the negation of the purchaser's title to the entirety of what he bought involved in the decree of August 24, 1905. If further support of this view be required, it may be found in the express provision of s. 14 of the Regulation which directs that in the suit for reversal itself the purchaser is to be indemnified against all loss". The learned Judge below held that the decision of the Privy Council was based on the special provisions of s. 14 of the Patni Regulation and does not apply to the present case. He relied on the case of *Gurshidawa* v. *Gangava* (2), where it was held with reference to the provisions of s. 315 of the C. P. C. of 1882, that the cause of action did not accrue till the purchaser was deprived of the property sold. It is sufficient to say with regard to the last point that the present suit is not one under the provisions of s. 315 of the Code of 1882. The law relating to this matter has been altered, and the words on which the decision in the Bombay case was based do not occur in the corresponding r. 93 of O. XXI of the present Code. With regard to the main question it seems to us that the present case falls within the rule in *Juscurn Boid's case* (1), apart from considerations arising out of the provisions of s. 14 of the Patni Regulation. In the present case there was a rateable distribution of the assets held by the Court under the provisions of the C. P. C. There was no undertaking by any person about the purchaser being put into possession of the properties sold. When the title to the properties was found by the Privy Council to be in Mina Kumari and not in the judgment-debtor there was a negation of the title of the judgment-debtor as well as that of the plaintiff. The result of the decision was that the money which passed into the hands of the defendants was finally declared not to be assets of the judgment-debtor which the defendants were entitled to claim or retain. It was plaintiff's money and he could recover it at once. I think, therefore, that the time from which the period of limitation began to run is the date of the decision and not the date of disturbance of possession with regard to which the defendants had no concern. It is argued on behalf of the respondent citing the case of *Hanuman Kamut* v. *Hanuman Mandar* (3), that the result of that case and the case of *Hukum Chand Boid* v. *Pirthichand Lal Chowdhury* (1) is that in such a case as this time would begin to run either from the date of the decree or from the disturbance of possession whichever is later. But the case of *Hanumant Kamut* v. *Hanuman Mandur* (3) hardly lends support to such a contention, where the disturbance of possession, when time was held to commence to run was earlier than the decree dismissing the plaintiff's suit for possession. Only one other case need be mentioned, that of *Amrita Lal Bagchi* v. *Jogendra Lal Chowdhury* (4), where under circumstances similar to this the learned Judges computed limitation from the date the sale was declared invalid, although they held that Art. 120 of the Limitation Act was applicable. The period of limitation in this case, therefore, commenced to run from December 11, 1916.

The other contentions of the appellants need only be stated for being rejected. It is urged that the plaintiff could not get the sale set aside if his judgment-debtor had any interest in the property sold and as the sale of all the properties has not been set

(1) 50 Ind. Cas. 444; 46 I. A. 52; 46 C. 670; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416 (P. C.).

(2) 22 B. 783; 11 Ind. Dec. (N. S.) 1106.

(3) 18 I. A. 158; 19 C. 123; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.).

(4) 15 Ind. Cas 707; 40 C 187.

aside, he cannot bring this suit for recovery of a part of the purchase-money. But the fact found is that the properties were separately sold for separate sums of money, and there is no reason why the plaintiff should not recover the purchase-money for those properties the sale with regard to which was set aside or declared void. It was next contended that the plaintiff had presented an application in insolvency proceedings against his judgment-debtor that all his debts had been satisfied, and the plaintiffcannot, therefore, recover the money claimed. It does not appear why he cannot do so, as the money claimed is the plaintiff's own money which has got into the defendants' hands. The last plea was that the plaintiff was not, at any rate, entitled to interest. This also has no substance as the defendant had the use of the money and he was rightly liable for interest.

As, however, the appellants succeed on the question of limitation, as the suit was brought more than three years after the date of the decree of the Privy Council, this appeal is allowed and the suit dismissed with costs in all Courts.

Greaves, J.—I agree.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 417 OF 1923.

July 14, 1925.

Present :—Mr. Justice Jackson.

MANEM AYYAMMA—DEFENDANT No. 3 —PETITIONER

versus

V. PULAVAITH VEERABHADARAM—PLAINTIFF—RESPONDENT.

Surety—Letter of guarantee drawn up in plural number signed only by one surety—Liability of surety—Stipulation that other surety must sign, effect of.

A letter of guarantee drawn up in the plural number but signed by one surety only is binding on the surety who actually signs it, unless such surety expressly or impliedly stipulates that the other surety shall also sign, in which case the condition must be fulfilled before any liability will attach under the letter. [p. 772, col. 1.]

Ex parte Harding, In re Smith Fleming & Co, (1879) 12 Ch. D. 557 at p. 566; 48 L. J. Bk. 115; 41 L. T. 517; 28 W. R. 158, referred to.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the Subordinate Judge, Cocanada, in S. C. S. No. 324 of 1922.

Mr. *G. Lakshmanna*, for the Petitioner.

Mr. *B. Satyanarayana*, for the Respondent.

JUDGMENT.—The petitioner seeks to revise the decree of the Subordinate Judge of Cocanada in S. C. S. No. 324 of 1922.

The plaintiff sued to recover Rs. 402-11-6. Defendants Nos. 1 and 2 who were immediately liable remained *ex parte*, and the suit was contested by the 3rd defendant who had executed a letter of guarantee, Ex. C. The learned Judge has found him liable under this letter ; and the question for determination is whether inasmuch as the letter begins with "Manem Ayyamma and Dentu Setti Basavalingam offer respects," continues, "In case money is not realised * * * * we agree to pay the said amount," and is signed only by Manem Ayyamma, Manem Ayyamma can be held responsible or whether, on the other hand, it should be held that Manem Ayyamma only contracted to be held responsible in case Dentu Setti Basavalingam also signed the letter. The learned Judge lays down the law on the point as follows :—

"In a case of this kind the person that actually executed the document would be liable unless it was intended that if the other persons did not join, his liability should not subsist."

It is contended on behalf of the petitioner that in such cases there is a presumption that the person who signed the document singly did not intend to be held responsible unless the others joined. In support of this argument the remark of Brett, L. J., in *Ex parte Harding, In re Smith Fleming & Co.* (1) is cited

"And, therefore, the doctrine that one of a number of sureties who signs a guarantee only agrees to be liable in case all the others sign, has no application."

I have not been able to find this doctrine laid down elsewhere to the effect that there is a presumption that one of a number of sureties who signs a guarantee only agrees to be liable in case all the others sign. In Cunningham and Shepherd's Commentary on the Indian Contract Act, 11th Edition, page 36, it is observed that: "Apparently it may be presumed that a party who has executed a bond did not intend to be bound unless the other person mentioned also executed it when the contract is in the nature of

(1) (1879) 12 Ch. D. 557 at p. 566; 48 L. J. Bk. 115; 41 L. T. 517; 28 W. R. 158.

a guarantee." The learned Commentators refer for authorities to their note on the actual section—s. 144 But there I only find it laid down as follows:—

"It appears to be a question of fact whether a promissor who has executed a bond which is in form joint is intended to be bound only if the other person named in it has also executed it," and the English authorties to which my attention has been drawn seem to bear out that there is no presumption. In *Coyte* v. *Elphick* (2), Blackburn, J., says:—"There is no authority for saying that because a deed contemplates several parties joining as co-sureties, therefore, one of them does not bind himself if he signs unless the others also sign." There is no authority for such a contention.

A note in Lord Halsbury's Laws of England, Vol. 15 page 469, para. 901 is to the same effect.

"A guarantee drawn up in the plural number, and concluding 'as witness our hands' but signed by one surety only, is binding on the surety who signed it [*Norton* v. *Powell* (3)]. Where, however, one surety expressly or impliedly stipulates that the other surety shall also sign, this amounts to a condition precedent which must be fulfilled."

Therefore, it is incumbent on the petitioner in this case to prove that he did so stipulate The learned Subordinate Judge is not quite correct in stating:

"There is no evidence which goes to show that at the time of the contract the 3rd defendant expressly excluded his liability if his partner D. Basavalingam should not agree to sign therein."

What he means is that there is no evidence apart from the statement of the 3rd defendant as D. W. No. 11 and evidently he was not prepared to accept that statement without corroboration. I find, therefore, that there is neither presumption nor proof that the 3rd defendant was only to be bound in case his partner also joined. In these circumstances there is no reason to revise the decree of the lower Court.

The respondent has never based his case on the fact that the 3rd defendant and his partner constituted the firm and, therefore, the omission in the plaint to name them as such is, as the learned Judge remarks not of much importance.

The petition is dismissed with costs.

V. N. V. *Petition dismissed.*

Z. K.

(2) (1874) 22 W. R. 541 at p. 543.

(3) (1812) 4 Man. & G. 42; 11 L. J. C. P. 202; 134 E. R. 18.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 3105 OF 1924.

June 15, 1925.

Present:—Mr. Justice Martineau.

GURANDITTA MAL—APPELLANT

versus

FIRM GURDASMAL-RAMCHAND AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 11, 145, O. XXI, r. 26—Stamp Act (II of 1899), ss. 15, 35, 36—Contract Act (IX of 1872), ss. 133, 135—Execution of decree—Stay of execution—Security given by judgment-debtor—Security bond written on plain paper bearing Court-fee stamp, validity of—Objection to validity of bond, withdrawal of—Appeal—Objection, whether can be renewed—Application by surety for cancellation of bond, rejection of—Res judicata—*Estoppel—Agreement between judgment-debtor and decree-holder enhancing rate of interest payable on decretal amount—Time granted by decree-holder to judgment-debtor for payment—Surety, whether absolved.*

During the pendency of a certain execution proceeding the judgment-debtor applied for a stay of execution till the decision of an appeal pending against the decree. The Court granted a stay of the proceedings till a certain date but subsequently on the objection of the decree-holder and after hearing the parties it made an order that the judgment-debtor should furnish security before the date to which the proceedings had been adjourned. The judgment-debtor filed a security bond executed by the appellant which was accepted by the Court but notwithstanding the execution of that bond execution proceedings continued at the instance of the decree-holder against the judgment-debtor. Proceedings were, however, subsequently stayed on the judgment-debtor agreeing to pay interest on the decretal amount at a rate higher than that provided in the decree. After the dismissal of the appeal filed by the judgment-debtor against the decree, execution was again taken out against the judgment-debtor. Thereafter the surety put in an application stating that he did not wish to continue as surety and asking that his bond might be cancelled. This application was rejected. The decree-holder then applied under s. 145 of the C. P. C. for execution against the surety but the surety objected that execution could not proceed against him inasmuch as (*a*) the security bond was not properly stamped in accordance with s. 15 of the Stamp Act, having been written on plain paper bearing only an eight-anna Court-fee stamp instead of being written upon a paper stamped with an impressed stamp, (*b*) the Executing Court was not competent to take security from the judgment-debtor after having passed an order staying the execution of the decree, (*c*) the surety was not liable on the bond as the decree-holder had continued

to prosecute the execution proceeding even after the execution of the bond and consequently the consideration for the bond had failed, (*d*) the decree-holder was not entitled to enforce the decree against the surety without first endeavouring to recover the decretal amount from the judgment-debtor, (*e*) the decree-holder had entered into an agreement with the judgment-debtor whereby the latter had agreed to pay interest at a rate higher than that mentioned in the decree and (*f*) the decree-holder had granted time to the judgment-debtor to pay up the decretal amount. These objections were overruled. On appeal:

Held, (1) that the surety's omission to raise objections to the validity of the bond in the application which he had made to the Court asking that the bond might be cancelled had not in any way affected the position of the decree-holder and did not estop the surety from contesting his liability under the bond when the decree was attempted to be executed against him and he became aware of his legal position; [p. 774, col. 2.]

(2) that the dismissal of the surety's application for cancellation of the security bond did not operate as *res judicata* inasmuch as the surety was not on the date on which he had made his previous application a party to the execution proceedings; [*ibid.*]

(3) that the surety having been made a party to the execution proceedings when the decree-holder made an application for execution of the decree against the surety, the surety's objections must be determined in the execution proceedings; [*ibid.*]

(4) that the order of the Executing Court calling upon the judgment-debtor to furnish security amounted merely to renewal of its previous stay order coupled with the condition which it was authorized to impose by sub-r. (3) of r. 26 of O. XXI of the C. P. C., and was, therefore, perfectly valid; [p. 775, col. 1.]

(5) that in the absence of a provision in the bond that the decree-holder must attempt to recover his money from the judgment-debtor before he could take proceedings against the surety, the decree-holder was entitled to proceed against the surety without attempting in the first instance to recover the decretal amount from the judgment-debtor; [p. 776, col. 1.]

(6) that the surety was under the bond liable for the amount held to be due to the decree-holder on the decision of the judgment-debtor's appeal and that he was not, therefore, liable to pay the enhanced rate of interest which the judgment-debtor had before the decision of the appeal agreed to pay to the decree-holder, and that the surety was not consequently affected by this agreement and the agreement did not absolve him from liability under the bond; [p. 776, cols. 1 & 2.]

(7) that inasmuch as the bond executed by the surety contemplated that execution proceedings should be stayed, the fact that the decree-holder granted time to the judgment-debtor to pay up the decretal amount did not absolve the surety from his liability; [p. 776, col. 2.]

(8) that the surety having taken objection to the validity of the bond on the ground that it was not properly stamped, as soon as he was made a party to the execution proceedings, and no order having been passed thereafter under s. 36 of the Stamp Act admitting the bond in evidence, the surety was entitled to raise the plea of the invalidity of the bond on that ground in appeal although the plea had been withdrawn in the lower Court; [p. 775, col. 2.]

(9) that the bond was not properly stamped and was, therefore, invalid; [*ibid.*]

(10) that the decree-holder having continued the execution proceedings against the judgment-debtor in spite of security having been furnished, consideration for the security bond had failed and the bond could not, therefore, be enforced against the surety. [p. 775, col. 1.]

Miscellaneous first appeal from an order of the Senior Sub-Judge, Shahpur, dated the 12th November 1924.

Bakhshi *Tek Chand* and Mr. *M. L. Puri*, for the Appellant.

Mr. *Moti Sagar*, for the Respondents.

JUDGMENT.—An *ex parte* money-decree carrying interest at 6 per cent. per annum was obtained by the Firm of Gurdas Mal-Ram Chand against the Firm of Narsingh Das-Shiv Lal in the Court of the Judicial Commissioner in Sind on the 13th May 1920, and an application by the judgment-debtor to have the decree set aside was rejected. He appealed from the order of rejection and ultimately on the 29th January 1923, the appeal was dismissed. Meanwhile in August 1920, the decree had been transferred for execution to the Court of the Senior Subordinate Judge at Sargodha and execution proceedings were taken in that Court. The question in the present appeal is whether the decree can be executed against the appellant Guranditta Mal, who, in December 1920, executed a security bond by which he undertook to pay whatever amount might be held to be payable to the decree-holder on the decision of the judgment-debtor's appeal if the latter failed to pay it.

The decree-holder applied to the Senior Subordinate Judge, on the 16th August 1920, for the execution of decree against the judgment-debtor, and an attachment warrant was issued, but on the judgment-debtor applying for time to obtain an order for stay of execution from the Karachi Court the Subordinate Judge, passed an *interim* order for stay. The decree-holder then filed objections. On the 19th August the Subordinate Judge after hearing the parties ordered that the execution proceedings should be stayed till the 11th October, and on that date, as the appeal pending in the Karachi Court had not been decided, he granted a further stay till the 13th December. Meanwhile, on the 12th October, the decree-holder again objected to the execution being stayed, pointing out that although the judgment-debtor had been given time to obtain an order for stay of execution from the Court at Karachi he had taken no steps to obtain such an

order. On the 4th November the Subordinate Judge after hearing arguments ordered that the judgment-debtor Shiv Lal should furnish security by the 13th December, otherwise his property would be attached. On the 13th December, an adjournment was granted, and on the 18th the security-bond executed by the appellant was filed and was accepted by the Court.

Notwithstanding the execution of that bond the execution proceedings continued at the instance of the decree-holder against the judgment-debtor, who was called upon, on the 2nd February 1921, to pay into the Court the sale-proceeds of some land which he had sold. He objected on the ground that he had given security, and at length on the 12th March 1921, the decree-holder agreed to the execution proceedings being stayed on the judgment-debtor promising to pay interest at the rate of 9 per cent. per annum instead of 6 per cent. per annum as provided in the decree. The execution proceedings were then adjourned from time to time pending the decision of the appeal by the Karachi Court, but on the 1st December 1921 the proceedings against the judgment-debtor were resumed and the Subordinate Juge directed the issue of a warrant of attachment, and on the 21st he repeated that order as the decree-holder expressed a wish that execution might proceed and a letter had been received from the Karachi Court in which it was intimated that the judgment-debtor had not applied to that Court for stay and that execution might proceed. The judgment-debtor, however, appeared the next day and objected and an *interim* order for stay of execution was passed. On the 27th January 1922, the surety Guranditta Mal put in an application, saying that he did not wish to continue as surety and asking that his bond might be cancelled. That application was rejected on the 15th March. Execution proceedings then went on against the judgment-debtor whose property was attached. On the 22nd May 1922, it was agreed between the decree-holder and the judgment-debtor that the latter should be allowed to sell or mortgage the attached property for the purpose of raising the decretal amount, and that he should be given time for a month and a half to pay the money into Court. Execution was accordingly stayed till the 7th July, but was continued after that date as the judgment-debtor failed to pay the money. On the 29th January 1923, the judgment-debtor's appeal was, as has been already mentioned, dismissed by the Karachi Court. On the 16th August 1923, the decree-holder applied under s. 145 of the C. P. C. for execution against the surety, and the Subordinate Judge, overruling the latter's objections, has held that execution can proceed against him.

It is contended for the appellant on various grounds that he is not liable on his security bond; but before dealing with these I will dispose of certain preliminary arguments advanced for the respondent, who maintains that the appellant is precluded from disputing his liability. It is first argued that the appellant's objections cannot be entertained because he did not raise them in his application of the 27th January 1922, in which he only urged that he did not wish to remain a surety any longer. The reply to this is that the appellant's omission to raise objections in his application in no way affected the position of the decree-holder and, therefore, does not estop the appellant from contesting his liability now that he has become aware of his legal position. Even if he impliedly admitted in his application that the bond was binding on him he is not debarred from withdrawing the admission, which was a gratuitous one.

The second argument for the respondent is that the order rejecting the appellant's application of the 27th January 1922, is *res judicata*. But this argument is untenable as the order was not open to appeal, since the surety was not a party to the suit, nor was he a party to the execution proceedings at the time when the order was made. It was not until an application was made for execution against him in August 1923 that he became a party to the execution proceedings. On this point see *Ramanathan Pillai* v. *Doraiswami Ayyangar* (1).

A third argument advanced for the respondent is that the surety can raise objections only in a suit and not in the execution proceedings. To this, however, the reply is that the appellant, though not at first a party to the execution proceedings, became a party when it was sought to enforce the decree against him. His objections have, therefore, to be determined in those proceedings.

I come now to the grounds on which the

(1) 55 Ind. Cas. 363; 43 M. 325; 38 M. L. J 65; 11 L. W. 45; (1920) M. W. N. 114; 27 M. L. T. 207.

appellant disputes his liability and the first ground taken is that the Subordinate Judge was not competent to take security from the judgment-debtor after having stayed the execution of the decree. Order XXI, r. 26 (1), C. P. C., provides that the Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, and sub-r. (3) provides that before making an order for execution the Court may require such security from the judgment-debtor as it thinks fit. The contention on behalf of the appellant is that it is only before making an order to stay execution that the Executing Court may under sub-r. (3) require security from the judgment-debtor, and that, therefore, the Subordinate Judge had no power to order the judgment-debtor, on the 4th November 1920, to furnish security when he had already stayed execution by his previous orders. The argument is plausible, but is not really sound and the fallacy lies in supposing that the giving of the security is ordered by the Court. The judgment-debtor is not obliged to furnish security but he may or may not furnish it as he pleases, so that the effect of the provision in sub-r. (3), by which the Court may before making an order for staying execution require security from the judgment-debtor, is merely to empower the Court to make the stay order, which it has to pass under sub-r. (1), conditional on the giving of security. Looking at the matter in this way I think that the order of the 4th November 1920, calling upon the judgment-debtor to furnish security by the 13th December, was within the Court's powers, as it amounted merely to renewal of the previous stay order coupled with the condition, which was authorised by sub-r. (3), that the judgment-debtor should furnish security, failing which execution would proceed against him. I, therefore, overrule the first contention.

The next contention put forward for the appellant is that the security-bond is not properly stamped in accordance with s. 15 of the Stamp Act, having been written on plain paper bearing only an eight annas Court-fee stamp instead of being written upon a paper stamped with an impressed stamp. In regard to this contention two preliminary objections are raised on behalf of the respondent. One is that the bond had already been admitted in evidence and that under s. 36 of the Stamp Act its admission cannot be called in question. There is, however, no force in the objection, as there was no order passed admitting the bond in evidence after the surety had become a party to the proceedings. As soon as he became a party in August 1923, he pleaded that the bond was not properly stamped, and it was only in the order under appeal that a decision was given on the point. The second reason urged on behalf of the respondent for not entertaining the plea as to insufficiency of stamp is that the appellant's Counsel withdrew the plea on the 17th November 1923. This objection also has no force, as, notwithstanding the withdrawal of the plea in the lower Court, s. 35 of the Stamp Act is an absolute bar to the bond being acted upon unless it is duly stamped.

Coming to the merits of the appellant's contention as to the bond not being properly stamped Counsel for the respondent argues that the bond was properly stamped with a Court-fee stamp of eight annas under Art. 6 of Sch. II of the Court Fees Act, having been written in pursuance of an order made by the Court. I cannot, however, agree that the bond was written in pursuance of such an order, for, as I have pointed out above in dealing with the appellant's first contention, the Court could not compel the judgment-debtor to furnish the security, but it was optional with him to furnish it or not as he pleased. What the Court had ordered was that execution should be stayed and the furnishing of security was really not part of its order, but was the condition which it attached to the order. *Dwarika Nath Dey Chowdhury* v. *Sailaja Kanta Mallick* (2) is in point, in which it was held that a security bond taken on an order for stay of execution must be stamped in accordance with the Stamp Act and cannot be written on a plain paper bearing a Court-fee of eight annas. I agree, therefore, with the appellant's contention that the bond is not properly stamped.

I also agree with his third contention, namely, that he is not liable on the bond as the consideration for it failed. The con-

(2) 43 Ind. Cas. 376; 21 C. W. N. 1150.

sideration for the appellant's promise was the decree-holder's forbearance to proceed with the execution of his decree against the judgment-debtor pending the decision of the appeal in the Karachi Court. In spite of the security having been furnished the decree-holder waited only a little more than a month, and then, as has been pointed out above, went on with the execution of the decree against the judgment-debtor. This, I consider, is a sufficient reason for holding the appellant to be free from liability. It is observed on page 481 of Vol. 15 of Halsbury's Laws of England that "where the consideration for the surety's promise is the forbearance to sue or to continue legal proceedings against the principal debtor all stipulations on the subject which constitute part of such consideration must be strictly complied with or the surety will not be bound," and again on page 515 it is remarked that "total failure of the consideration for the surety's promise of guarantee will discharge him."

A fourth contention is that the decree-holder was not entitled after the dismissal of the judgment-debtor's appeal to seek to enforce the decree against the surety without first endeavouring to recover the decretal amount from the judgment-debtor. I think there is no force in this contention as the bond provided merely that the surety would be responsible if the judgment-debtor failed to pay, and it contained no provision that the decree-holder was to attempt to recover his money from the judgment-debtor before he could take proceedings against the surety.

Lastly, it is contended that the appellant is discharged from liability by the agreements entered into between the decree-holder and the judgment-debtor without his consent. There was first the agreement of the 1st March 1921, by which the interest payable under the decree was raised from 6 to 9 per cent. per annum, and afterwards the agreement of the 22nd May 1922, by which the decree-holder gave the judgment-debtor time for paying the amount due under the decree, and it is contended that the surety was discharged by the first agreement under s. 133 of the Contract Act and by the second under s. 135. I do not agree with these contentions. The surety was under his bond to be liable for the amount that would be held to be due to the decree-holder on the decision of the judgment-debtor's appeal. He would not be liable to pay the enhanced rate of interest which the judgment-debtor before the decision of the appeal agreed to pay to the decree-holder, and he was not affected by that agreement. Nor was he affected by the second agreement, by which time for payment was given to the judgment-debtor, since the bond that he himself had executed contemplated that execution proceedings were to be stayed against the judgment-debtor up to the time of the decision of the appeal.

My conclusion is that the appellant is for two reasons not liable on the security-bond, namely, (1) that the bond is not properly stamped, and (2) that consideration for the bond failed in consequence of the decree-holder's own action in proceeding with the execution of the decree against the judgment-debtor. I accordingly accept the appeal and set aside the order of the lower Court, but leave the parties to bear their own costs.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT No. 699 OF 1923.

March 27, 1925.

Present:—Mr. Justice Waller.

PACHAYAMMAL—PLAINTIFF

versus

DEVANAIMMAL—DEFENDANT.

Fraud—Suit to recover property—Defendant, whether can allege his own fraud.

Where it is found that both the parties to a suit have been guilty of fraud in connection with the transaction in respect of which relief is claimed, that party fails who has first to allege the fraud in which he participated, irrespective of the fact whether he is plaintiff or defendant in the suit. [p. 777, col. 2.]

In a suit by a plaintiff to recover possession of property to which he alleges title by purchase, it is not open to the defendant to show that the funds for the purchase were provided by him by means of a fraud practised on a third person to which he and the plaintiff were both parties. In such a case as the defendant cannot succeed without alleging his own fraud, the plaintiff's suit must succeed. [*ibid.*]

Mr. *S. Guruswami Chettiar*, for the Plaintiff.

Mr. *C. Srinivasachari* for Mr. *Mahomed Ibrahim Sahib*, for the Defendant.

JUDGMENT.—The suit is as regards the title to and possession of a house. Plaintiff alleges that she bought the house for Rs. 2,800 in August 1917 and allowed

the defendant, who is her brother's widow, to occupy part of it. As the latter is now setting up a title in herself, plaintiff sues for a declaration of her title and possession. Defendant replies that she bought the house with own funds in the name of plaintiff "for fear of her *dayadies*" why, if the funds were her own, she should have been afraid of her husband's *dayadies* is not apparent. The reason, of course, is that if her real defence is true, the funds out of which the house was acquired were not, strictly speaking, hers at all. What happened was this. Defendant, a widow in possession of her husband's estate, sold part of it, a house in April 1917 for Rs. 2,800. The reversioner at once filed a suit impeaching this and other alienations by the widow. In August, the house now in question was purchased by plaintiff for Rs. 2,800 precisely the same amount as had been received by defendant for the sale in April. In October defendant filed her written statement in the reversioner's suit, pleading that the alienations had been for necessary purposes. In March 1918, a compromise was arrived at, the reversioner accepting the sale for Rs. 2,800 as having been *bona fide* and for necessary purpose." Had he been aware that the proceeds had been devoted to the acquisition of another house by defendant, in the name of a third party, he would certainly not have agreed to the compromise.

The real defence, then, is this :—That defendant sold part of her husband's estate, purchased a house in plaintiff's name out of the proceeds and successfully deluded the reversioner into believing that the proceeds had been devoted to the payment of debts binding on the estate. It is, I think, clear that if the positions of the parties were reversed, that is to say, if defendant came into Court as a plaintiff and asked for relief against plaintiff as a defendant, on the basis of her present story, she would be non-suited. As matters stand, she is a defendant in possession and there is a considerable body of authority, in favour of the view, that a litigant in her position is entitled to show the real nature of the transaction, as against a confederate in the fraud; *in pari delicto potior est conditio possidentis*. The decisions are summarised in *Raghupati Chatterjee* v. *Nrishingha Hari Das* (1), a case of a fraudulent conveyance in which the grantor was allowed to plead his own fraud in defence against a suit by his confederate. This ruling expressly dissents from *Sidlingappa* v. *Harisa* (2), where it was held that the defendant could not set up his fraud against a claim to immoveable property conveyed by him to a *benamidar*. The Bombay case has been followed in Madras, *Voddina Kamayya* v. *Gudisa Mamayya* (3) in which Coutts-Trotter, J., pointed out that the effect of the decisions was that "that party fails who first has to allege the fraud in which he participated."

The question is one of public policy and I think that public policy will be best served by following the rule that a man should not be allowed to plead his own fraud. As Sir Lawrence Jenkins showed in the Bombay case, it is the rule which "will be most apt to deter persons from frauds of this kind." It is the fraudulent grantor, who expects to extract the entire, or the main benefit from the fraud. And if he realises that the law will give him neither a remedy nor a defence against his confederate, the temptation to commit the fraud will be minimised. In this case, plaintiff has a title by purchase, which is, on the face of it, perfectly valid. I find that it is not open to defendant to show that it was she that provided the funds for the purchase, by means of a fraud on the reversioner, to which she and plaintiff were parties.

Issue No. 1 is found against defendant. There will be a declaration of plaintiff's title and a decree for possession with costs. Plaintiff claims mesne profits at the rate of Rs. 20 per month, for 18 months, before the date of the suit. Profits will be allowed, at that rate, for the period claimed, upto the date of delivery. It should be noted that, as a result of the view taken by me, defendant was not permitted to adduce any evidence.

V. N. V.
Z. K. *Suit decreed.*

(1) 71 Ind. Cas. 1; 36 C. L. J. 491; (1923) A. I. R. (C.) 90.
(2) 31 B. 405; 9 Bom. L. R. 542.
(3) 43 Ind. Cas. 352; 32 M. L. J. 484.

LAHORE HIGH COURT.

CIVIL REVISION No. 680 OF 1924.

May 2, 1925.

Present:—Mr. Justice LeRossignol.

TEJA SINGH—PLAINTIFF—PETITIONER

versus

FIRM KALYAN DAS-CHET RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 130—Assignment of debt—Writing, whether necessary—Applicability of Act to Punjab—Civil Procedure Code (Act V of 1908), s. 115—Refusal to recognize oral assignment—Irregularity—Revision.

Although the equitable principles underlying the Transfer of Property Act are followed in the Punjab, the Act itself, with its technicalities, does not apply.

An assignment of a debt need not necessarily be effected in writing, and where a Court refuses to recognize an assignment which is otherwise proved and admitted by the assignor himself, merely on the ground that it was not made in writing, its action amounts to an irregular exercise of jurisdiction, and is open to correction in revision.

Civil revision from a decree of the Sub-Judge, Rawalpindi, dated the 18th February 1924.

Mr. *Anant Ram Khosla*, for Bhai *Man Singh*, for the Petitioner.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—This application arises out of an action brought on the following facts:

The defendant firm borrowed Rs. 200 from Indar Singh, defendant No. 2, and executed an acknowledgment of the debt in the books of defendant No. 2. Defendant No. 2 assigned the debt to the plaintiff who brought an action for recovery and arrayed defendant No. 2 as a formal defendant.

The Courts below are agreed that the document executed by defendant No. 1 was for consideration, but the learned Senior Subordinate Judge accepted a contention urged for the first time before him to the effect that the assignment was bad in law inasmuch as it had not been made in writing.

Now, although the equitable principles underlying the Transfer of Property Act are followed in the Punjab, the Act itself, with its technicalities, does not apply, and the learned Subordinate Judge committed an irregularity in relying upon that Act to dismiss on a purely technical point a claim which he otherwise held to be just and equitable. The assignor was made a party to the suit and he admitted the assignment of the debt to the plaintiff. The only defence on the merits was that the debt was without consideration. That the debt was for consideration has been held by the Courts below.

I accordingly accept the application and restore the decree of the first Court; but as the assignment of the debt does not seem to have been effected in the ordinary course of business, I leave the parties to bear their own costs throughout.

Z. K. *Application accepted.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 98 OF 1924.

February 9, 1925.

Present:—Mr. Justice Carr and Mr. Justice Brown.

LIM KAR CHANG—APPELLANT

versus

T. S. CHETTY FIRM—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 50—Decree against partnership—Execution against partner, leave for—Liability, dispute as to—Deputy Registrar, power of, to determine dispute—Procedure.

Under the Rangoon High Court Original Side Rules the Deputy Registrar is given powers to deal with applications for leave to execute a decree under O. XXI, r. 50 (2) of the C. P. C. Where, however, the person against whom the decree is sought to be executed disputes his liability under the decree, the Deputy Registrar has no power to try and determine the question and the matter must be determined by the Court. [p. 779, col. 2.]

Miscellaneous appeal from an order of the Original Side in C. M. No. 66 of 1924.

Mr. *Young*, for the Appellant.

Mr. *Cowasji*, for the Respondents.

JUDGMENT.—The respondent Chettiar Firm obtained a decree against Lim Chin Tsong and the firm of Lim Soo Hean and Company on the Original Side of this Court. In Civil Miscellaneous No. 66 of 1924 they applied to the Court to be allowed to execute their decree under the provisions of r. 50 of O. XXI of the C. P. C., against the appellant, Lim Kar Chang on the ground that he was a partner in the firm of Lim Soo Hean and Company. Lim Kar Chang denied the partnership and the question as to the whether he was or was not a partner was heard and decided by the Deputy Registrar. On the 2nd May 1924, the Deputy Registrar found that the appellant was not a partner and dismissed the respondent's application. On the 5th June the respondent filed an application ask-

ing that the matter might be referred to the Court for orders. Orders were passed for the matter to be referred accordingly and the 9th June was fixed for the hearing of the matter by the Court. On the 9th June the Court was closed and the matter was heard the next day. In the meanwhile the respondent had filed a further affidavit and asked to be allowed to refer to the record in Civil Regular No. 309 of 1923 which had not been before the Deputy Registrar. There is nothing in the proceedings to show that the appellant had any notice of this application or of the affidavit. On the 10th June, the learned Judge on the Original Side heard the Advocates for the parties and passed orders. He refers to the evidence which was before the Deputy Registrar and also to the records which he was asked to consider after the matter had been decided by the Deputy Registrar. He came to the conclusion that the appellant was a partner and gave the respondent leave to execute the decree against him. It is against this order that the present appeal is preferred. Various grounds have been set forth in the memorandum of appeal, but the substantial points which have been taken are two in number. The first point is that the application to have the matter referred to the Judge was not made until after the expiry of the right allowed by the rules for such an application. The second point is that the Trial Court should not have admitted the record in Civil Regular No. 309 of 1923 without giving the appellant liberty to explain himself. It appears to us that there is considerable force in this second ground. In the course of his order the learned Judge remarks, "Mr. Chari complains that this record was not put to his client when the application was heard by the learned Deputy Registrar so that his client was deprived of an opportunity of giving an explanation with regard to this petition. Having regard to the records in the Small Cause Court in which the respondent on this petition describes himself on oath as a partner in the firm of Lim Soo Hean and Company, the record in Civil Regular No. 309 of 1923 of this Court and of the petition filed by the respondent in consequence of it, the only opportunity which I can see the respondent has been deprived of is that of committing further perjury." It is quite clear from this passage in the order that objection was taken at the time of the hearing of the matter before the Court to the admission of these records without giving any opportunity to the appellant to explain them and the reasons for not allowing the appellant such an opportunity do not seem to us to be sufficient. It is, in our opinion, quite impossible to hold that the appellant could not explain what appeared in the records and could not have placed sufficient material before the Court to show that the records did not establish the partnership, without allowing him any opportunity of doing so. The matter was an important one, the effect of the order being to render the appellant personally liable on a decree for a large amount, and we do not think that the learned Judge on the Original Side was justified in adopting the procedure he did. The appellant has, therefore, in our opinion, made out sufficient grounds for ordering a further enquiry in the matter. It seems to us further that the whole procedure adopted with regard to the application of the respondents was wrong. Under the rules framed as to the matters which can be dealt with by a Deputy Registrar, a Deputy Registrar is given power to deal with applications for leave under O. XXI, r. 50, sub-r. (2) of the C. P. C. Under that clause when a decree-holder makes a claim, such as he has made in this case, he may apply to the Court which passed the decree for leave to execute the decree against the person he alleges to be a partner. If the person in question does not dispute his liability, the Court can then grant leave, but if the liability is disputed, the liability must be tried and determined. The Deputy Registrar clearly would not be able to try and determine an issue in suit and it seems to us clear that he had no power to try and determine the issue as to whether the appellant was or was not a partner. In this view of the matter, the point taken in the memorandum of appeal as to the failure on the part of the respondents to apply within eight days to have the order of the Registrar referred to the Court need not be considered. In our opinion the matter should have been put before the Court to be tried before the Court as soon as the appellant denied his liability and it seems to us that in the circumstances of the case that is what should be done now. We accordingly set aside the order granting leave to the respondents to execute the decree, and direct that the liability of the appellant as a partner under

the decree be tried and determined by the Court. The respondent will pay the appellant his costs in this appeal. Advocate's fee five gold *mohurs*.

Order set aside.

Z. K.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 83 OF 1924.

August 24, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr. Justice Viswanatha Sastri.

GANDHA HORLIAH—PLAINTIFF—APPELLANT

versus

JANOO HASSAN—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 65—Charter party—Ship chartered for particular venture—Venture frustrated—Advance freight, whether can be recovered.

A chartered ship is not a common carrier and a contract in respect thereof is not excluded from the operation of the Contract Act. [p. 781, col. 1.]

Whether a chartered ship is a common carrier or not, advance freight paid in respect of such a ship can be recovered back by the shipper on the frustration of the venture for which the ship was chartered. [p. 782, col. 1.]

The liability in England to recover advance freight on the frustration of the venture is derived from the general principles of the Common Law and not from any supposed peculiar incident attaching to maritime contracts of affreightment, so that matters relating to the recoverability of freight paid in advance although they happen to occur in a charter party which is a maritime document of affreightment are nevertheless to be regarded as being regulated by the ordinary Common Law or Statute Law, whether English or Indian. [p. 781, col. 2.]

Blakeley v. *Muller & Co.*, (1903) 2 K. B. 760*n*; 67 J. P. 51; 88 L. T. 90; 19 T. L. R. 186, relied on.

The plaintiff chartered two steamers belonging to the defendant for the carriage of rice from Akyab to the Coromandel coast. It was within the knowledge of both parties that the importation of rice was at the time permitted only if and when a certificate for importation could be obtained from the Food Controller. The certificate could not be obtained and the execution of the contract became impossible. In a suit by the shipper for recovery of monies paid to the shipowner as advance freight under the charter party:

Held, that the venture for which the ship had been chartered having been frustrated plaintiff was entitled to recover the advance freight paid by him to the defendant. [p. 780, col. 2.]

Appeal from the judgment of Mr. Justice Waller, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. S. No. 9 of 1920.

Mr. *S. Srinivasa Iyer*, for the Appellant.

Mr. *K. Sundara Rao*, for the Respondent.

JUDGMENT.—This case raises a point of some interest that has been much discussed in the English Courts and has very recently been the subject of a decision by Mr. Justice Macleod as he then was sitting in the High Court of Bombay [*Boggiano & Co.*, v. *Arab Steamers* (1).] It is not disputed by the appellant that if Mr. Justice Macleod's judgment is correct he is out of Court. The defendant was the owner of two steamers which were chartered by the plaintiff for the carriage of rice from Akyab to the Coromandel coast. The importation of rice was only permitted, and Mr Justice Waller, the Trial Judge, has very rightly found that this was a fact perfectly within the knowledge of the parties, if and when a certificate could be obtained from the Food Controller. The learned Judge has also rightly found and this part of his judgment is not challenged that neither party to the contract committed himself to a guarantee that such a certificate would be forthcoming. As to that no question arises and the learned Judge, therefore, thinks that the execution of the contract became impossible owing to an act which is neither under the control of the parties nor one which they had put themselves in the position of having warranted to be in existence, namely, the certificate. In these circumstances, the shipper says that he is entitled to be paid back certain moneys which he had paid to the ship-owner and these moneys are described in the contract as being paid for freight at the rate provided for in the charter party,

"1. Rs. 450 only advance on acceptance of charter party and to be deducted from the freight of the second ship.

2. Half of the freight to be paid as the vessel reaches Akyab and takes the cargo.

3. The balance freight to be paid as the vessel reaches the port of destination."

It is sought to be said by the appellant in this case that this contract between the parties is not to be regarded as being governed by the general law of India laid down in the Contract Act but by the English Common Law. The appellant's Vakil has very properly accepted the position that in circumstances such as the present the money that passed from one hand to the other is recoverable by Indian Law but irrecoverable by the English Com-

(1) 33 Ind. Cas. 536; 40 B. 529; 18 Bom. L. R. 126.

mon Law. If that were all that has to be said about it, it is quite plain that we should have to be guided by the Statute Law that obtains in this country and should not be justified, in going past the Indian Statute to the English Common Law; but a very ingenious argument is put forward, the same argument that was really put forward in the Bombay case. It is said that a ship in this position is a common carrier and that in accordance with the decision of the Privy Council in *Irrawaddy Flotilla Co.* v. *Bugwandas* (2), the contract between the parties is not to be supposed to be governed by the Indian Contract Act but by the English Common Law regarding the liabilities and rights of common carriers. It is said that the moment you show that a person is a common carrier you have proved the existence of a certain type of contract of a special kind which according to the Privy Council decision is not governed by the provisions of the Indian Contract Act. There appear to me to be two objections and the first is this that it is more than doubtful whether a ship under charter as distinct from a general ship taking the goods of several shippers under separate bills of lading on the same voyage is properly described as a common carrier at all. It is not necessary to decide that point fortunately in this case but it is one that has been frequently discussed in commercial circles and amongst commercial lawyers for the past 70 years and there are a very considerable number of expressions of opinion by eminent commercial lawyers on the Bench that a chartered ship is not a common carrier. If that be right, the appellant's case is ended at once. It appears to me that we can put the case on an even more solid footing than that in the following way. Let us assume that in a contract of carriage by sea, all those features which are peculiar to the contract of affreightment are governed by the English Common Law and, therefore, would not be touched even in this country by the provisions of the Indian Contract Act. But there are other incidents in the relation of ship-owner and shipper in a contract of affreightment which are in no way peculiarly confined to a contract of affreightment and which are independent of the special provisions of maritime law. That that is so, I think, is clear from many of the cases which were cited before us, so that the question narrows itself down to this, is money paid in the present circumstances by way of an advance freight a special feature of a contract of affreightment deriving all its validity and force from the law maritime or does it derive its validity and force from the general English Common Law. The answer is to be found in the decision of the Divisional Court in *Blakeley* v. *Muller & Co.* (3) which is reported as a foot-note to the *Civil Service Co-operative Society Ltd.* v. *General Steam Navigation Co.* (4). There Channel, J., dealing with one of the coronation cases as they are commonly called expressly says that it is an incident of the English Common Law and says that it is the same principle of the Common Law which prevents the refunding of advance freight on a charter party where the voyage is not completed and the freight, therefore, not earned. That way of putting it was assented to in the judgment of the Earl of Halsbury, L. C., Lord Alverstone, C. J. and Cozens Hardy, L. J., where, after citing the passage which I have read, the Earl of Halsbury, L. C., says he concurs with every word of that. If that be the right principle that was laid down by Channel, J., it follows that the liability in England to recover advance freight on the frustration of the venture is derived from the general principles of the Common Law and not from any supposed peculiar incident attaching to maritime contracts of affreightment. That being so, even if a chartered ship is a common carrier, the answer would be that matters relating to the recoverability of freight paid in advance although they happen to occur in a charter-party which is a maritime document of affreightment are nevertheless to be regarded as being regulated by the ordinary Common Law or Statute Law, whether English or Indian. Then you get back to this position; that being the Common Law of the land or the Statute Law of the land and the general principle is different in India from what it is in England. Therefore, just as we should apply the Common Law in England, so we should apply the express Statute that is obtaining in India. It, therefore, seems to me that we should take the view that whether a chartered-ship is a common

(2) 18 C. 620; 18 I. A. 121; 15 Ind. Jur. 403 & 542; 6 Sar. P. C. J. 40; 9 Ind Dec. (N. S.) 413.

(3) (1903) 2 K. B. 760*n*; 67 J. P. 51; 88 L. T. 90; 19 T. L. R. 186.

(4) (1903) 2 K. B. 756; 72 L. J. K. B. 933; 52 W. R. 181; 89 L. T. 429; 20 T. L. R. 10; 9 Asp. M. C. 477.

carrier or not, nevertheless the general principle of the Indian Contract Act applies and advance frieght when paid can be recovered back by the shipper on the frustration of the venture. That appears to be in accordance with the view expressed by Phillips and Odgers, JJ., in *Sivanadian Chettiar* v. *Batchu Surayya* (5). Our decision is also in accordance with that in (*Boggiano & Co.* v. *Arab Steamers*, (1) with which we respectfully agree. The appeal will be dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

(5) 87 Ind. Cas. 127; 48 M. L. J. 413; 21 L. W. 445; (1925) M. W. N. 303; (1925) A. I. R. (M.) 727; 48 M. 459.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 278 OF 1925.

May 28, 1925.

Present:—Mr. Justice Abdul Raoof.

FIRM GURDAS MAL-RAM LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM LAL—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 30—Wagering contract—Intention of parties—Circumstantial evidence—Appeal, second—Finding of fact.

In order to determine whether a contract is a wagering contract what the Court is concerned with is the intention of the contracting parties, but in order to find what the intention was, the Court is entitled to consider the position of the parties, the history of the dealings between them and the surrounding circumstances of the case. [p. 783, col. 1.]

A contract for the sale of a certain quantity of salt was entered into by the Salt Department with one *K* and the Salt Department issued a cheque promising to deliver the salt at a certain time. *K* transferred this cheque to *S* on receipt of profits calculated according to the market price, and similar transactions were entered into by various transferees of the cheque and on the occasion of each transfer each transferee paid the profits on the basis of the prevailing market rate. In a suit by the last transferee to recover from the last transferor the amount of profits paid to the latter and also the amount of loss incurred by the plaintiff on the transaction, the lower Appellate Court arrived at the finding that it was not intended by the parties that actual delivery of the salt should take place and that the contract was a wagering contract:

Held, that the finding as to the intention of the parties being one of fact based upon the circumstantial evidence in the case, was binding on the High Court in second appeal. [p. 782, col.2.]

Second appeal from an order of the District Judge, Jhelum, dated the 6th November 1924.

Mr. *Nanak Chand*, for the Appellants.

Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—This was a suit for the recovery of a sum of money on account of loss incurred and also for the recovery of profits amounting to Rs. 360 paid to the defendant by the plaintiff under a contract, dated 18th July 1918 marked Ex. P/1. By this contract the defendant had sold 450 maunds of salt to be delivered in the months of March and April. The original contract was entered into on 11th September 1917 between the Salt Authorities and the firm Kalyan Das through Sunder Das who had deposited Rs. 611-11-6 in the Treasury at Pind Dadan Khan for purchase of 450 maunds of salt from Khewra Salt Mines. The Salt Authorities had issued a cheque No. 78/610 promising to deliver the salt in March and April 1920. Firm Kalyan Das transferred this cheque to Shaunka Mal-Ram Das on receipt of profits calculated according to the market price. Similar transactions were entered into by various transferees and on the occasion of each transfer each transferee had paid the profits. The present suit was instituted on 13th February 1921 by the plaintiff against Sukh Dayal-Ram Lal who had received Rs. 360 as profits from the plaintiff and had promised to deliver Railway receipt on payment of Rs. 611-11-6 the price of 450 maunds of salt. The suit was resisted principally on the ground that the contract was a wagering contract and that the plaintiff was not entitled to sue on it. The first Court granted a decree for Rs. 360, the amount which the defendant had received as profits and the rest of the claim was dismissed. Both parties appealed with the result that the suit was dismissed *in toto*, the Appellate Court holding that the contract was a wagering contract. The plaintiff has come up in second appeal and the finding of the Appellate Court upon this point has been challenged on the ground that it is not based upon any evidence. The question to be determined was whether it was intended by the parties to the contract that delivery of salt was to take place. The finding of the lower Appellate Court is in the negative. The following passage in the judgment clearly shows that the finding is based upon circumstantial evidence and it is only upon this class of evidence that a conclusion can be arrived at in a matter of this kind :—

"In the present case it appears that though dealings took place in these cheques (1) it is the original purchaser of the salt

who is recognized by the Salt Department and to whom delivery is actually made. (2) The so-called cheques are not apparently bearer securities entitling the holder whoever he may be to take delivery. (3) In the present case it is clear that no document was handed over to the plaintiffs. (4) Seeing that the delivery was obviously likely to be much delayed and the actual date of delivery was doubtful, I consider that there was never any intention either to make or take delivery of the salt."

In *Doshi Talakshi* v. *Shah Ujamsi Velsi* (1) the learned Chief Justice made the following pertinent remark at page 231* :

"It is quite true that we are only concerned with the intentions of the contracting parties, but there arises the important question, how are we to learn what those intentions were except from those surrounding circumstances ? They and the position of the parties and the history of dealings of this class are legitimate, though not exclusive, matters for our investigation into the true intention of the parties."

The learned Judge then proceeded to refer to certain circumstances which were not so immediately connected with the contract in question as those in the present case.

On the finding recorded by the lower Appellate Court the suit was bound to fail and was rightly dismissed.

I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 24 B. 227; 1 Bom. L. R. 786; 12 Ind. Dec. (N. S.) 688.

*Page of 24 B.—[*Ed.*]

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 744 OF 1923.

November 12, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

MOHAMMAD AYUB—DEFENDANT—APPELLANT

versus

Raja SURAJPAL SINGH—PLAINTIFF—RESPONDENT.

Guardian and ward—Court of Wards, estate managed by—Withdrawal of management—Release of all claims by ward—Suit by ward against employee of Court of wards to recover loss caused to estate, whether maintainable.

There is no privity of contract between a ward of Court and the staff employed by the Court of Wards to manage the estate of the Ward. A ward cannot, therefore, after the Court of wards has withdrawn from the management of the estate and has handed over the estate to the ward and obtained a release of all claims from him, maintain a suit against a member of the staff employed by the Court of Wards to manage the estate, to recover the amount of loss caused to the estate by the negligence of such employee of the Court of Wards. [p. 784, cols. 1 & 2.]

Second appeal from a decree of the Additional Judge, Aligarh, dated the 31st January 1923.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for recovery of an amount of money and for rendition of account. It is necessary to mention that the claim related to two periods, the period up to the 26th of October 1917 when the plaintiff's estate was under the superintendence of the Court of Wards and a period subsequent to that date. The defendant was a *zilladar* appointed by the Court of Wards for the purpose of collecting rents. Even after the release by the Court of Wards the defendant was employed by the plaintiff as his own *zilladar*. With regard to the first period the plaintiff's claim is that the defendant through bad faith, negligence and carelessness allowed a sum of Rs. 1,417-11-9 the amount of arrears of rent, irrigation, *taqawi* advances and interest due by the cultivators of his circle to be time-barred. He is accordingly said to be liable to pay damages for this amount. As regards the subsequent period he is held liable because he has not accounted for sums of money received by him. The defendant denied his liability to pay any damage for the first period and did not even admit his liability for any amount during the subsequent period. The learned Subordinate Judge who framed the issues first disposed of the preliminary question of law whether the defendant could be made liable for damages during the period of the superintendence by the Court of Wards. This issue was decided against the plaintiff. Another Subordinate Judge who succeeded him then disposed of the case and passed a preliminary decree directing the defendant to render accounts in respect of the subsequent period. The defendant submitted to this decree but the plaintiff appealed to the District Judge and urged that the defendant was liable even for the period during which the Court of Wards was managing the estate. The learned Judge has come to a contrary conclusion; and having allowed the appeal he has ordered that the plaintiff is entitled to a decree for

rendition of account by the defendant of the whole amount sued for, *viz.* Rs. 2,213.

Under the Court of Wards Act it is the Board of Revenue which is the Court and which assumes charge of the estate and manages it. The Board, however, may appoint any staff it chooses and it very often happens that in one district there are several estates which are under the same management and are looked after by the same staff. If any of the servants of the Court of Wards failed in his duty to realise rents in time and there was negligence the Court of Wards itself should be liable to make good the loss to the plaintiff. But when the time for release came and the plaintiff granted a deed of release according to form No. 49 given in the Court of Wards Manual under which he released the Court of Wards from all accounts, claims or demands whatsoever for and in respect of the cash balance, documents and files aforesaid or in respect of any act done or suffered by the Court of Wards itself or under its orders or with its consent in respect of the said estate or the management thereof", he abandoned all claim and demand in respect of any loss suffered by him owing to bad management. The bad management might be due to the lack of supervision on the part of the Court of Wards or might be due to the negligence of the servants employed by it. But the release would prevent the plaintiff from making any further demands in respect of the bad management. It may further be said in favour of the defendant that the Court of Wards was not acting as a mere agent of the plaintiff so that all the servants employed by it were really the servants of the plaintiff. The Board was acting under the powers conferred upon it by Act IV of 1912 and the servants were working under its own orders and were responsible to the Court of Wards. After the release the plaintiff cannot now sue the manager of the Court of Ward or other servants for damages on account of loss suffered by him in the course of the management by the Court of Wards. If the plaintiff's contention were to be allowed, the result would be that even if the Board of Revenue is exonerated from all liability by virtue of the deed of release the Collector or other the Manager of the Court of Wards would be still held responsible on account of the alleged loss suffered by the plaintiff. This obviously could not have been in the contemplation of the Legislature. In our opinion, therefore, there being no privity of contract between the plaintiff and the defendant the plaintiff cannot sue him for any damage said to have been caused during the period when the Court of Wards was managing his estate and for which period he has granted it a release.

The appeal is accordingly allowed and the decree of the lower Appellate Court is set aside and that of the Court of first instance restored with costs in the lower Appellate Court and this Court including fees on the higher scale.

M. A. A. *Appeal allowed.*

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3028 OF 1924.

May 5, 1925.

Present:—Mr. Justice Abdul Raoof.

JHANDA MAL AND ANOTHER—DEFENDANTS —APPELLANTS

versus

GOPAL DAS AND OTHERS—PLAINTIFFS —RESPONDENTS.

Pleadings and practice—Point not raised by party, whether can be raised by Court—Issue, trial of.

A Court should not make out a case for a party which that party has not set up in its pleadings. [p. 785, col. 2.]

Where, however, an issue can legitimately arise on the pleadings of the parties, it must be decided upon evidence properly recorded in the case. [p. 785, col. 1.]

Second appeal from a decree of the District Judge, Gujranwala, dated the 16th August 1924.

Mr. *D. C. Ralli* for Mr. *Mehr Chand Mahajan*, for the Appellants.

Mr. *Dev Raj Sawhney* for Mr. *M. L. Puri*, for the Respondents.

JUDGMENT.—This was a suit for the possession of a house which originally belonged to one Harkishen Das. The defendants are in possession of the house at present. The plaintiffs are the reversioners of Harkishen Das and they instituted the suit in their right as reversioners. The relevant facts are Harkishen Das had a son, Nanak Chand, who predeceased him leaving a widow, *Musammat* Ganesh Devi, who died five months before suit. Harkishen Das had adopted Anant Ram as his son. The suit was resisted on the following grounds:—

(1) That the plaintiffs had no *locus standi* to maintain the suit;

(2) that the house had come to the defendants under a gift made in their favour by Harkishen Das; and

(3) that in any case the defendants had been in adverse possession of the house for more than 12 years and that the plaintiffs' right, if any, had been extinguished by limitation.

The only question that I have to determine at present is whether the defendants had acquired an indefeasible title in the house in dispute by adverse possession. The other questions arising in the case have been set at rest by decisions arrived at in the Court below and in the High Court.

On the question of adverse possession the lower Appellate Court has found against the defendants and the plea of adverse possession has been overruled. It has, however, been contended before me by Mr. D. C. Ralli that *Musammat* Ganesh Devi, the widow of Nanak Chand, had taken adverse possession, and that, as his clients had derived title through *Musammat* Ganesh Devi, her adverse possession should be tacked on to their adverse possession. Incidentally, therefore, a question arose whether *Musammat* Ganesh Devi had ever taken adverse possession over the house in question. It was contended for the plaintiffs that as a widow she was entitled to maintenance and her possession over the house should be considered to have been in lieu of maintenance. On the other hand it was urged on behalf of the defendants before the lower Appellate Court that, inasmuch as *Musammat* Ganesh Devi was not an heir under the Hindu Law, her possession must be presumed to have been adverse. The learned Judge of the Court below has, however, raised a presumption the other way and has held as follows: —

"It is in evidence that some property was given to her for her maintenance and under these circumstances it may reasonably be presumed that the house in dispute was given to her for her residence."

I have no hesitation in saying that the presumption acted upon by the learned Judge cannot be justified. If an issue can legitimately arise in a case it will have to be tried upon evidence as to whether the possession in the position of a person as *Musammat* Ganesh Devi was an act adverse or under some arrangement with the reversioners. In the present case, however, this issue upon the pleadings did not arise, and in my opinion the learned Judge of the Court below ought not to have allowed the defendants-appellants to urge a point which did not arise upon the pleadings. The defendants claimed ownership either as donees from Harkishen Das or by adverse possession by themselves. In fact Jhanda Mal, in his statement before the Court on the 12th of November 1921, had distinctly stated that *Musammat* Ganesh Devi had never got possession over the house. The defendants had pleaded that the gift in their favour was made by Harkishen Das but the Trial Court went out of its way to hold that the gift in favour of the defendants had been made by *Musammat* Ganesh Devi. Mr. Ralli has relied upon this circumstance strongly, and has contended that, although it had never been pleaded by his clients that they had derived title through *Musammat* Ganesh Devi, the question had become material and relevant on account of the decision of the first Court. In my opinion the Trial Court tried to make out a case for the defendants which they themselves had never set up. In this view I must uphold the decree of the lower Appellate Court and dismiss the appeal with costs. I order accordingly.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 1468 OF 1924.

November 11, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

BINDA PRASAD AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

RAJ BALLABH SAHAI—DECREE-HOLDER—RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 11, 53—Execution of decree—Objection that certain property is not liable to attachment, dismissal of—Attachment of other property—Objection on similar grounds as previous objection, whether can be taken—*Res judicata*—Hindu Law—Joint family—Decree against member—Execution against sons after death of judgment-debtor, when can be allowed.*

Section 11 of the C. P. C. does not in terms apply to execution proceedings, but the principles underlying it would be applicable to such proceedings in cases where a point has been expressly raised and decided or in cases where it must be deemed to have been raised and decided by necessary implication. But where the subject-matter of a subsequent investigation

in execution proceedings is different and the basis of objection is a subsequent attachment, a previous order in regard to another property is not a bar to the objection being re-considered, inasmuch as the objection of a judgment-debtor may be allowed with regard to one item of property and may not succeed with regard to another. A decision that certain property is liable for the satisfaction of a decree cannot operate as *res judicata* when the liability of another item of property has to be considered. When a new item of property is attached it is always open to the judgment-debtor to plead that this new property is not liable to attachment. If in the course of deciding the dispute the Court has to re-consider the question of law already decided, there is no bar to such re-consideration. [p. 787, col. 2; p. 788, col. 1.]

The liability of a Hindu son to pay his father's debts not tainted with immorality is the same whether the liability is enforced through Court or is taken advantage of by the father in paying off his antecedent debts by private treaty. [p. 789, col. 1.]

The meaning of s. 53 of the C. P. C. is that where there is a liability under the Hindu Law on the sons to pay their father's debt that liability may be followed in execution as well. The test is that under that section the property which the father could sell in his lifetime is the only property that can be pursued by his creditor on his death in the hands of his sons. The Court must determine with reference to the date of the death of the father what property was at that time liable for the payment of his debts. [*ibid.*]

The mere fact that property in which a Hindu father had at one time an interest as member of a joint Hindu family has several years after his death passed into the hands of his sons by survivorship would not entitle a person who holds a decree against the father to proceed against such property in execution of the decree under s. 53 of the C. P. C. It must be shown that at the date of the father's death this property was liable for the satisfaction of the father's debts. [p. 789, cols. 1 & 2.]

Execution second appeal from a decree of the Additional Subordinate Judge, Ghazipur, dated the 21st July 1924.

REFERRING ORDER.—This case raises a substantial question of law as to the liability of the sons of a deceased judgment-debtor under a simple money decree when on the death of the judgment-debtor his own father also survived him. The learned Vakil for the appellants relies on the case of *Chunilal Harilal* v. *Bai Mani* (1). Before the new C. P. C. the creditor, inasmuch as he had not attached the interest of the judgment debtor in his lifetime, had no remedy. The question is whether s. 53 covers this case or whether that section should be confined to the case where on the death of the judgment-debtor the only members of which family who survive him are his sons or grandsons and not brothers or father. There is a further question whether a previous decision of the Execution Court when some other property was attached can operate as *res judicata*. In my opinion it is a fit case to be referred to a Bench of two Judges as it raises an important question of law. I accordingly direct that this case be laid before a Bench of two Judges.

Mr. *Shiva Prasad Sinha*, for the Appellants.

Messrs. *S. K. Dar* and *Baleshwari Prasad*, for the Respondent.

(1) 46 Ind. Cas. 745; 42 B. 504; 20 Bom. L. R. 660.

JUDGMENT.

Sulaiman, J.—This is an appeal by two judgment-debtors arising out of an execution matter. It appears that Tapeshari Dayal, the father of these objectors, had borrowed some money from the plaintiff decree-holder on a promissory-note in 1914. On the basis of that promissory-note a decree was obtained against him on the 28th of February 1916. Before any property of his was attached Tepeshari Dayal died. On his death he left his father Behari Lal and four sons, the two appellants and two minor brothers of theirs. In 1919 an application for execution of the decree was made against the sons alone. The two major sons filed objections on the 5th of August 1919 denying their liability to pay the amount due under the decree. Behari Lal also filed separate objections. By an order dated the 2nd of September 1919 the objections of the two sons were disallowed. By a subsequent order dated the 11th of December 1919 the objection of Behari Lal was allowed with respect to the house which had been attached but was disallowed with respect to certain mortgage rights. Subsequently Behari Lal also died. The decree-holder has now applied for recovery of the balance of the decretal amount by execution against the sons of Tapeshari Dayal by attaching a new item of property. The sons again filed objections urging that the property was not liable to pay the amount. The Court of first instance allowed their objections, but on appeal their objections have been disallowed and execution ordered to proceed, hence this second appeal.

It cannot be doubted that under the rulings which were in force under the old C. P. C., a decree-holder who had obtained a money-decree against a member of a joint Hindu family had no remedy in the execution department against the sons of the deceased. Under certain circumstances it was laid down that his remedy was by a separate suit. But I am not aware of any

case in which a separate suit was maintained when the deceased left not only sons and grandsons but also father, uncle, brother or nephews. However, that may be the decree-holder had no remedy in the execution department under the old Code. Provisions of s. 53 have now been added which under certain circumstances make the sons of the deceased liable to pay the debt. It is obvious that unless the respondent can come within the four corners of s. 53 which is a new enactment he has no remedy on the execution side. Section 50, sub-cl. 2 provides that the legal representative of a deceased person is liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. Section 52 says that the decree is to be executed by attachment and sale of the property of the deceased person. Now ordinarily a member of a joint Hindu family holds joint property in his own right which he acquired at his birth and does not inherit it from the deceased co-parcener in the strict sence of the word. But s. 53 provides that for the purposes of ss. 50 and 52 property in the hands of a son or other descendant which is liable under Hindu Law for the payment of debt of a deceased ancestor in respect of which a decree has been passed shall be deemed to be the property of the deceased which has come to the hands of the son or other descendant as his legal representative. It is clear to my mind that in order to see whether a certain person is the legal representative of the deceased with regard to the property sought to be attached the crucial date is the date of the death of the deceased and not the date of attachment of that property. If on the date when the deceased died it cannot be said that a certain property came into the hands of son or other descendant as his legal representatives, s. 52 will not be applicable. In the present case on the date when Tapeshari Dayal died Behari Lal was alive. Behari Lal was not a son or other descendant. He was in fact the father of the deceased. Under the Hindu Law there was no pious obligation on Behari Lal to pay his son's debt. The joint family of which Behari Lal was a member was also, therefore, not liable to discharge the debt. The property belonging to the f mily was, therefore, on the death of Tapeshari Dayal was not one which was liable under the Hindu Law for the payment of the debt of the deceased. It cannot, therefore, be disputed that between the years 1916 and 1919, when Behari Lal was alive, the decree-holder could not possibly proceed against the joint family property on the ground that it was liable to pay the debt of the deceased.

The learned Vakil for the respondent has argued before us that at the time when the attachment was being made there were no other members of the family but the sons and possibly grandsons of the deceased Tapeshari Dayal. It is said that, therefore, the property now in the hands of a son or other descendant is liable under the Hindu Law for payment of the debt of the deceased father. If the crucial date to be considered is the date of the death of the deceased then this argument obviously has no force. If the property was not liable before, it cannot now become liable merely because the grandfather has died since. I am, therefore, of opinion that the decree-holder is not entitled to proceed against this property and treat it as part of the assets of the deceased which has come into the hands of the sons and grandsons.

Lastly it has been urged that the question whether the sons are or are not liable is *res judicata* by virtue of the previous order dated the 2nd of September 1919. At that time the decree-holder had sought to attach items of property which were different from the property now sought to be attached. It is true that in their objections the sons did put forward the plea that as members of a joint Hindu family there was no liablity to pay the debt of their father. But in the execution application there was no express assertion that the property was separate or joint property. The order of the Court also is not very clear as to whether the property sought to be attached was separate or joint. The Court seems to have held that the sons were always the legal representatives of their deceased father and that execution can always proceed against them. It seems to have decided this question in the abstract as will appear from the following sentence in the order:—

"Whether a son inherits any property or not he is still the heir."

The question whether the joint property in the hands of the sons is liable or not is a pure question of law. The previous decision really related to the liability of the property that had been then attached. When a new item of property is attached it is

always open to the judgment-debtors to plead that this new property is not liable to attachment. If in the course of deciding the dispute the Court has to re-consider the question of law decided previously there is no bar to its re-consideration. Section 11 of the C. P. C. does not in terms apply to an execution proceeding. But the principle underlying it has been applied to such proceedings in cases where a point has been expressly raised and decided, or in cases where it must be deemed to have been raised and decided by necessary implication. But where the subject-matter is different and the basis of objection is a fresh attachment I cannot hold that the previous order in regard to another property is a bar to the point being reconsidered. The objection of a judgment-debtor may be allowed with regard to some items and may not succeed with regard to others. A decision that certain property is liable cannot operate as *res judicata* when the liability of another property is to be considered. The former decision cannot be considered as having decided the question in the abstract irrespective of the property which had been then attached. I, therefore, hold that the principle of *res judicata* does not apply.

Mukerji, J.—Having regard to the able arguments that have been addressed on both sides in this case I have thought it necessary to say a few words although I am generally in agreement with what has fallen from my learned brother.

Two points have been discussed. One is whether the appellants as Hindu sons are liable to pay out of the joint family property the debt of their father, and secondly, whether a previous order passed in the execution department dated the 2nd of September 1919 operates as *res judicata*.

It would be necessary to give the facts, briefly, in order to appreciate the points raised. There was a joint Hindu family consisting of the grandfather Behari Lal, the father Tapeshari Dayal and four sons, *viz.*, the appellants Binda Prasad and Baleshwari Prasad and two others, who are not before us. A money decree was obtained by the decree-holder the respondent against Tapeshari Dayal. Tapeshari Dayal died before the execution could be taken out against him. Some time in 1919, the decree holder sought the attachment of two properties, *viz.*, a half share in a house and a half share in a certain mortgagee interest. In the execution application the decree-holder did not say whether the property was ancestral or whether the property was the separate property of Tapeshari Dayal. He only made the four sons of Tapeshari Dayal party to the execution application. He did not say at all whether Behari Lal, the father of Tapeshari Dayal, was alive or dead or whether the family was joint or separate. In this state of things two objections were taken, one by the appellants, the adult sons of Tapeshari Dayal and the other by Behari Lal, the father of the deceased judgment-debtor. The sons said that they did not inherit any property of Tapeshari Dayal, that the property in their hands was their own property being joint family property and did not constitute any asset of Tapeshari Dayal. The father said in his objection that the family was joint and as the head of the family he had built the house. As to the mortgage, Behari Lal said that he had obtained the mortgage but in the name of his son. It does not appear that the decree-holder filed any answer to these objections. We are left in the dark as to what the case of the decree-holder was. The learned Munsif held that the present appellants, *qua* sons, were liable to pay. As regards Behari Lal's objection the learned Munsif held that the house was liable to be exempted, but the mortgagee interest was liable to be sold. There ended the matter for the time being.

Behari Lal died, later on and a fresh execution application was instituted, *viz.*, the one out of which the present appeal has arisen. This time the decree-holder sought the attachment of a certain fixed rate holding which is now admitted to be a joint family property of Behari Lal, Tapeshari Dayal when he was alive and Tapeshari Dayal's sons.

The first question to be considered is whether this property is liable to be attached in execution of Tapeshari Dayal's decree.

Section 53 of the C. P. C., is, by consent, the only provision to which we must refer to find the answer. Section 53 lays down who would be regarded as the legal representatives and what property would be regarded as the assets of a deceased judgment-debtor, in certain circumstances. But to read and understand s. 53 it would be necessary to read ss. 50 and 52 to which the section refers. Section 50 says that when a judgment-debtor dies the decree may be

executed against his legal representative. Then it further says that the legal representative is liable only to the extent of the property of the deceased which has come into his hands and has not been duly disposed of. In the case of a joint Hindu family, on the death of a joint member who happens to be a debtor, there are no assets that can be followed; because the deceased's share lapses into the family by the principle of survivorship. There is however a proposition of Hindu Law, *viz.*, the family property, in the hands of a father, is liable to pay his debts, not withstanding there may be joint sons of the father. On this principle, this High Court allowed only suits to be brought against sons of a deceased judgment-debtor, who happened to be a member of a joint Hindu family, if the property had not been attached in the lifetime of the debtor. Some High Court allowed the sons to be brought on the record and the family property to be pursued in their hands. To remove this anomaly s. 53 was enacted. It is laid down therein that where there is a liability under the Hindu Law on the sons to pay their father's debt that liability may be followed in execution as well. That is the meaning of s. 53 as I understand it. Taking this test we have to see whether the joint family property could be realised on the death of Tapeshari Dayal for the payment of his debts. There can be no doubt that Tapeshari Dayal could not sell the property at the time he died in order to pay off his own debts. He was not the head of the family and the property was not in his hands. The property was in his father's hands. The liability of the sons to pay their father's debt not tainted with immorality is the same whether the liability is enforced through the Court or it is taken advantage of by the father in paying off his antecedent debts by private treaty. In my opinion the test is that the property which the father could sell in his lifetime is the only property that could be pursued by his creditor on his death in the hands of his sons. This must be so, for obvious reasons. No case has been cited to us in which it has been established that irrespective of the nature of the property sons are liable to pay. The sons if they have any personal property, not inherited through the father, are not liable to pay a father's debt. It is, therefore, only such property as was under the control of the father in his lifetime in order to pay his antecedent debts that can be followed in execution. If this be so, it is clear that the property that existed in the family on the death of Tapeshari Dayal was not so liable. It is conceded that for three years, that is to say, during the lifetime of Behari Lal, the property could not be attached. Then the question is whether the death of Behari Lal has made any such difference in the position of the parties as to make the property, which was not attachable before, attachable now. The sons may very well say and they do say that they got the property not from their father but from their grandfather. As a matter of Hindu Law the grandsons get their property in their own right neither through their father nor through their grand-father. But in order to adjust the conflicting rights, *viz.*, of the creditor and of the son it is said that the property received by sons through their father is liable. In this case the property in question was received by the sons through their grandfather and not through the father. In this view we have to look to the date of the death of Tapeshari Dayal in order to see what property was liable to pay his debts. The result would be that the property now in question cannot be sold in execution.

On the question of *res judicata*. I have already indicated that the decree-holder did not make any statement whatsoever as to the nature of the property. He did not say whether the property was ancestral; he did not say whether the property was self-acquired property or separate property of Tapeshari Dayal. There was, therefore, no issue *as between the parties*. The Court chose to decide the appellants' objection on a point of law and it did decide it. But that would not show that was the contention of the decree-holder on the question of fact involved, *viz.*, as to the nature of the property. This will be one reason for holding that the previous order does not operate as *res judicata*.

Secondly, s. 53 of the C. P. C. shows that it is not with respect to every property that a Hindu son can be said to be the legal representative of his deceased joint father. A Hindu son may be a legal representative with respect to a certain property and he may not be a legal representative with respect to another property. If this be so, it cannot be said that because the appellants were held to be legal representatives

of the deceased judgment-debtor *qua* the properties attached before, they are also the legal representatives of the deceased, *qua* the property now in question, *viz.*, the fixed rate tenancy. In this view also the argument based on *res judicata* cannot hold water. In my opinion also the appeal must be allowed.

By the Court.—The appeal is accordingly allowed and the decree of the lower Appellate Court is set aside and that of the Court of first instance restored with costs throughout.

M. A. A.
Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT NO. 1170 OF 1924.
August 20, 1925.
Present:—Mr. Justice Buckland.
RAMLAL MURLIDHAR—PLAINTIFF
versus
JOGENDRA KRISHNA RAY—DEFENDANT.

Contract Act (IX of 1872), s. 62—Debtor and creditor—Mortgage, execution of—Loan, contract of, whether superseded—Intention of parties.

Where a debtor executes a mortgage in favour of his creditor and the debt is included in the consideration for the mortgage, the question whether the mortgage is intended to be a collateral contract or in substitution of the original contract of loan between the parties is a question of fact and intention to be decided in each case with reference to the language of the mortgage-deed and the other circumstances of the case. Where it does not appear that the parties intended to substitute the mortgage contract for the pre-existing contract of loan, the liability of the debtor under the previous contract is not superseded by the mortgage.

Mr. *S. C. Mitter*, for the Plaintiff.
Mr. *S. C. Bose*, for the Defendant.

JUDGMENT.—This is a suit to recover the sum of Rs. 25,000 as principal, and Rs. 7,853, the balance of interest due on a *hatchitta* with further interest in default. The principal sum was advanced on the 14th November 1920. The defendants on the same day signed a *hatchitta*. The *hatchitta* is admitted and also payments of interest subsequently made.

It appears that on the 3rd May 1921 the defendants by way of security executed a mortgage in favour of the plaintiff and other creditors charging certain property for the purpose of securing their pre-existing debts.

The only point taken on behalf of the defendant is that the debt on the *hatchitta* is merged in the mortgage and that the plaintiffs are not entitled to recover on the *hatchitta* exclusively.

No oral evidence has been adduced on either side, and I have been referred to the terms of the mortgage itself. It is argued under s. 62 of the Indian Contract Act that the parties agreed to substitute one contract for the other. But this is a question of fact and intention, *viz.*, whether the mortgage was intended to be collateral or in substitution.

I have been referred on behalf of the plaintiffs to *Ethel Georgina Kerr* v. *Clara B. Ruxton* (1), where it was held that where there is an existing debt, and the payment of it is secured by a deed intended to operate as a mortgage, the pre-existing personal liability of the debtor is not superseded. Upon the deed itself, it does not, in my opinion, appear that it was the intention of the parties to substitute it for pre-existing debt, and in consequence the liability of the debtor was not thereby superseded.

The mortgage, in my opinion, was merely intended as a collateral security. As regards this the plaintiff asked for leave under O. II, r. 2, of the C. P. C., to reserve his rights under the mortgage. Such leave has been granted, if necessary, I grant it now and there will be a decree for the amount claimed with costs on scale No. 2, interest on judgment at 6 per cent.

Z. K. *Order accordingly.*

(1) 4 C. L. J. 510.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 178 OF 1925.
October 28, 1925.
Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.
B. KISHEN PRASAD AND ANOTHER—DECREE-HOLDERS—APPELLANTS
versus
KUNJ BEHARI LAL—JUDGMENT-DEBTOR—RESPONDENT.

Contract Act (IX of 1872), s. 74—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise decree—Execution of decree—Court, whether can refuse to enforce penal clause—Plaintiff agreeing to

waive portion of claim if remainder satisfied within certain time—Penalty—Default in payment—Power of Court to grant relief.

Under O. XXIII, r. 3 of the C. P. C. where the parties to a suit arrive at a lawful agreement or compromise the Court is bound to record such agreement or compromise and to pass a decree in accordance with its terms. Under the rule no option is left to the Court to examine the terms of the compromise beyond seeing whether the agreement is lawful or not. An agreement of compromise which contains a penal clause, such as may be covered by s. 74 of the Contract Act, is not in any sense of the term unlawful, and a Court cannot refuse to record such an agreement merely on the ground of the inclusion in it of such clause. Where a decree passed on the basis of such an agreement is sought to be enforced by way of execution, it is open to the Court to examine the compromise and if it finds that the compromise falls within the purview of s. 74 of the Contract Act, it has power to refuse to enforce the penalty. [p. 792, cols. 1 & 2.]

Where a plaintiff agrees to accept a sum smaller than that claimed by him in the suit in satisfaction of his entire claim provided payment is made by certain date and the agreement provides that if the payment is not made by such date the plaintiff would be entitled to recover the whole of the amount claimed by him from the defendant, the agreement cannot be said to contain a penal clause, inasmuch as the plaintiff after default is made by the defendant in payment of the smaller sum within the time limited merely withdraws the concession granted by him to the defendant and does not seek to recover a penalty by making a demand for the recovery of the full amount of his claim. In such a case time must be regarded as of the essence of the contract and if the defendant fails to pay the smaller amount within the time agreed upon the Court has no power to relieve him from the consequences of such default. [p. 793, cols. 1 & 2.]

Execution first appeal from a decree of the Subordinate Judge, Mirzapur, dated the 14th February 1925.

Dr. *K. N. Katju*, for the Appellants.

Dr. *M. L. Agarwala* and Mr. *S. N. Chaube*, for the Respondent.

JUDGMENT.

Mukerji, J.—This is a decree-holder's appeal. On the 29th of May 1924 the suit, out of which the present execution proceedings have arisen, was compromised. The appellants here had claimed Rs. 15,000 and odd and the claim had been denied *in toto*, but on the date aforesaid the parties came to terms, the language of which will be material, for there is a good deal of controversy over its interpretation. Briefly the terms were to the effect that if the defendants paid a sum of Rs. 6,000 within a month and-a-half of the date of the compromise, and the balance of the sum that would make up one-half of the amount of the claim, namely, Rs. 1,532-8-0 together with the costs, in the course of three months, the plaintiffs would remit the balance of their claim. In the case of default on the part of the defendants the plaintiffs would recover the entire amount of their claim. According to the terms of the compromise, therefore, the sum of Rs. 6,000 was payable on the 13th of July 1924 and the balance to make up the one-half of the amount claimed and the costs were to be paid on or before the 29th of August 1924. The costs amounted to Rs. 1,552-15-9. The defendants paid the sum of Rs. 6,000 on the 15th of July 1924. On the 31st of August 1924 they paid a further sum of Rs. 2,000, also out of Court. On the 10th of September 1924 the appellants took out execution of their decree and claimed the whole amount for which the suit had been brought *minus* the sums which they had already received. In other words, they treated the whole of the claim as due to them and were expressly of opinion that there had been a default in terms of the compromise. On the 16th of September 1924 a further sum of Rs. 900 was paid and a few days later, on the 29th of September 1924 a sum of Rs. 185-7-9 was paid. Thus on the last mentioned date the entire sum of Rs. 9,0-5 7-9 decreed to the plaintiffs, with conditions attached, was paid up.

In spite of the payments, the decree-holders wanted to proceed with the execution and the judgment-debtors contested the application. They raised a question of fact, namely, the plaintiffs decree-holders had agreed to take the sum of Rs. 185-7-9 in full satisfaction of their claim. This question has been decided against the judgment-debtors and this question has not again been brought up before us for decision.

The judgment-debtors further contended that the terms of the compromise were of a nature as could be interfered with on principles of equity by the Court and the Court should not execute the decree for any sum beyond the one already paid out. In reply to this, the decree-holders contended that the Court executing the decree had no jurisdiction to go behind the terms of the decree and in any case the terms of the compromise were not of a penal character and on a true interpretation of the decree the whole amount claimed and the costs were payable.

Two questions accordingly arise before us for decision. First, whether the Execu-

ting Court had any jurisdiction to interfere with the terms of the compromise, supposing the terms were such as would enable the Court to interfere with under s. 74 of the Contract Act or on principles of equity akin to the terms of that enactment. The second question is whether on a true interpretation of the terms of the compromise it is open to the judgment-debtors to contend that the terms are penal and the Court should award only such compensation to the decree-holders as it may deem fit.

On behalf of the appellants the case of *Raghunandan Prasad* v. *Ghulam Alauddin Beg* (1) has been cited as authority. The facts of that case are slightly different in nature from the facts of the case before us, but there can be no doubt that the Court laid down the rule that the Court executing the decree must take the decree as it stood and had no power to go behind it or entertain an objection as to the enforceability of the terms of the decree, The learned Judges also held that the terms of s. 74 of the Contract Act were not applicable to a decree. This seems to be the only case in this Court which is directly to the point. On the other hand, there is a host of rulings of other High Courts which would establish that a compromise decree does not stand in many respects on a higher footing than a private contract. Such cases are, to mention some only, *Nagappa* v. *Venkat Rao* (2), *Lakshmanaswami Naidu* v. *Rangamma* (3), *Ramasami Naik* v. *Ramasami Chetti* (4), *Kandarpa Nag* v. *Banwari Lal Nag* (5), *Nand Rani Kuer* v. *Durga Dass Narain* (6) and *Krishna Bai* v. *Hari Govind Kulkarni* (7).

In view of the fact that on the second question involved in this case we are going to accept the appeal it is not necessary for us to express any definite opinion as to the question of law raised before us. If it were necessary we would find it rather difficult to agree with the case of *Raghunandan Prasad* v. *Ghulam Ala-ud-din* (1). Our reasons, briefly, would be something like this. Under O. XXIII, r. 3 of the C. P. C., where parties to a suit arrive at a lawful agreement or compromise the Court is bound to record such agreement or compromise and to pass a decree in accordance with the terms of the same. It will be noticed that no option is left to the Court to examine the terms of the compromise beyond seeing whether the agreement is lawful or not. An agreement which carries a penal clause such as may be covered by s. 74 of the Contract Act, is not in any sense of the term "unlawful." The agreement is lawful. The only question is whether the Court, in its discretion, would interfere with the terms or not in enforcing the same. Such being the case, an agreement which contains a penal clause will have to be recorded by the Court and is bound to form a part of the decree, according to law. The question would then arise whether the Court would be powerless to interfere with a compromise decree when executing the same. If the Court be powerless the whole policy of law would be reversed. As already stated, the Court has no power to scrutinise the terms of the compromise in order to see whether it contains any penal clause or not. Notwithstanding the rule contained in s. 74 of the Contract Act or the principles on which the enactment is based, a decree-holder would be free to enforce any terms, however oppressive against the judgment-debtor, and all this will happen although the decree is based on nothing more than an agreement between the parties.

If we examine the terms of s. 74 of the Contract Act we shall see that there is nothing in it which says that the Court has to use its discretion only in the case of a suit and at no other stage of it. The language used is extremely wide and would cover a case where a compromise decree is being sought to be enforced by way of execution. We need not definitely decide whether s. 74 in terms applies to the execution of a decree or not. It has been held in the rulings already quoted that the principle underlying s. 74 of the Contract Act will apply. From reasons of policy, therefore, it would be open to the Court to examine the terms of a compromise decree before enforcing it. On principle and authority, therefore, it was open to the Court below to examine the terms of the compromise and to see whether the penal clause, if there was any, was to be enforced *in toto* or not.

Coming to the second point in the appeal

(1) 79 Ind. Cas. 916; 46 A. 571; 22 A. L. J. 464; (1924) A. I. R. (A.) 689.
(2) 24 M. 265.
(3) 26 M. 31.
(4) 30 M. 255; 2 M. L. T. 167; 17 M. L. J. 201.
(5) 60 Ind. Cas. 864; 33 C. L. J. 244.
(6) 82 Ind. Cas. 505; 2 Pat. 906; (1924) Pat. 122; 5 P. L. T. 401; (1924) A. I. R. (Pat.) 387.
(7) 31 B 15; 8 Bom. L. R. 813; 1 M. L. T. 370.

it appears to us that the compromise comes within the purview of the rule in *Katub-ud-din Ahmad* v. *Bashir-ud-din* (8). As already indicated, and as we read the compromise, the defendants agreed that the plaintiffs' case was wholly true and enforceable. As a matter of concession, however, the plaintiffs agreed that they would accept one half of the amount claimed and full costs in lieu of entire amount claimed and the costs, if half the money claimed and the costs were paid within a certain time limited in the compromise. According to the terms of the compromise, therefore, if there was to be a default the plaintiffs were to get nothing more than what was declared to be due to them. It is not the case that because of a default the plaintiffs were to get something more than what they were entitled to. The compromise repeatedly states that in case of regular payment of the amounts mentioned, the plaintiffs would remit and excuse the payment of the remaining sum claimed. It was stated in the clearest of terms that in case of default the plaintiff would recover the amount claimed and the costs. We find, therefore, nothing in the terms of the compromise which would enable us to interfere and to accept the contention of the judgment-debtors that the decree-holders are entitled only to the lesser sum mentioned in the compromise and such compensation as the Court may award.

It was contended on behalf of the respondents that s. 55 of the Contract Act applied and the Court had to see whether time was of the essence of the contract or not. The contention was that time was not of the essence of the contract and, therefore, it did not at all matter if the judgment-debtors failed to make the payments on the stipulated dates. We cannot accept this contention and there is no authority for it. In cases of enforcement of contracts for the sale of land it has been held that ordinarily time is not of the essence of contract. We are not aware of any case in which it has been held that where a person is conceding something to another on the ground of the latter performing his part of the contract within a specified period the former is compelled to treat time as being not of the essence of the contract. If we entered into the spirit of the compromise, we should see that the whole claim was to stand decreed, but the defendants were to have this concession that if they paid certain sums of money, almost immediately and within the time limited, the plaintiffs would remit the balance of their claim. We are of opinion that even if s. 55 of the Contract Act were applicable, time was of the essence of the contract in this particular case, and there having been a default on the part of the judgment-debtors the decree was executable in its entirety.

I would, therefore, allow the appeal with costs, set aside the decree of the Court below and send the case back to that Court to proceed with the execution. The costs in the Court below will abide the event, and the costs in this Court will include Counsel's fees on the higher scale.

Sulaiman, J.—I agree. With regard to the ruling of *Raghunandan Prasad* v. *Ghulam Ala-ud-din* (1) which purported to follow the case of *Kalipada Sarkar* v. *Hari Mohan Dalal* (9) it does seem that the attention of the learned Judges was not drawn to various rulings in which the contrary view had been upheld. My learned brother has referred to the cases of the Madras High Court where it has been consistently held that it is open to an Executing Court to apply the principle underlying s. 74 of the Contract Act to a compromise decree. The Bombay High Court is also inclined to the same view. The Calcutta case in *Kalipada Sakar* v. *Hari Mohan Dalal* (9) is not directly in point, and it is noteworthy that Mr. Justice Mukerji who was one of the learned Juges who decided that case subsequently held in the case of *Kandarpa Nag* v. *Banwari Nag* (5) that the question should be gone into in the execution department. In a subsequent suit their Lordships of the Privy Council also interfered with a compromise decree [*vide Ram Gopal Mookerjea* v. *Masseyk* (10).] It also does appear that in the case of *Balkishen Das* v. *Run Bahadur Singh* (11) their Lordships of the Privy Council were prepared to consider the binding nature of a compromise decree in the execution department, though in that particular case it did not turn out to contain any penal clause. It is not, however, absolutely necessary in this

(8) 5 Ind. Cas. 665; 32 A. 448; 7 A. L. J. 394.

(9) 35 Ind. Cas. 856; 44 C. 627; 24 C. L. J. 375; 21 C. W. N. 1104.

(10) 8 M. I. A. 239; 2 W. R. P. C. 43; 1 Suth. P. C. J. 409; 1 Sar. P. C. J. 760; 19 E. R. 521.

(11) 10 C. 205; 10 I. A. 162; 13 C. L. R. 592; 7 Ind. Jur. 554; 4 Sar. P. C. J. 465; 5 Ind. Dec. (N. S.) 204 (P. C.).

case to express any final opinion on this point.

I agree that the terms of the compromise decree make it quite clear that the plaintiffs had agreed to make a concession in favour of the defendants in case the amounts were paid in two instalments within the times fixed. If the amounts were paid in time then the plaintiffs agreed to give up and relinquish the remaining portions of the amount claimed and to excuse its non-payment. This was a concession which they agreed to make in case no default was made. In the present case it cannot be disputed that the default was made at least with regard to the second instalment. The clause in the compromise decree is not like clauses where a penalty is prescribed for default of payment

It must also be conceded that the true intention of the parties must have been that time was of the essence of the contract. When the defendants did not make payments as directed by the compromise decree they cannot compel the plaintiffs to make the concession which they had agreed to make only if no default was made.

By the Court.—The appeal is allowed with costs. We set aside the decree of the Court below and remand the execution application to it with direction to proceed with it according to law. The costs in the Court below will abide the result. The costs in this Court will include Counsel's fees on the higher scale.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 248 AND 286 OF 1924

AND

CIVIL REVISION PETITIONS NOS. 485, 594 AND 645 OF 1924.

August 27, 1924.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Jackson.

BAVA C. VYTHELINGA MUDALIAR AND OTHERS—PETITIONERS

versus

R. MAHADEVA IYER AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 92—Temple—Scheme of management—Powers of Court—Court, authority of, to interfere in management of temple—Trustees, powers of, exercise of, mode of—Order passed by Court in pursuance of scheme—Appeal, whether lies.

A Court has no general power to regulate the affairs of a temple in respect of which a scheme has been framed under s. 92 of the C. P. C. In such a case the authority of the Court to deal with matters arising under the scheme is derived from the scheme itself and the Court has no general power outside of or independent of the scheme. [p. 795, col. 1]

Where a scheme framed by the Court under s. 92 of the C. P. C. for the management of a temple provides for the appointment of an officer by the Board of Control set up under the scheme, the Court has no power to cancel an appointment made by the Board or to direct the Board to appoint another person in place of the one appointed. [p. 795, col. 2.]

Where under such a scheme certain powers are delegated to the Board of Control to be exercised by a vote of the majority of the members of the Board subject to confirmation by the Court, a majority of the members of the Board cannot exercise those powers by separate and individual action; the powers must be exercised in a meeting of the Board duly convened in accordance with the provisions of the scheme. Where a majority of the members of the Board purport to exercise any of such powers individually without convening a meeting, the Court has no power either to confirm or to reject what the members have purported to do, inasmuch as the action of the members cannot be regarded as that of the majority of the members in accordance with the provisions of the scheme. [*ibid.*]

An order passed by the Court in pursuance of a scheme of management framed by the Court under s. 92 of the C. P. C. is not an order passed in execution of a decree and is not, therefore, appealable. [p. 796, col. 1.]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order, dated the 31st March 1924, of the Court of the Subordinate Judge, Tiruvalur, in E. A. No. 116 of 1924, in O. S. No. 125 of 1921 on the file of the Court of the Subordinate Judge, Nagapatam.

Mr. *T. V. Gopalaswamy Mudaliar*, for the Appellants.

Messrs. *N. Muthuswamy Iyer*, *K. Narasimha Iyengar*, *K. V. Krishnaswamy Iyer* and *K. S. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—A scheme was framed to regulate the affairs of the temple known as Tiruvalur Tyagarajaswami Koil. A Board of Control was constituted consisting of five members. There was a vacancy in the office of the superintendent of the temple and on 9th February 1924 the Board appointed one Swaminatha Mudaly as superintendent. One Mahadeva Iyer presented a petition to the Subordinate Judge of Tiruvalur and the relief he asked for is contained in the following paragraph, "For the above reasons I pray that this Hon'ble Court will be pleased to cancel the

said appointment and either direct the trustees to appoint a new fit and proper person or itself appoint a fit and proper person for the said post." The Subordinate Judge upon this petition made an order on 31st March 1924 from which we take the following passage: "It is, therefore, desirable not to have him any more as the temple superintendent and *I would, therefore, call upon the members of the Board to remove him from that place and* see that a proper man who has no such bad antecedents is appointed." Then again, "The Board will be requested to make the appointment within 15 days from the date of receipt hereof and if no proper person is appointed by that date *this Court will make the appointment*, in place of the present superintendent whose appointment is not approved at all." The correctness of this order has been questioned on the ground that it is one made without jurisdiction. It is not disputed that the authority of the Court to deal with matters arising under the scheme is derived from the scheme itself and no general power of the Court outside of or independent of the scheme is relied on. Turning to the provisions of the scheme, we find nothing in them to justify the order of the Judge. Paragraph 5 of the scheme deals with the appointment of a treasurer and superintendent. It runs thus: "A treasurer shall be appointed in the first instance by the Court and shall receive a monthly salary not exceeding Rs. 150 and if any vacancy arises hereafter his successor shall be appointed by the Court. A temple superintendent shall be appointed by the Court on a salary of Rs. 50 and the subsequent vacancies may be filled up by the Board. Only high caste Hindus are eligible for this appointment." While the clause gives the Court the power to appoint a successor in the case of a Treasurer, power of appointment in the case of a vacancy in the office of the superintendent is clearly vested in the Board. Now, turning to the order of the Subordinate Judge, he seems to think that the Superintendent being a relation of one of the trustees, is not qualified. Another reason given is that it is desirable to have a Brahmin as a Superintendent. These expressions of view on the part of the learned Subordinate Judge derive no support from the scheme itself. They are indeed opposed to it and we are inclined to think that the Judge is under the impression that he has general power to regulate the affairs of the temple in question, which, of course, he has not and we must, therefore, set aside his order.

The next order which is impeached relates to the cancellation by the Sub Court of what purports to be a dismissal of the treasurer. In May 1924 three out of the five members of the Board seized all the papers and account books in the hands of the treasurer, and suspended him. On 13th May 1924 the matter having been brought to the notice of the Subordinate Judge he cancelled the order of suspension. Clause 6 of the scheme regulates the power of the Court in this respect. It reads thus:— "The Board shall have no power of suspension or dismissal of the treasurer except by a vote of majority of the members subject to confirmation by the Court." The power of suspension is vested in the Board. The decision of the Board is, no doubt, subject to confirmation by the Court. Now the three members of the Board acting in their individual capacity suspended the treasurer. There was no resolution of the Board placed before the Court for confirmation and the order of the Judge cancelling what purports to be the suspension of the treasurer is without jurisdiction.

At a meeting of the Board alleged to have been held on 14th June 1924 the treasurer was dismissed and the resolution was again placed before the Court. On the 24th July 1924 the Judge purported to cancel the order of the Board. Here again he does not appear to have properly appreciated the position. Under the scheme and the rules framed by the Court the treasurer who is the secretary of the Board can convene a meeting or the President may convene it. As a matter to be disposed of at the meeting is the alleged misappropriation by the treasurer and as he refuses to take orders from the three members who are dissatisfied with him, it is said that the latter cannot get the treasurer to convene a meeting. As the president is siding with the treasurer it is alleged that he will not convene a meeting either. In these circumstances, the three members referred to after suspending the treasurer appointed in his place the superintendent of the temple. This course does not find sanction in the scheme. He purported to call for a meeting and it was at that meeting that the treasurer was dismissed. We are inclined to think that there was in law no meeting and no resolution. Thus

the condition precedent to the exercise of its power by the Court, namely, a resolution of the Board, was wanting. The learned Judge says: "Their order cannot be approved under the circumstances and I cancel it and the treasurer will continue as the treasurer from that date pending enquiry into the charges which the Board might wish to establish against him." If this implies a mandate to the Board to meet and vote on the question relating to the dismissal of the treasurer, it is obvious that the Judge has no such power and this part of the order is not justified by either party. And if this part of the order cannot be carried into effect and at the same time the order of dissmisal stands cancelled, the result is that a treasurer against whom serious charges are made by a majority will be allowed to continue in office. There will then be a deadlock and this illustrates the danger of the Court intervening without strict regard to the provisions of the scheme. We think, that the order of the Subordinate Judge is without jurisdiction and we, therefore, set it aside.

All the parties complain that there are many defects in the scheme as well as the rules, that they need revision and that these deficiencies are responsible for the present state of affairs. If this be so, the parties must be left to their proper remedies.

The appeals filed against the orders of the Subordinate Judge, we have treated as civil revision petitions; where revision petitions were filed it has not been necessary to resort to this procedure. Appeals were justified on the footing that the orders of the Subordinate Judge were made in execution of the scheme decree. This contention is clearly wrong and is opposed to *Rungantaha* v. *Krishnawsami* (1). The orders of the Subordinate Judge, however, being without jurisdiction, are liable to be set aside in revision and we are satisfied that a case has been made out for the exercise of our revisional powers.

Each party will bear his costs and none of the trustees will be permitted to take his costs from the temple funds.

V. N. V.

Z. K. *Order accordingly.*

(1) 75 Ind. Cas. 189; 18 L. W. 237; (1923) M. W. N. 664; 47 M. 139; (1924) A. I. R. (M.) 369.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 122 AND 123 OF 1922.

January 28, 1925.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Page.

BASANTA KUMAR PAL AND ANOTHER DEFENDANTS NOS. 4 AND 5—APPELLANTS

versus

HARENDRA NATH MUKHOPADHYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Public Demands Recovery Act (III of 1913), ss. 36, 37—Certificate sale—Suit to set aside sale, maintainability of—Fraud, fictitious allegation of, effect of.

Where a sale held under the provisions of the Bengal Public Demands Recovery Act is sought to be set aside by the certificate debtor, questions arising between the certificate holder and the certificate debtor or their representatives must be decided in accordance with the procedure laid down by s. 37 of the Act, notwithstanding that the purchaser under the auction-sale is also impleaded as a party interested in the proceeding. [p. 797, col. 2.]

A certificate debtor cannot evade the provisions of s. 37 of the Bengal Public Demands Recovery Act and maintain a suit to set aside a sale held under the Act by making fictitious allegations of fraud in respect of matters which under the section, and in the absence of fraud, must be determined by means of the procedure specified in the section. [p. 798, col. 1.]

Appeals against the decrees of the Subordinate Judge, Jessore, dated the 16th January 1922.

Dr. *D. N. Mitter*, and Babu *Narain Chunder Kar*, for the Appellants.

Mr. *N. K. Basu*, Babus *Profulla Chunder Chukerbutty*, *Surendra Nath Guha* and Mr. *Nuruddin Ahmed*, for the Respondents.

JUDGMENT.

IN NO. 122 OF 1922.

Page, J.—The plaintiffs, who are the respondents in this appeal, in the suit out of which the appeal arises claimed a declaration that a sale by auction pursuant to a certificate granted under the Public Demands Recovery Act, III (B. C.) of 1913, was void as being obtained by fraud and also on the ground of certain irregularities in relation to the execution proceedings. The suit was decreed and the 4th and 5th defendants prefer this appeal and contend that the suit was incompetent and was not maintainable having regard to the provisions of s. 37 of the Public Demands Recovery Act. At the auction sale, the property in question was purchased by the 2nd defendant who subsequently assigned his interest therein for value to the 4th and 5th defendants.

Now, certain irregularities which were material and, therefore, would have justified

an application to the certificate officer to set aside the sale were canvassed before us, the two main irregularities being that no notice was served upon the certificate-debtors as provided by s. 7 of the Act and that no sale-proclamation was published. Originally, an application was made on behalf of the plaintiffs *inter alia* to set aside the sale under s. 23 and the appellants contend that the suit was incompetent by reason of the provisions of s. 36 (*b*) of the Act which provides that "Notwithstanding anything hereinbefore contained, a sale of immoveable property in execution of a certificate shall not be held to be void on the ground that the notice required by s. 7 has not been served; but a suit may be brought in a Civil Court to recover possession of such property or to set aside such sale on the ground that such notice has not been served and that the plaintiff has sustained substantial injury by reason of the irregularity: provided that no such suit shall be entertained, if the certificate-debtor has made appearance in the certificate proceeding, or has applied to the certificate-officer under s. 22 or s. 23 to set aside the sale." The answer of the respondents is that their complaint was not merely that the notice required by s. 7 had not been served but that there were other material irregularities in the execution proceedings and that, therefore, s. 36 would not render their suit incompetent. The appellants further contend that the irregularities complained of were irregularities which involved the decision of questions between the certificate-holder and the certificate debtors or their representatives relating to the confirmation or setting aside by an order of the Court under the Public Demands Recovery Act of a sale held in execution in such certificate and that, pursuant to s. 37 of the Act, the suit was not maintainable because that section provides that "any such question shall be determined not by suit but by order of the certificate-officer before whom such question arises or of such other certificate-officer as he may determine." Now, it is, in my opinion, clear that the questions which arose with respect to the irregular process of execution were questions which arose between the certificate-holder, that is, the Secretary of State, and the certificate-debtors, because, if the questions in issue were determined in a manner favourable to the certificate-debtors (who are the respondents in this appeal), the effect would be that the execution levied pursuant to the certifice on behalf of the Secretary of State would be rendered nugatory. It is settled law that, where a question arises between the certificate-holder and the certificate-debtors or their representatives, the procedure laid down by s. 37 must be adopted, notwithstanding that the purchasers under the auction-sale may be impleaded as being interested parties in the suit. See *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1). But that case is an authority for another proposition, namely, that it was the policy of the Legislature in enacting the Public Demands Recovery Act to provide that such questions as would arise in the course of execution proceedings should be settled in the manner provided by s. 37. Lord Macnaghten in delivering the judgment of the Board in the case to which I have referred observed as follows:—"It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of s. 244, and that, when a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit is interested in the result has never been held a bar to the application of the section." In my opinion, those observations are apposite in a consideration of the provisions of s 37 of the Public Demands Recovery Act: and, in relation to any question which comes within the ambit of that section, recourse must be had to the procedure therein specified. I, therefore, think that, if the present suit was a suit based merely on the irregularities in the execution proceedings to which our attention has been adverted, it was not maintainable. *A fortiori* it was not maintainable when, in point of fact, an application in that behalf had been made to the certificate-officer pursuant to the Act and in this suit it was sought to canvass anew the same question.

The respondents, however, take one further point in opposition to the objection raised by the appellants to the maintainability of the suit. The learned Advocate on behalf of the plaintiffs has strenuously urged that s. 37 in any event has no application,

(1) 19 C. 683; 19 I. A. 166; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898 (P. C.).

because in the suit it was sought to set aside the sale and to recover possession of the premises, the subject-matter thereof, on the ground that the execution proceedings were brought about by the fraud of the defendant: and he argues that the terms of the first paragraph of that section are to take effect subject to the proviso that "a suit may be brought in a Civil Court in respect of any such question upon the ground of fraud." Now, it is abundantly clear from a perusal of the record in this case that the main contest in the Trial Court ranged on the question as to whether the sale had been brought about through the fraud of the defendants. Evidence was led for the purpose of proving that the plaintiffs' *gomastha* Najimuddin, the auction-purchaser, (the defendant No. 2) and Krishna Behari Ray, a co-sharer with the plaintiffs in the property in question, had combined to defraud the plaintiffs of a valuable property by so acting in the matter of the execution proceedings that the sale should take place without the plaintiffs having knowledge of, or, being privy to, such proceedings. My learned brother and I invited the Advocate for the respondents to draw our attention to the evidence in support of this charge of fraud: but the evidence to which he referred us, in my opinion, was wholly inadequate to found a charge of fraud. With respect to the allegation of fraud, the learned Trial Judge has arrived at a clear finding adverse to the plaintiffs. So far am I from disturbing that finding that I find myself, after a perusal of the evidence, in full accord with it. The matter, therefore, stands thus: The plaintiffs, after taking steps to have the sale set aside by making application to the certificate-officer pursuant to the provisions of the Act, seek in this suit to re-open the same questions and, in addition, have added a claim to the same relief upon an allegation of fraud which proves to be groundless. If it were open to a certificate-debtor to adopt such a procedure, the provisions of ss. 36 and 37 would to a large extent become nugatory; for, a certificate-debtor, if minded to evade the provisions of the 37th section, could always bring a suit by making a fictitious allegation of fraud in respect of matters which under the section and in the absence of fraud, must be determined by means of the procedure therein specified. In my opinion, in the circumstances obtaining in this case, the allegation of fraud having been negatived, there is no other alternative but to hold under the terms of the Act that the plaintiffs should fail in their suit unless they satisfy the Court that they are entitled to a decree based upon some ground other than those to which s. 37 is made applicable To my mind, the plaintiffs have wholly failed to make out their claim on any such ground, and this suit must be held to be not maintainable. The decree passed therein must, therefore, be set aside and the suit dismissed with costs both here and below. The transferee defendants Nos 4 and 5 and the Secretary of State for India are entitled to separate sets of costs in both the Courts.

Walmsley, J.—I agree.

IN No. 123 OF 1922.

The judgment that has just been delivered in Appeal No. 122 will apply equally to this case also. This appeal is also decreed and the plaintiffs' suit dismissed with separate sets of costs to the transferee defendants Nos. 4 and 5 and the Secretary of State for India in Council.

Z. K. *Appeals allowed.*

LAHORE HIGH COURT.

CIVIL REVISION No. 160 OF 1925.

May 25, 1925.

Present:—Mr. Justice Abdul Raoof.

MOHLA—PLAINTIFF—PETITIONER

versus

KAHNUN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. IX, r. 13—Limitation Act (IX of 1908), Sch. I, Art. 164—*Ex parte *decree, application to set aside—Summons not duly served on defendant—Limitation, determination of.*

Upon an application to set aside an *ex parte* decree the Court must satisfy itself as to whether the application is within time and whether sufficient cause has been shown for the non-appearance of the defendant on the date of hearing. Where due service of notice on the defendant is not established, the Court must decide whether the application is within time from the date when the petitioner came to know of the *ex parte* decree.

Civil revision from an order of the Sub-Judge, Second Class, Sargodha, dated the 22nd January 1925.

Mr. *M. L. Puri*, for the Petitioner.

JUDGMENT.—An *ex parte* decree was passed against Dara, defendant No. 1, the vendee, on the 14th October 1924. He

made an application on the 8th December 1924 for the setting aside of the *ex parte* decree. Upon this application the Court had to satisfy itself upon two points (1) whether the application was within time. Article 164 of the Indian Limitation Act provides a period of 30 days from the date of the *ex parte* decree or from any subsequent date when the applicant had knowledge of the decree. (2) Whether sufficient cause had been shown for the non-appearance of the defendant on the date of hearing. This second ground has been dealt with by the Court and it has been decided that he had shown sufficient cause for non-appearance on the date of hearing. On the question of limitation the Court below has expressed no opinion. It was its duty to see whether the application was within time. One thing is, however, clear that service of notice on the defendant was not established. It was, however, for the Court to decide whether the application was within time from the date when the patitioner came to know of the *ex parte* decree. For the decision of this question the case will go back to the Court below. The remand is under O. XLI, r. 25, C. P. C.

Z. K. *Case remanded.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 44 OF 1925

AND

CIVIL REVISION No. 23 OF 1925.

June 24, 1925.

Present:—Mr. Justice Das and Mr. Justice Ross.

SAGAR MULL—DEFENDANT No. 6—APPELLANT—PETITIONER

versus

HIRA MAHARAJ AND OTHERS—PLAINTIFFS—RESPONDENTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7, Sch. II, paras. 15, 16—Reference to arbitration—Minor plaintiff not interested in relief—Sanction of Court, absence of, effect of—Award—Objections—Decree in accordance with award—Appeal, whether lies.

Where a suit is referred to arbitration and on the award being made the Court considers the objections made against the award and overruling the objections pronounces judgment according to the award, no appeal lies against the decree on any of the grounds which would go to establish the invalidity of the award. The only ground on which such a decree can be objected to in appeal is that it is in excess of the award and the appeal must be directed only against that part of the decree which is open to such objection. [p. 800, col. 1.]

Where a minor plaintiff is not in any way interested in the relief claimed in a suit, a reference of the dispute to arbitration is not rendered invalid by reason of the fact that the sanction of the Court under r. 7 of O. XXXII of the C. P. C. is not granted to the minor's joining such reference. [p. 800, col. 2.]

Appeal against a decision of the District Judge, Monghyr, dated the 3rd of November 1924, reversing that of the Munsif, First Court, Monghyr, dated the 12th of April 1922.

Messrs. *S. M. Mullick* and *N. N. Sen*, for the Appellant.

Messrs. *Hasan Imam*, *N. C. Sinha*, *N. C. Ghosh* and *Niamutullah*, for the Respondents.

JUDGMENT.

ROSS, J.—This is an appeal against an order of the learned District Judge of Monghyr reversing a decision of the Munsif and remanding the suit for trial on the merits. The suit was brought by plaintiff No. 1, Hira Maharaj, and his minor son against the six defendants who are said to be members of the Committee of the Lakhisarai Gausala. The suit was for specific performance of an agreement for sale of a plot of land entered into by the defendants with the plaintiff No. 1 on the 18th of December 1920. The parties entered into an agreement to refer the matter to arbitration and a petition was presented on behalf of the minor plaintiff for leave to enter into this agreement and permission was granted by the Court. As the award was not submitted by the time limited by the Court, after several adjournments had been given, the arbitration was superseded on the 27th of March 1921 and the case was fixed for hearing for the 30th. On that date another application was made by plaintiff No. 1 and the defendants to refer the suit again to arbitration. This was granted and the same arbitrators were appointed and they submitted their award on the following day.

The Munsif passed a decree in accordance with the award and dismissed the suit. The learned District Judge held that the reference to arbitration was illegal inasmuch as no permission was granted to the minor plaintiff to enter into the agreement by which the case was submitted to the arbitrators on the second occasion. He, therefore, set aside the decree and remanded the suit for trial on the merits.

On behalf of the appellant, who is defendant No. 6, the contentions are, first, that no appeal lay to the District Judge;

secondly, that the question of permission to the minor plaintiff did not arise inasmuch as it was only plaintiff No. 1 who asked for relief; thirdly, that no permission was necessary because O. XXXII, r. 7, does not control para. 1 of Sch. II to the Code; and, lastly, that even if permission was ordinarily necessary, it was not necessary in this case as plaintiff No. 2 was joint with his father, the *karta* of the family, and was, therefore, represented by him.

On behalf of the respondents it is contended in the first place that even if no appeal lay to the District Judge he has passed a proper order such as the Court would have passed on an application by the plaintiff under s. 115, and, therefore, this Court should not interfere; secondly, that the supersession of the arbitration on the 27th of March cancelled all the proceedings in arbitration up to that date and it was necessary to obtain fresh permission for the minor plaintiff to enter into an agreement to refer the suit to arbitrators; and, thirdly, that permission was necessary because O. XXXII, r. 7, controls para. 1 of Sch. II; and, therefore, the reference to arbitration was without jurisdiction and the order passed by the District Judge was right.

Now para. 15 of Sch. II states the grounds on which an award can be set aside. These are for the Trial Court to consider; and the ground now taken fell to be considered and was considered by that Court and it was decided that the award was not invalid on that ground. Under para. 16, therefore, the Court had to pronounce judgment according to the award and it did so. Clause (2) of that paragraph states the grounds on which an appeal may be taken against such a decree, *viz.*, that it is in excess of the award and not in accordance with it. No such ground was taken before the District Judge and, therefore, no appeal lay. This is plain on the language of the section itself and the authorities are clear—*Ghulam Khan* v. *Muhammad Hassan* (1), *Lutawan Kubar* v. *Lachiya* (2) and *Khudiram Mahto* v. *Chandi Charan Mahto* (3). The case which the learned District Judge has relied upon, *Benode Lal Pakrasi* v. *Pran Chandra Pakrasi* (4), was decided in 1898 under the old Code and before the decision of the Judicial Committee and is no longer law. The learned Counsel for the respondents did not attempt to support this part of the judgment and conceded that no appeal lay to the District Judge. But as the District Judge entertained and decided the appeal there is a second appeal to this Court. That second appeal must be decided according to law and the judgment of the District Judge must be set aside.

As to the contention of the respondents that this Court should not interfere when a proper order has been made, this argument can be raised only in answer to an application for the exercise of the revisional jurisdiction of the Court. This is not the case here; nor is there any application by the respondents against the order of the Munsif; consequently this point does not arise. Moreover, even if it did arise, this contention could not succeed because it rests on a pure technicality. The defect is formal only, because on the first reference to arbitration permission was accorded to plaintiff No. 2; and there is no ground for supposing that it would have been refused on the second occasion.

But on the merits it is clear that the appellant is entitled to succeed. I do not propose to enter into the question whether O. XXXII, r. 7, controls para. 1 of Sch. II—a question on which there has been much difference of opinion; nor need I discuss the argument that plaintiff No. 1 represented plaintiff No. 2 so as to make it unnecessary for the Court to grant permission to plaintiff No. 2 to agree to arbitration. But the plaint itself shows—and the prayer is specific—that only plaintiff No. 1 prayed for judgment. No relief was sought for plaintiff No. 2 and he was in no way interested in the suit. The agreement of which specific performance was sought was entered into by the defendants with the plaintiff No. 1 and he alone was entitled to enforce it.

On every ground I am of opinion that the decision of the learned District Judge is wrong and must be set aside. The appeal is, therefore, decreed with costs throughout and the decree of the District Judge is set aside and that of the Munsif is restored.

The application in revision is dismissed.

Das, J.—I agree.

Z. K. *Application dismissed.*

(1) 29 C. 167; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(2) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57.

(3) 35 Ind. Cas. 358; 1 P. L. J. 306; 2 P. L. W. 377.

(4) 11 Ind. Cas. 898; 14 C. L. J. 143.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 376 OF 1925.

July 23, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Pearson.

THOMAS JAMES HENRY ARNUP—ACCUSED—PETITIONER

versus

KEDAR NATH GHOSH—COMPLAINANT—OPPOSITE PARTY.

Evidence Act (I of 1872), ss. 145, 155 (3)—Statement made by witness before Police and reduced to writing, whether admissible—Procedure—Criminal trial—Delay, undesirability of.

A statement made by a witness in a criminal case to the Police which has been taken down in writing is admissible in evidence at the trial under s. 155 (3) of the Evidence Act for the purpose of contradicting such witness, provided the provisions of s. 145 of the Act are complied with in the matter of putting the specific parts of the statement which are to be relied upon to the witness in his cross-examination. [p. 803, col. 2.]

Delay in the disposal of a criminal case only invites evidence which cannot be relied upon. The longer the period allowed to elapse from the time of the event to the time when the witnesses give evidence, the greater is the probability of confusion and of the truth being obscured. [p. 804, col. 1.]

Messrs. *Sen* and *Satindra Nath Mukherjee*, for the Petitioner.

Mr. *Panna Lal Chatterji*, for the Opposite Party and the Crown.

JUDGMENT.

Sanderson, C. J.—This Rule was granted by my learned brother, Mr. Justice Panton, and me, calling upon the Chief Presidency Magistrate and the opposite party to show cause why the conviction of, and the sentence passed on, the petitioner should not be set aside on grounds Nos. 1, 8 and 9 stated in the petition.

The petitioner was convicted by an Honorary Presidency Magistrate for assault under s. 323 of the Indian Penal Code and sentenced to pay a fine of Rs. 50. The decision was given on the 23rd of March, 1925.

The petitioner is a sergeant in the Calcutta Police attached to the Kumartoli, outpost and the assault is alleged to have been committed on the 19th of February, 1924.

The case for the complainant, Kedar Nath Ghose, who is a taxi-car driver, shortly stated, was as follows: He was driving a taxi-car near a tea-shop in Ahiritola Street when some person from the tea-shop summoned him to stop. He stopped, and the man who called him asked him to wait two or three minutes while he had some tea. The complainant, therefore, drew up his taxi and waited. The petitioner came upon the scene and asked him to move his car. The complainant gave him the explanation which I have already mentioned and then it was alleged, without any cause, as the complainant (the taxi-driver) was about to start his taxi, the officer assaulted him, poked him with a stick and then gave him a blow on the head. The blow on the head caused an abrasion of the skin and bleeding. The sergeant then blew a whistle, which brought two or three constables to the spot, dragged him out of the car and took him to the *thana*. That is the complainant's story.

The case for the petitioner is that he found the complainant's car stationary, and on asking the complainant to move it, he was told that he stopped there for the purpose of getting a cup of tea. The petitioner then told him that he must not stay there and asked him to move his car, which he refused to do. The petitioner also asked for his license, but the complainant refused to produce it. The petitioner then attempted to arrest the complainant with the object of taking him to the *thana* because of the obstruction which he had caused and because he refused to produce his license. There was a scuffle and the petitioner had to get assistance, and in the course of the scuffle the complainant's head was hurt by his falling on the ground.

The Rule was granted on three grounds: the first was "that the learned Magistrate's judgment was not in accordance with law inasmuch as he had not considered the evidence of the witnesses examined on behalf of the defence."

On further examination of the judgment, and by reason of the explanation of the Magistrate, I am of opinion that there is no substance in that ground.

Another ground on which the Rule was granted was that "the learned Magistrate was wrong in holding that the statements of Kedar Nath, Anath Motilal and Harendra Chakravarty before the Deputy Commissioner of Police were not on the record and the said witnesses were not confronted with them." This ground as far as I can see upon further information, now needs consideration only with regard to the complainant Kedar Nath and Anath.

It appears that the complainant was examined by the Deputy Commissioner on the 22nd of February, that is to say,

three days after the event, and he was represented by a Pleader; the Deputy Commissioner took down his statement in writing; and, there is no doubt that the complainant, when he was before the Magistrate in this case, was cross-examined with regard to certain statements which he was alleged to have made to the Deputy Commissioner and which the Deputy Commissioner had taken down in writing. They were put to the complainant for the purpose of showing that the complainant's evidence could not be relied upon by reason of the fact that the complainant had made statements to the Deputy Commissioner which were inconsistent with parts of the evidence which he had given before the Magistrate.

The Magistrate stated in his answer to the Rule as follows: "With regard to ground No. 8 of the petition this Court considered the statements of the witnesses Kedar Nath Ghose—and not Khagendra Nath as stated in the petition evidently through an oversight—Anath, Nati Lal and Herendra Chakravarty before the Deputy Commissioner of Police inadmissible in evidence for the following reasons." I need not deal with this point at any length because the learned Vakil, who appeared for the Crown did not endeavour to support the contention, which was put forward by the Honorary Magistrate, in this respect, and he stated that he could not contend that the statement which Kedar Nath, the complainant, had made to the Deputy Commissioner was inadmissible. In my opinion the learned Vakil for the Crown was correct in his opinion and took the right course in not contending that the statement was inadmissible. In my judgment it was admissible.

It, therefore, appears that in this respect there was ground for this Rule being granted.

The next question which has to be considered is whether the Rule should be made absolute by reason of the matter to which I have just referred.

In my opinion the statement which the complainant made to the Deputy Commissioner was of importance, first because it was made within three days of the occurrence and the evidence given by the complainant before the Magistrate was given some months after the event. Therefore, it is probable that the complainant would be more accurate, when he was making his statement three days after the event, than when he was giving evidence some months after.

In the second place the statement which the complainant made to the Deputy Commissioner contained some important admissions; for instance the complainant said: "I stopped my car. I was going to get my flag down, but the would-be passenger told me to wait a couple of minutes. I then ordered for a cup of tea from the tea-shop keeper who sent me a cup of tea. I was drinking it. Just at this time a sergeant came and told me to move on, and I told him that I was waiting because a Baboo had told me to wait. Saheb asked for my license I did not show him the license, but I was begging the sergeant to excuse me at which the sergeant abused me."

The statement refers to two matters: first, that the complainant was having a cup of tea; and, secondly, that he was asked for his license and he did not produce it. Both these statements the complainant denied when they were put to him when he was giving evidence before the Magistrate. I do not place much importance upon the point whether the taxi-driver was having a cup of tea, or was not having a cup of tea, but the other matter is of importance because if he was asked for the license and he refused to produce it, I understand that it would be the duty of the petitioner to take him into custody, and if the complainant resisted, the petitioner would be justified in using the necessary amount of force to carry out his duty.

To what extent the mind of the Honorary Magistrate would have been influenced, if he had understood that the above-mentioned evidence was admissible and that he must take it into consideration it is difficult to say. It is true that in his judgment the Magistrate did refer to this statement having been put to the complainant when he was giving evidence, but I do not find that the Magistrate at any time in his judgment came to any definite decision whether the complainant was asked for the license and whether he refused to produce it. He has referred to the fact that the complainant was charged with obstruction and was convicted of causing an obstruction; and the Magistrate seems to have thought that there the matter ended and that he need not consider that question further.

In my opinion it was essential in this case that the Magistrate should make up his mind in the first instance as to how the scuffle began. Did it begin by an unwarranted assault by the petitioner upon the complainant, or did it begin by reason of the petitioner asking him for the license and by reason of the complainant refusing to produce it?

It seems to me quite possible that if the Magistrate had applied his mind to that view of the case he might have come to a contrary conclusion.

For these reasons, without expressing any opinion upon the merits of the case, I am of opinion that this Rule must be made absolute.

In the ordinary course, and especially having regard to the fact that the petitioner was in the position of a sergeant of the Police, I should have thought it necessary to remit this matter to the Magistrate in order that it might be re-tried, the Magistrate giving due weight to the evidence which he thought was inadmissible but which I have decided is admissible.

But this is, I trust, an exceptional case; and, in my opinion, for the reasons to which I will presently refer, it would be wrong for this Court to direct a further trial.

The rule, therefore, must be made absolute; the conviction and sentence set side; and, the fine, if paid, will be refunded.

I have already stated that the occurrence took place on the 19th of February 1924, and the matter was eventually decided by the Magistrate on the 23rd of March 1925, more than a year after the event. We were informed that the proceedings against the petitioner were instituted on the 20th of March 1924, which was, as my learned brother reminds me, the day following that on which the proceedings against the complainant were started in respect of the alleged obstruction. We were informed that the hearing of this case did not begin until the 25th of August 1924, as I understand, because the other case (the prosecution of the complainant) was taken up first and was not concluded until about that time.

In my judgment there are not sufficient materials before this Court to enable it to form any estimate as to what was the reason, or what were the reasons, for the extraordinary delay which occurred in the disposal of this case.

It is only necessary to mention one or two facts to see that some steps must be taken to prevent such delays occurring in the future. This was a simple case—an ordinary assault case—which, in my judgment, ought to have been disposed of within a week or so after the event which happened on the 19th February 1924. Instead of that, I find that witnesses were examined in August, September, October, and November, 1924 and the decision was not given until March 1925. Whether this is considered from the point of view of the complainant, or from the point of view of the petitioner, such a delay as took place in this case is inexcusable having regard to the simple nature of the case, and it might easily amount to a denial of justice. I desire to make it clear that I do not intend to make any reflection upon the Honorary Magistrate, because, as I have already said, I have not sufficient materials to enable me to specify what was the cause of the delay, and, further, it is evident that the Magistrate took great care with the case.

The fact, however, remains that it was more than a year before this simple case was disposed of; and my learned brother and I are of opinion that it is our duty to call attention to it and direct that a copy of our judgment be sent to the Government of Bengal.

Pearson, J.—I entirely agree with the judgment of the learned Chief Justice in this matter. I also think that the learned Magistrate ought to have gone right back to the very beginning of the events leading up to the assault, and from that point of view it was of very great materiality to consider the question which has been raised of the demand for the production of the license by the accused from the complainant.

In so far as the learned Magistrate has stated in his explanation that he considers the previous statement of certain witnesses inadmissible in evidence, I only wish to say that it is abundantly clear to my mind that the evidence was admissible under s. 155, sub-s. (3) of the Evidence Act subject only to this: that the provisions of s. 145 of the Evidence Act had been complied with, in the matter of putting the specific parts of it, which were to be relied upon to the witnesses in their cross-examina-

tion. That in fact was done in at least two cases. That evidence was admissible.

I desire to associate myself entirely with what has fallen from the learned Chief Justice with regard to the delay which has taken place in this case. I have not been able to go in detail into the matters which would enable me to say upon whom the blame rests. While I desire also to associate myself with what has been said about the great care which the Magistrate seems to have applied in coming to his judgment in the case, it seems inconceivable that a simple assault case which ought to have been disposed of within a few days of the events or, at any rate, within a few days of the complaint, should spread itself over a period of more than a year before the decision was arrived at. Such delay is only inviting evidence which cannot be relied upon. The longer the period allowed to elapse from the time of the event to the time when the witnesses give evidence the greater the probability of confusion and of the truth being obscured, particularly in a case like this where the accused happens to be a Police Officer, and the alleged offence arises out of his conduct during the course of his duties.

Z. K. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 9 OF 1925.

March 3, 1925.

Present :—Mr. Justice Jai Lal.

QADIR BAKHSH AND OTHERS—CONVICTS —APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 149, 304, 325—Riot—Grievous hurt caused to several persons—Death resulting from grievous hurt—Conviction, separate, for grievous hurt and culpable homicide, legality of.

Accused assaulted the party of the complainants and caused injuries to several members of that party. Some of the injuries were grievous and in one case they proved fatal. All the accused were convicted of offences under ss. 304 149 and 325 149 of the Penal Code and were awarded separate sentences in respect of each offence:

Held, that a conviction under ss. 325 149 was not legal in the face of the conviction under ss. 304 149 as the major offence included the minor. [p. 805, col. 1.]

Criminal appeal from an order of the Sessions Judge, Jhelum, dated the 16th October 1924.

Messrs. *M. L. Puri* and *Shiv Narain*, for the Appellants.

Diwan *Ram Lal*, for the Crown.

JUDGMENT.—On the 12th April 1924 there was a serious riot in *Mouza* Dharuggi in which one Maula Bakhsh received seven injuries which caused his death and ten others on his side received a large number of injuries. The First Information Report was made at Dhuman Police Station by Sarfraz Khan (P. W. No. 3) at 4-30 on the same afternoon. The time of occurrence is mentioned as midday, and the distance between *Mouza* Dharuggi and the Police Station as five miles. The nine appellants who were sent up for trial have been convicted by the Sessions Judge of Jhelum under ss. 148, 304/149 and 325/149, Indian Penal Code, and have been sentenced to seven years' rigorous imprisonment each under ss. 304/149 and to rigorous imprisonment for three years each under ss. 325/149. The sentences have been ordered to run consecutively. No sentence under s. 148 has been passed.

The case for the prosecution is that on the 11th April 1924 the cattle of Qadir Bakhsh and Bag Hussain, appellants, trespassed into the wheat of Maula Dad. *Musammat* Ghulam Bi, wife of Maula Bakhsh, deceased, and Maula Dad seized the cattle and took them to the cattle pound. On the 12th April 1924 *Musammat* Sardaran and one Sher were beaten by some members of the party of the appellants by way of retaliation. Sher, *Musammat* Sardaran, Rahim Dad and Maula Bakhsh left the village to report the matter at the *thana*. When they reached the field of *Musammat* Rajan they were set upon by all the appellants who were armed with *lathis*. The other injured persons came to their rescue; they also were beaten by the accused. Maula Bakhsh died the same day.

The story of the prosecution is supported, *inter alia* by the evidence of Sarfraz Khan (P. W. No. 3.), Sher (P. W. No. 4), *Musammat* Sardaran (P. W. No. 5), Fateh Ali (P. W. No. 10), Muhammad Zaman (P. W. No. 12), *Musammat* Begam (P. W. No. 13), and also by *Musammat* Soni (P. W. No. 14), and Rahim Dad (P. W. No. 15). Except Fateh Ali (P. W. No. 10) all the witnesses belong to the family of the deceased or are in some way or other related to him. Fateh Ali appears to be the only distinterested witness who has been produced in this case. But the evidence of these witnesses is sup-

ported by the medical evidence from which it appears that ten members of the complainant's party received a large number of injuries, while out of the accused Qadir Bakhsh, Nawazish Ali, Allah Ditta, Muhammad Wali, and Muhammad Waris had altogether ten injuries between them. These latter injuries were all comparatively slight. All the appellants except Qadir Bakhsh, deny their presence at the time of the assault and have produced evidence in support of their plea. This evidence has rightly been rejected as unreliable by the learned Sessions Judge. Qadir Bakhsh who admitted having taken part in the fight, stated that his cattle damaged the crop of Maula Dad and the latter impounded them. The next day he drove the complainant's cattle to the pound and, therefore, a fight between himself, Allah Ditta, Muhammad Wali and two others and the complainant's party took place, in which stones and sticks were used, but Maula Bakhsh was not killed at the time. Now this statement leaves wholly unexplained the large number of injuries received by the members of the complainant's party. It is inconceivable that if, as alleged by Qadir Bakhsh, the complainant's party came to fight with Qadir Bakhsh and hiscompanions they did not cause more harm than they have been proved to have done. The First Information Report was made without any undue delay. It fully supports the evidence given at the trial. In my opinion the guilt of all the appellants has been established. The appellants have all been convicted under ss. 304/149 and also under ss. 325/149. Section 304 is the graver of the two offences. All the appellants have been convicted under ss. 304/149 and 325/149 not for any injury caused by them individually, but on account of the injuries caused by some members of the unlawful assembly of which they also were members. I do not think that a conviction under ss. 325/149 is legal in the face of the conviction under ss. 304/149 as the major offence included the minor. I, therefore, set aside the conviction and sentence under ss. 325/149 in the case of each appellant, but confirm their conviction and sentence under ss. 304/149, Indian Penal Code.

Z. K. *Appeal partly accepted.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE CASE NO. 158 OF 1925.

July 22, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Pearson.

SHAIKH GARIB HAJI—COMPLAINANT

versus

MUCHIRAM SHAU AND ANOTHER—ACCUSED.

Penal Code (Act XLV of 1860), s. 379—Theft, essence of—Possession of accused, effect of—Criminal Procedure Code (Act V of 1898), s. 438—Reference to High Court—Admission before Sessions Judge, effect of.

An offence under s. 379 of the Penal Code is an offence against possession, and a person cannot, therefore, be convicted of stealing something of which he was already in possession.

Where in a proceeding before a Sessions Judge upon which a reference is made to the High Court, admissions of fact are made by either party, such admissions ought to be accepted by the High Court for the purposes of the reference.

Criminal reference, under s. 438 of the Cr. P. C, made by the Sessions Judge, Birbhum.

Mr. *R. M. Chatterji*, for the Complainant.

Mr *Satindra Nath Mukerji*, for the Accused.

JUDGMENT.

Pearson, J.—This is a reference under s. 438 of the Cr. P. C. made by the learned Sessions Judge of Birbhum.

It appears that the two accused, who were father and son, were convicted of an offence under s. 379 of the Indian Penal Code in respect of two trees which they cut down either partly or altogether.

The facts show that they were admittedly occupying a *pachai* shop for about three years and that upon the bank of a tank near by, these trees were growing in what formed the compound of the house occupied by the accused.

The learned Sessions Judge has given his opinion that the complaint does not disclose an offence under s. 379 of the Indian Penal Code, inasmuch as the trees are admitted to have been on the holding in possession of the accused. That is an admission which disposes of the case because the offence under s. 379 is an offence against possession.

It is said by the learned Vakil appearing for the complainant that an admission in these circumstances should not be held necessarily binding upon his client in a proceeding of this kind which is not a judgment and in which the learned Sessions Judge does not come to any decision on

the lines of a judgment. But it is quite clear that if upon the proceedings before the learned Judge upon which the reference is made, admissions of fact should be made by either party, then those admissions of fact ought to be accepted by this Court for the purpose of the reference, and, in the present case, it appears from the order-sheet that before the motion for reference was made by the accused, notice was served upon the opposite party and that Pleaders for both parties were heard. We have, however, been referred to the judgment of the Trying Magistrate in connection with what is said to be a mistake with regard to these admissions; and although there are certain statements there, which taken by themselves might be construed into a finding that the compound in which these trees grew was not in possession of the accused, there are, on the other hand, other statements which would certainly lead to that conclusion.

I would, therefore, accept the reference, set aside the conviction and the sentence, and direct that the fine, if paid, be refunded.

Sanderson, C. J.—I agree.

Z. K. *Conviction set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 109 OF 1925.

May 14, 1925.

Present:—Mr. Justice Martineau and Mr. Justice Zafar Ali.

NAZIR SINGH AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 211, 215, 291—Commitment, whether can be questioned in appeal against conviction—List of defence witnesses not filed till late stage—Absence of witness—Adjournment, right to—Evidence Act (I of 1872), s. 26—Confession made to Magistrate while accused in custody of Police, admissibility of.

A commitment once made stands, unless quashed by the High Court, and if it is not quashed the trial of the person committed must take place in pursuance thereof. After a trial has ended it is not open to the accused to impugn the commitment, inasmuch as a commitment can be quashed with only one object, namely, that the trial of the person committed may not take place, and where a trial has already taken place it serves no purpose to impugn the commitment. [p. 806, col. 2.]

Where an accused person does not file a list of witnesses under s. 211 of the Cr. P. C., he is not as of right entitled to an adjournment of the trial by reason of the fact that one of the witnesses summoned at his request at a late stage has not turned up. [p. 807, col. 1.]

A confession made by an accused person to a Magistrate at a time when he is in the custody of the Police is admissible in evidence under s. 26 of the Evidence Act. [p. 808, col. 1.]

Criminal appeal from an order of the Sessions Judge, Ferozepore, dated the 13th December 1924.

Dr. *Nand Lal* and Mr. *Gullu Ram*, for the Appellants.

Mr. *Des Raj Sawhney*, for the Crown.

JUDGMENT.

Zafar Ali, J.—Agreeing with the unanimous opinion of the four assessors the Sessions Judge of Ferozepur has convicted Nazir Singh or Nazir, carpenter, aged 17, and Indar Singh *Jat*, aged 27, of the murder of Thola Singh, carpenter, aged 28, and has sentenced both under s. 302, Indian Penal Code, to suffer the penalty of death. The convicts have appealed jointly through Dr. Nand Lal, and the case is also before us under s. 374, Cr. P. C., for confirmation of the capital sentences.

The result of the usual magisterial enquiry before the commitment originally was that both the accused were discharged but the District Magistrate came to the conclusion that they had been improperly discharged, and then in compliance with his order the Magistrate committed them for trial. Dr. Nand Lal contends that the order of the District Magistrate was illegal inasmuch as he failed to give the accused an opportunity which he was bound to do under proviso (*a*) to s. 437, Cr. P. C., to show cause why they should not be committed for trial, and that the commitment being based on an illegal order was itself illegal, and he urges that this illegality vitiated the trial that followed. But a commitment once made stands, unless quashed by the High Court, and if it is not quashed the trial of the persons must take place in pursuance thereof. In the present case the High Court was not moved at all to quash the commitment and, therefore, the trial was perfectly in order. Now that the trial has ended in conviction it is not open to the accused to impugn the commitment because the stage at which they could do so has passed. A commitment is quashed with only one object, namely, that the trial of the persons committed may not take place. If a trial has already taken place it serves no purpose to impugn the commitment.

Another preliminary objection taken by the learned Counsel was that the conviction was illegal because the case was decided without procuring the attendance of and examining a witness cited by the appellants in defence. But the appellants gave no list of witnesses to the Committing Magistrate as they should have done under s. 211, Cr. P. C. The dates originally fixed for the trial in the Court of Session were 12th and 13th November which had been duly notified to the prisoners, but they filed no list of witnesses before those dates. After the case had been postponed to the 8th December a list of defence witnesses was filed on the 28th November, *i. e.*, only ten days before the commencement of the trial. All the witnesses were duly summoned, but one Behari Lal who belonged to the Faridkote State did not appear. The President of the State reported that the witness was untraceable. The learned Sessions Judge held that "the accused were seriously at fault in delaying their application to have Behari Lal summoned" and refused to grant any adjournment. In the circumstances stated above the refusal to grant an adjournment was fully justified, and the accused had no right to summon a witness whom they had not cited before the Committing Magistrate. Section 291, Cr. P. C., provides that "the accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in ss. 211 and 231, be entitled as of right to have any witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial." This objection, therefore, was as indefensible as the former, and both were overruled and then arguments were heard on the merits.

Now the incontrovertible facts are briefly as below:—

Thola Singh, deceased, went out from home on the evening of the 9th October 1923 and did not return. His absence that night did not rouse any apprehensions in the mind of his wife *Musammat* Bishno (P. W. No. 4) as she thought that he had gone to her parents at Mari. The next morning her son Indar (P. W. No. 5), aged 9, went out to graze cattle, and she went after him with food. There she went into her field of maize and lighted on the body of her husband, who lay in the field strangled with his own turban. She burst into cries and lamentations, which attracted to the spot Bhola Singh (P. W. No. 3) brother of the deceased. Other people also collected there. The son of the deceased, *i. e.*, the boy Indar (P. W. No. 5), gave the information that as he was returning home the preceding evening his father had met him at the canal bridge within a short distance of his field and that he saw at that time Indar *Jat*, Sarmukh carpenter, and Nazir, son of Sarmukh, following his father with sticks and sickles in their hands. Bhola Singh, accompanied by this boy and Sewa Singh *lambardar*, repaired to the Police Station, which was seven miles off, and made the First Information Report at 7 P. M. In this report he related all the facts that have been described above and stated that his brother might have been murdered by Sarmukh, Nazir and Indar because they were inimical to him.

The Sub-Inspector reached the spot at midnight and on the ensuing day (11th October) Sardar Sahib Uttam Singh, Honorary Magistrate and *Zaildar*, joined the investigation because the village of the deceased was within his *zail* (circle). The Sub-Inspector asked Sardar Sahib Uttam Singh to make enquiries from Nazir and accordingly Sardar Sahib Uttam Singh took Nazir aside to a house to do so. Sardar Sahib Uttam Singh took with him two *safedposhes*, both named Harnam Singh, a third *safedposh* and Sewa Singh *lambardar* also. Before Sardar Sahib Uttam Singh and all these gentlemen Nazir made a clean breast of it, and made a confession to the following effect:

"He (Nazir) and Indar both went to Thola Singh's field to break his *makki*. Thola Singh, deceased, suddenly jumped out from some direction and caught hold of Indar accused, and a struggle ensued between the two. Nazir ran to about 200 *karams* away, but seeing that Indar was not following him he returned to the spot and there saw that Indar had got Thola Singh pinned underneath him. Indar asked Nazir to help him, saying that if they did not kill Thola Singh he would get them imprisoned. Indar and Nazir both then strangled Thola Singh with his turban. A sickle and a *safi* were found on the spot close to the body. Nazir stated that the sickle was his and that the *safi* belonged to Indar"

Indar was then taken aside and he also confessed before Sardar Sahib Uttam Singh and his companions.

Besides Indar (P. W. No. 5) two other boys, *viz.*, Gulzara and Bachittar (P. Ws. Nos. 6 and 7), also deposed that on the fateful evening they saw the appellants together near the village pond. Further, Ishar (P. W. No. 9) deposed that he saw both the appellants emerging from the field of the deceased after sunset.

Thus the main evidence against the appellants is that they made confessions before the Honorary Magistrate, Sardar Saheb Uttam Singh, and persons who were with him. The circumstantial evidence is that they were seen near the spot before and after the occurrence. Further, there were certain scratches on the shoulder of Indar and his shirt and *chaddar* bore stains of blood.

The Committing Magistrate had discharged the accused holding that their confessions were not admissible in evidence, and Counsel for the appellants has contended in this Court also that they are inadmissible because the accused were practically in the custody of the Police when the confessions were made. But even if they were in the custody of the Police the confessions were admissible because they were made to a Magistrate. Section 26 of the Evidence Act lays down that no confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. As the confessions in the present case were made in the immediate presence of a Magistrate it is clear that they were admissible in evidence. However, as they were not adhered to, the question is whether they are genuine and true. There can be no doubt that the appellants made the confessions as deposed to by the Magistrate himself, and all the surrounding circumstances indicated that they were made voluntarily and that the appellants gave a true description of what had actually taken place. We, therefore, can find no reason for holding that they were not true and genuine. These confessions, coupled with the circumstantial evidence detailed above are quite sufficient to bring the offence home to the accused, and we are of opinion that they have been rightly convicted, and we maintain the convictions and confirm the sentence of death in the case of Indar. But having ragard to the extreme youth of Nazir, who seems to have played into the hands of Indar, we are of opinion that the extreme penalty of law should not be exacted in his case and we accordingly alter his sentence to that of transportation for life.

Martineau, J.—I agree with my learned brother. The principal evidence in the case is the evidence as to the appellants having confessed their guilt to Sardar Uttam Singh. That gentleman is an Honorary Magistrate and I see no reason for not accepting his statement and that of Harnam Singh, *safedposh*, regarding the confessions. There are also circumstances indicating that the confessions were true. In particular it has been shown that the appellant Nazir, after making his confession, pointed out his foot-marks along the route which he had taken when he ran away from the place, where Indar and Thola Singh were struggling, and came back to it. These footmarks were faint near the place of the murder, but became distinct about 95 *karams* off, and some were covered up there and were identified by the tracker Hira (P. W. No. 13) as Nazir's out of the footmarks of a number of other persons. As regards Indar there is some evidence to show that the "*safi*" found on the spot is his, and the presence of scratches on his shoulder and blood stains on his clothes is of some significance. The statements of the deceased's son Indar (P. W. No 5) and the other two boys show only that they saw the appellants near the village pond, and do not help the case for the prosecution materially; but Ishar's statement that he saw the appellants coming from the deceased's maize field on the evening in question is of importance, and no reason for rejecting it has been shown.

I concur in maintaining the convictions and in confirming the sentence of death passed on Indar and altering the sentence in the case of Nazir to one of transportation for life.

Z. K. *Appeal partly accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 641 OF 1925.

October 31, 1925.

Present:—Mr. Justice Walsh.

KALLU—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Arms Act (XI of 1878), s. 19 (f)—Cartridge, empty, whether ammunition—Possession of empty cartridge—Offence.

An empty cartridge which cannot be re-loaded in India is not ammunition and the possession of such a cartridge does not, therefore, amount to an offence under s. 19 (*f*) of the Arms Act.

Criminal reference made by the Additional Sessions Judge, Moradabad, dated the 7th October 1925.

REFERRING ORDER.—The house of the applicant was searched in connection with a dacoity on the 5th of November 1924, when some empty cartridges were found in his house. As he was not a licensed holder of arms, he was put up on his trial on a charge under s. 19 (*f*) of the Indian Arms Act in connection with these cartridges. His defence was that his village was situate in a place where people went to do shooting, and that consequently a good many empty cartridges could be found there. He had not collected these cartridges but that they had been brought by his children as curiosities. Consequently he was not guilty of any offence in connection with these cartridges. The lower Court has overruled this defence and has accordingly inflicted a fine of Rs. 50 on the applicant. Hence the present application.

The question to be decided in this case is very simple. The learned Vakil of the applicant has practically accepted that the cartridges were recovered from his house. He has, however, argued that there was nothing on the record to show that these cartridges could be re-loaded in India, and so they could not be regarded as ammunition within the meaning of the Arms Act. It appears from the judgment of the Magistrate that he has followed the ruling of the Hon'ble Court reported as *Baldeo Singh* v. *Emperor* (1). In that ruling it has been laid down that an empty cartridge is ammunition within the meaning of the Arms Act, and so a person found in possession of it is guilty of an offence under s. 19 (*f*) of the Arms Act. On the other hand, the learned Vakil of the applicant has pressed upon me the ruling of the Hon'ble Court reported as *Amir* v. *Emperor* (2). In that ruling it has been held that if an empty cartridge cannot be re-loaded in India, it may not be regarded as ammunition within the meaning of s. 19 (*f*) of the Arms Act. I think that when both these rulings are considered together, it may be taken in a case of possession of empty cartridges, it should be proved that these cartridges can be re-loaded in India and used as ammunition by the persons with whom they are found. If this is not found, it is to be held that the recovered cartridges are not ammunition and so no prosecution can be made on their basis. In the present case, there is no proof on the record to show that the cartridges that were recovered from the applicant's house were cartridges that could be re-loaded in India. If the present case had been an appeal, I would have recorded further evidence on this point and decided the case on the basis of that evidence. But as this is not an appeal but an application for revision, I think that I have no authority to do so. In these circumstances, I think that the evidence against the applicant is not sufficient and that the benefit of the want of that sufficient evidence should be given to the applicant.

I accordingly submit the case to the Hon'ble Court with the recommendation that the conviction of the applicant be set aside and the fine, if paid by him, should be refunded. The record is to be sent to the Magistrate with the request that he may submit any explanation that he thinks fit.

JUDGMENT.—I agree with the Sessions Judge, set aside the conviction and direct the fine to be refunded.

Z. K. *Conviction set aside.*

(1) 4 Ind. Cas. 405; 7 A. L. J. 102; 32 A. 152; 10 Cr. L. J. 573.

(2) 87 Ind. Cas. 927; 23 A. L. J. 455; L. R. 6 A. 127 Cr.; (1925) A. I. R. (A.) 498; 26 Cr. L. J. 1039; 47 A. 629.

PATNA HIGH COURT.

CRIMINAL REVISION No. 715 OF 1924.

January 15, 1925.

Present:—Justice Sir Jwala Prasad, KT.

RAMESHWAR SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 522—Penal Code (Act XLV of 1860), ss. 143, 448—Criminal trespass accompanied by show of force—Restoration of possession, whether can be directed—Order, when can be passed—Revisional Court, powers of.

Accused came armed in large numbers and forced themselves into the house of the complainant in spite of the remonstrance made by the complainant and succeeded in taking possession of the house. They were convicted under ss. 143 and 448 of the Penal

Code and an order was also passed against them under s. 522 of the Cr. P. C. directing restoration of the possession of the house to the complainant:

Held, that the accused having taken possession of the house by means of criminal trespass threatening to use force to the complainant, their act came within the purview of s. 522 of the Cr. P. C. and the order directing restoration of possession was, therefore, perfectly valid.

Under s. 522 of the Cr. P. C. an order directing the restoration of possession of the property must be made by the Magistrate trying the case within one month of the conviction of the accused in the case. By virtue of cl. (3) of the section, however, an order under the section may be passed by a Court of Appeal, confirmation, reference or revision at any time howsoever long after the conviction by the Magistrate.

Criminal revision from an order of the Honorary Magistrate, Gaya, dated the 6th November 1924.

Messrs. *S. Bashiruddin* and *S. N. Nooruddin*, for the Appellant.

JUDGMENT.—The Magistrate by his order of the 6th November 1924, directed the Sub-Inspector, Tikari Police, to see that possession of the house, for entering which the petitioners were in another case convicted under s. 448, Penal Code, was restored to the complainant. The order is objected to on two grounds: first, that the mere conviction under s. 448 does not justify an order for restoration under s. 522 of the Cr. P. C. The complainant's case under s. 448 was that the accused persons in large numbers came armed and forced themselves into the house in spite of the remonstrance made by the complainant. The accused succeeded in taking possession of the house by means of criminal trespass threatening to use force to the complainant and his men. Therefore, their act would clearly come under s. 522 which says:

"Whenever a person is convicted of an offence attended by criminal force (or show of force or by criminal intimidation), and it appears to the Court that by such force (or show of force or criminal intimidation) any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, (when convicting such person or at any time within one month from the date of the conviction) order (the person dispossessed) to be restored to the possession of the same."

The case cited on behalf of the petitioners *Mahesh Sahu* v. *Emperor* (1) does not apply to the present case, and the amendment of s. 522, as it then stood, by adding the words "show of criminal force" puts an end to the present contention. Section 522, previous to the amendment of 1923, had only the words "by criminal force." By the amendment the words "or show of force or by criminal intimidation" have been added. In the present case the finding of the Magistrate is that the accused were members of an unlawful assembly under s. 143, Penal Code, and they have been convicted under that section though no separate sentence has been passed; so the conviction in the present case is not merely under s. 448, but under ss. 448 and 143. The contention must, therefore, be overruled.

Next it is contended that the order of the Magistrate in the present case passed on the 6th of November, more than six weeks after the conviction of the accused by him on the 23rd September 1924, is illegal. In this connection also the recent amendment may be usefully looked into. Under the old section the Magistrate was required to pass an order of restoration immediately upon the conviction of an accused, and it was held that the order of restoration must have been passed simultaneously. In view of those decisions one month's time is now given to the Magistrate to pass an order of restoration after the conviction of an accused. The order in the present case is, no doubt, more than six weeks after the conviction of the accused. Strictly speaking, therefore, the order will be beyond the power of the Magistrate. But cl. (3) of the section is a new provision added in 1923 whereby an order under the section may be made by any Court of Appeal, confirmation, reference or revision.

Thus, the order may be passed by the Courts of Appeal, confirmation, reference or revision at any time howsoever long after the conviction by the Magistrate. The matter has come to this Court in revision. This Court is, therefore, competent to pass an order restoring the property to the complainant of which he has been dispossessed by forcible criminal trespass committed by the accused. In the circumstances of the case I exercise my power to pass an order under s. 522 of the Cr. P. C., which virtually is confirmation of the order passed by the Magistrate.

Z. K. *Revision disallowed.*

(1) 50 Ind. Cas. 30; 20 Cr. L. J. 270.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 61 OF 1925.

September 23, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

LAHANU MANAJI—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 339, 341—"Wrongful restraint", what amounts to—Obstructing person from proceeding in certain direction with bullocks—Offence.

All that s. 339 of the Penal Code protects is the obstruction of any person. The section does not cover a case where a person is himself left free to proceed in a direction in which he has a right to proceed, but without any impediment (such as a cart) that he may have with him. The circumstances of each case must, however, be considered and if the obstruction to a person's taking a thing with him amounts to obstructing the person himself from going in a manner he has a right to go, there is "wrongful restraint" within the meaning of s. 339 of the Penal Code.

Accused prevented the complainant from using a *mot* to which he had yoked his bullocks on the slope of a well which existed for that purpose:

Held, that the accused having obstructed the complainant from proceeding with his bullocks in a direction in which he had a right to proceed with his bullocks were guilty of an offence under s. 341 of the Penal Code.

Reference made by the Sessions Judge, Nasik.

Mr. *S. D. Sapre*, for the Accused.

JUDGMENT.—In this case the evidence is that the two accused prevented the complainant from using a *mot* to which he had yoked his bullocks on the slope to a well, which existed for that purpose. The complainant stated in his evidence that the accused obstructed him by sitting on the slope and saying that they would not allow the *mot* to be used. The complainant had purchased a share entitling him to the use of the *mot* on this well. The accused objected to his doing so, until he had paid an amount alleged to be due on account of his share of expenses on the well. The two accused were convicted and sentenced: accused No. 1 to pay a fine of Rs. 50, and accused No. 2 to pay a fine of Rs. 20.

The Sessions Judge, Nasik, refers the case to us under s. 438 of the Cr. P. C., with a recommendation that the conviction of the two accused may be set aside. He says the case is similar to that of *Emperor* v. *Rama Lala* (1). There the accused had constructed a hedge at the end of a passage which prevented the complainant from passing along the land in his cart, but the hedge had an opening in it which permitted the complainant to pass through on foot. It was held that, as the complainant in that case was himself unobstructed, though hindered from driving a bullock cart through the passage, the accused could not be convicted of wrongful restraint under s. 339, Indian Penal Code. No doubt there is authority for the view that all that s. 339 protects is the obstruction *of any person*, and that it does not cover a case where he himself is free to proceed in a direction in which he has a right to proceed, but without any impediments (such as a cart) that he may have with him: see Gour's Penal Law of India, Vol. I, Art. 3326, at page 1547. On the other hand, this view of personal obstruction must obviously have some limits. Suppose *A* wants to proceed in a certain direction with a pair of boots on, and *B* says: "I will not allow you to do this. You must take your boots off and go without them, if you want to proceed." If *B* has no right to say that *A* cannot wear his boots, while proceeding, surely there is wrongful restraint falling within the definition in s. 339, Indian Penal Code. Again, supposing *A* has a stick or box with him, and *B* wrongly prevents him taking it with him, would not this be wrongful restraint? And, similarly, if *A* is wrongly prevented from taking a bicycle with him, or riding it on his way to a place, I can see no adequate ground for the view that there is no wrongful restraint, if *B* is willing to let him proceed without his bicycle. The circumstances of the case must, in my opinion, be considered, and if the obstruction to *A*'s taking a thing with him amounts to obstructing *A* himself from going in a manner he has a right to go, I think there is 'wrongful restraint.' Here there is a slope which is purposely made for driving a *mot*. On the evidence, the complainant has a right to use that *mot* and the accused prevented him from doing so. The case, therefore, in my opinion, is not entirely on all fours with that of *Emperor* v. *Rama Lala* (1) where there was nothing to show that the complainant had a right to drive his cart past the hedge in question. I am personally averse to saying that s. 339 cannot cover cases like the present, where there was an obstruction to the complainant's proceeding with his bullocks in a direction in which he had a right to proceed with his bullocks.

(1) 19 Ind. Cas. 177; 15 Bom. L. R. 103; 14 Cr. L. J. 177.

I would, therefore, refuse to interfere and return the record and proceedings.

Z. K. *Record returned.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 397 OF 1925.

June 16, 1925.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Addison.

PAKHAR SINGH AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act I of 1872, s. 6—Witness proceeding to scene of offence immediately after commission of offence—Statement made by by-standers, whether admissible.

Shortly after a murder one *C* went to a person and admitted that he had killed the deceased and was prepared to confess. The latter went to the spot immediately and there heard the by-standers talking that four persons including *C* had committed the murder:

Held, that the transaction in which the murder took place having already come to an end, what the witness heard the by-standers say at the time of his arrival on the spot was not admissible in evidence under s. 6 of the Evidence Act. [p. 813, col. 2.]

Criminal appeal from an order of the Sessions Judge, Ferozepur, dated the 23rd March 1925.

Lala *Moti Sagar*, R. B., for the Appellants.

Mr. *Des Raj Sawhney*, for the Opposite Party.

JUDGMENT.—At the village Daroli Bhai in the Moga Tehsil of the Ferozepur District, two persons, namely, *Musammat* Chand Kaur and Khem Singh were killed. It was alleged that Chet Singh, Suchet Singh, Pakhar Singh and Sardara Singh were the murderers. Chet Singh and Sardara Singh having died in the judicial lock-up, Suchet Singh and Pakhar Singh, appellants, were charged and tried under s. 302 of the Indian Penal Code before the Sessions Judge of Ferozepure. They were found guilty under s. 304 (1) of the Indian Penal Code for causing the death of *Musammat* Chand Kaur, but they were held to be guilty of the murder of Khem Singh, were convicted under s. 302 of the Indian Penal Code and sentenced to death. They have appealed against their convictions and the case has also been referred to us under s. 374 of the Cr P. C. for the confirmation of the sentences of death.

The pedigree table given in the judgment of the learned Sessions Judge discloses the relationship between the deceased and the appellants. Sohel Singh had two wives. By his wife *Musammat* Nandan (P. W. No. 5) he had his son Khem Singh, deceased. *Musammat* Chand Kaur was the wife of Khem Singh, *Musammat* Bhagwan Kaur (P. W. No. 6) is the daughter of Khem Singh. and Bikram Singh (P. W. No. 8) is his son. By his second wife *Musammat* Mahan Kaur he had two sons Chet Singh and Suchet Singh. Pakhar Singh and Sardara Singh were the sons of Chet Singh. It may be taken as admitted that there were constant quarrels between Khem Singh and Chet Singh. There was a dispute as to *lambardari* between them and Suchet Singh was supporting Chet Singh his brother. The real dispute, however, between them was as to joint land. Khem Singh had a house with a door opening into a lane. He closed the door and opened another facing the joint land. It also may be taken as admitted that by some private arrangement the land in front of the new door opened by Khem Singh had been given to brothers Chet Singh and Suchet Singh. The latter made preparations to construct a wall in front of Khem Singh's door. This was naturally objected to by Khem Singh. An attempt to have the dispute settled by a *panchayat* on the morning of the 29th June 1924 having failed, Chet Singh and Suchet Singh assisted by Prem Singh, at about 9 or 10 A. M. on the same day proceeded to erect the wall in the absence of Khem Singh in spite of the protest of Khem Singh's wife *Musammat* Chand Kaur in the presence of *Musammat* Nandan (P. W. No. 5) mother, *Musammat* Bhagwan Kaur daughter and Bikram Singh, son of Khem Singh. It is said that *Musammat* Chand Kaur standing at her door, protested against the action of Chet Singh and his party and used abusive language. Chet Singh got infuriated at this and dragged her by her hair to the place where the wall was being constructed. While prostrate on the ground she was struck by Pakhar Singh with a *dang* on her head. Sardara Singh also struck her with a wooden *pahaura*. Then, according to the statement of *Musammat* Nandan (P. W. No 5), the unfortunate woman was cruelly belaboured and killed. *Musammat* Nandan, while trying to render assistance to *Musammat* Chand Kaur, received a *dang* blow on her back from Pakhar Singh. *Musammat* Bhagwan

Kaur (P. W. No. 6), daughter of Khem Singh, was also similarly treated on her trying to intervene and received a blow on her right arm which caused fracture of the wrist. Thereupon *Musammat* Bhagwan Kaur went to fetch Khem Singh, her father from the house of Man Singh, a neighbour, where he is said to have gone. When Khem Singh arrived he was surrounded by the four accused. Pakhar Singh struck him on the head with a *dang* and Sardara Singh hit him with a *pahaura*. Khem Singh tried to escape and take shelter in Kala Singh's house but he was soon caught near Kala Singh's house, and was knocked down with a blow of Pakhar Singh's *dang*.

The First Information Report was lodged by Wasawa Singh *lambardar* (P. W. No. 3) in which the names of Suchet Singh and Chet Singh alone were mentioned and it was stated that they were in the custody of Bhai Gajindra Singh, Sub-Registrar, (P. W. No. 7). The Police arrived on the spot and Exs. P-1 and P-2—two *dangs*—which had been found by Bhai Gajindra Singh near the dead bodies of *Musammat* Chand Kaur and Khem Singh were handed over to them. The *pahaura*, Ex. P-3, was found by the Police in the house of Chet Singh. The *fards*, Exs. P-B and P-D, were prepared. Eight eye-witnesses were called by the prosecution in the Court of the Committing Magistrate. Three of them namely, *Musammat* Nandan (P. W. No. 5), *Musammat* Bhagwan Kaur (P. W. No. 6), and the boy Bikram Singh (P. W. No. 8), were members of the family of Khem Singh, and the remaining five, Prem Singh *Tarkhan* (P. W. No. 13), Sundar *Chamar* (P. W. No. 14), Hazara Singh (P. W. No. 15), Kala Singh (P. W. No. 16), and Babu Singh (P. W. No. 17), were outsiders. The Public Prosecutor refused to tender these five witnesses before the Sessions Court as it had become manifest that they had been won over by the defence. The Sessions Judge, however, decided to call them on behalf of the Crown. They were accordingly examined and cross-examined before the Court. The case, therefore, mainly depended upon the evidence of the three members of the family of the deceased. Besides the eye-witnesses there were some other witnesses called, the principal of them being Bhai Gajindra Singh (P. W. No. 7) and Wasawa Singh *lambardar* (P. W. No. 3). According to Bhai Gajindra Singh, Chet Singh went to him after the murder and admitted that he had killed the deceased and was prepared to confess. The witness then went to the spot at once and there heard the by-standers talking that the four persons, Chet Singh, Suchet Singh, Pakhar Singh and Sardara Singh, had committed the murders. This portion of the evidence was admitted by the learned Sessions Judge under the provisions of s. 6, illustration (*a*), of the Indian Evidence Act. That section provides that "Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places." The illustration (*a*) runs thus: "*A* is accused of the murder of *B* by beating him. Whatever was said or done by *A* or *B* or the other by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact." From the evidence it is clear that the transaction in the present case had come to an end. Chet Singh, after the occurrence, had gone to Bhai Gajindra Singh and had brought him to the spot. In the meantime two of the murderers, namely, Pakhar Singh and Sardara Singh, had left the place and only Suchet Singh was there. In our opinion, therefore, this portion of the evidence was not admissible in evidence and was wrongly admitted by the learned Sessions Judge. This evidence was relied upon by the prosecution for the purpose of contradicting Babu Singh, Kala Singh and Prem Singh who had been heard on that day saying that all the four accused had jointly committed the murders, but who had tried to exculpate Suchet Singh and Pakhar Singh in Court. The two accused Chet Singh and Suchet Singh were present when the Police arrived and were handed over by Gajindra Singh to them. The two *dangs*, Exs. P-1 and P-2 as already mentioned were handed over by Bhai Gajindra Singh on this occasion to the Police. The necessary *fards* were prepared. According to the report of the Chemical Examiner the *dangs* were found to be bloodstained.

The medical evidence leaves no doubt on the point that the two deceased persons had died in consequence of the injuries received from the *lathi* blows. From the medical evidence it also appears that the witnesses (P. W. No. 5) and (P. W. No. 6)—*Musammat* Nandan and *Musammat* Bhag-

wan Kaur—had also received injuries at the hands of the accused persons. Therefore there can be no doubt as to their presence on the occasion. The learned Sessions Judge, agreeing with the assessors, has considered the evidence given by (P. W. No. 5), (P. W. No. 6) and (P. W. No. 8) as trustworthy and he has, agreeing with the assessors, unhesitatingly rejected the evidence of the five Court witnesses, namely, Prem Singh, Sundar *Chamar*, Hazara Singh, Kala Singh and Babu Singh, as being partial to the defence. He has also rejected the evidence for the defence.

We have carefully examined the evidence of the five Court witnesses and have attentively listened to the criticisms made by the learned Counsel for the appellants who has put the case for the prosecution and the defence very fairly before us; but we are constrained to hold that the evidence given by these five witnesses cannot be relied upon for a moment.

We consider the evidence given by the three witnesses, *Musammat* Nandan, *Musammat* Bhagwan Kaur and Bikram Singh, quite trustworthy. In this view it is not necessary to examine in detail the evidence given by some of the other witnesses, nor is it necessary to decide the question whether the statement contained in *surat-i-hal* was admissible in evidence or not. We consider the defence evidence worthless. We find that the two appellants have been rightly convicted. We accordingly dismiss the appeal and affirm their convictions and confirm the sentences of death passed upon them.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 651 OF 1925.

November 3, 1925.

Present:—Mr. Justice Lindsay.

BANWARI—ACCUSED

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 173—Refusal to accept summons—Offence.

The mere refusal to accept a summons does not amount to an offence under s. 173 of the Penal Code.

Criminal reference made by the Sessions Judge, Ghazipur, dated the 9th October 1925.

REFERRING ORDER.—In this case the accused has been convicted of an offence under s. 173 of the Indian Penal Code and sentenced to a fine of Rs. 50. The case for the prosecution was that the Police of Shadiabad required the accused to appear before it on 31st July 1925 in connection with an investigation in a criminal case and a *souphina* was issued to the accused for the purpose. The *souphina* was given to Ram Janam Singh for service.

The case has been tried summarily and the lower Court writes in its judgment that the constable Ram Janam Singh went to the house of the accused in village Mustafabad found the accused there but the accused refused to have the *souphina* served on him. Taking the evidence as it stands it is clear that no offence has been committed. It has been held over and over that mere refusal to take a summons does not amount to disobedience under s. 173 of the Indian Penal Code. The learned Government Pleader conceded before me that he cannot support the order of the Court below and, no doubt, he cannot in view of the following rulings on the subject: see *Chandika Prasad* v. *Emperor* (1) and *Sahdeo Rai* v. *Emperor* (2). Therefore, I submit the record to the Hon'ble High Court with the recommendation that the conviction be set aside and the fine be refunded. Let the record be first sent to the Court below for such explanation as it likes to offer and then to the Hon'ble High Court.

JUDGMENT.—Reference accepted. Conviction and sentence set aside. The fine, if paid, will be refunded.

Z. K. *Reference accepted.*

(1) 46 Ind. Cas. 817; 21 O. C. 150; 19 Cr. L. J. 801.

(2) 46 Ind. Cas. 522; 40 A. 577; 16 A. L. J. 453; 19 Cr. L. J. 746.

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 70 OF 1924.

November 6, 1924.

Present:—Mr. Justice Kulwant Sahay.

CHHAKAURI LALL—1ST PARTY

versus

ISHER SINGH—2ND PARTY.

Criminal Procedure Code (Act V of 1898), ss. 147, 439—User of immoveable property, dispute as to—Manager made party on behalf of employer—Irregularity—Order against manager, legality of.

The fact that the manager of an estate and not his employer, the owner of the estate, has been made a party to a proceeding under s. 147 of the Cr. P. C. is a mere irregularity, or at most an error of law which does not affect the Magistrate's jurisdiction. In such a proceeding it is open to the Magistrate to make an order against the manager who puts forward a written statement on behalf of his employer and sets up a claim of the latter to the user of the immoveable property in dispute.

Reference made by the District Magistrate, Gaya.

Mr. *Nawal Kishore Prasad*, II, for the 1st Party.

Mr. *Shiveshwar Dayal*, for the 2nd Party.

JUDGMENT.—This is a reference made by the District Magistrate of Gaya, recommending that the order passed under s. 147 of the Cr. P. C. by the Deputy Magistrate, directing the second party to desist from putting in earth on a weir, should be set aside. The reason upon which the learned District Magistrate recommends that the order should be set aside is that in the proceeding under s. 147 the second party was one Isher Singh who was the *gomashta* for the 9-annas Tikari Raj and the proprietor was not made a party. It appears that the first party, who is a proprietor of village Khaira, objected to the second party, the *gomashta* of the Tikari Raj, putting earth work on a certain weir which had the effect of diverting water into hisown village Khaira with the apprehension of submerging the whole village. The learned District Magistrate is of opinion that the real party interested in the dispute is the proprietor, namely, the Maharaja of the 9-annas Tikari Raj, and that the Maharaja himself or his duly appointed *mukhtear-am* should have been made a party, and not the *gomashta* as it is possible that the *gomashta* might be dismissed or transferred to another place and the order would not be binding upon the Tikari Raj or any other *gomashta* when he comes in place of Isher Singh. He has referred to certain cases where it is held that the person really interested should be made a party in the dispute. There can be no doubt that it was desirable that the person really interested ought to have been made a party but I am not satisfied that the proceeding will be illegal or without jurisdiction because the *gomashta*, and not the proprietor, was made a party to the proceeding. The cases referred to by the District Magistrate have almost all been referred to in the Full Bench case of the Calcutta High Court in *Dhondhai Singh* v. *Follet* (1) where it was held by the Full Bench that there is jurisdiction under s. 145 of the Cr. P. C. to make an order in favour of a person who claims to be in possession of the disputed land as agent to, or the manager for the proprietors when the actual proprietors are not residents within the Appellate Jurisdiction of the High Court. In *Bhola Nath Singh* v. *Wood* (2) a Division Bench of the Calcutta High Court distinctly held that the fact that the manager, and not his employer the *zemindar*, has been made a party to a proceeding under s. 145 of the Cr. P. C., is a mere irregularity, or at most an error of law which does not affect the Magistrate's jurisdiction.

No doubt, under the amended provisions of the Cr. P. C., orders under ss. 145 and 147 can be revised by the High Court not only on the question of jurisdiction but also on the question of illegality, but I do not find any illegality in the Magistrate's making the order under s. 147 against Isher Singh, who as *gomashta* filed the written statement on behalf of Tikari Raj and set up the claim of the Tikari Raj to put up earth work on the weir. The learned Vakil appearing for the petitioner is unable to cite any authority which would go against the decision in the cases reported as *Dhondhai Singh* v. *Follett* (1) and *Bhola Nath Singh* v. *Wood* (2) referred to above.

I am unable to accept the recommendation of the learned District Magistrate. The order under s. 147 will, therefore, stand.

Z. K. *Order accordingly.*

(1) 31 C. 48; 7 C. W. N. 825.
(2) 32 C. 287.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 668 OF 1925.
November 6, 1925.
Present :—Mr. Justice Mukerji.
FAUJDAR MAHTO AND ANOTHER—APPELLANTS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 234, 235—Penal Code (Act XLV of 1860), ss. 366, 420—Offences committed by accused in distinct and separate transactions—Joint trial, legality of—Kidnapping and cheating.

The operation of ss. 234 and 235 of the Cr. P. C. cannot be combined.

Where different offences have been committed by the same accused in two sets of separate and independent transactions, the offences cannot be tried together in one trial

Two girls were kidnapped by the accused on different dates and were falsely passed off as *Chhatri* girls on receipt of money from the complainant who wanted a wife for himself and a wife for his brother. The accused was charged with and tried for separate offences of kidnapping and cheating in respect of each girl in the same trial :

Held, that the trial was bad on account of misjoinder of charges inasmuch as the case did not in its entirety come either under s. 234 or under s. 235 of the Cr. P. C.

Criminal appeal from an order of the Sessions Judge, Ghazipur, dated the 29th of July 1925.

Messrs. *L. M. Roy* and *K. Verma*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—The first point argued in this appeal is that there is a misjoinder of charges and the whole trial is vitiated by illegality.

It appears to me that this argument is well-founded and must be given effect to, although the point was not taken specifically in the memorandum of appeal.

Briefly, the alleged facts are these. Two girls were kidnapped on different dates and they were passed off as *Chattri* girls on receipt of money from one Bishun Rai, who wanted a wife for himself and a wife for his brother. It is argued that the offences of kidnapping being separate offences the trial ordinarily ought to have been separate, under s. 233 of the Cr. P. C. There can be no doubt that this is correct, provided the case does not come within ss. 234, 235, 236 or 239. Section 234 of the Cr. P. C. says that where more offences than one but of the same kind are committed within the space of 12 months the offender can be tried for all the offences provided they do not exceed three in number, in the same trial. Section 235 lays down that where in one series of facts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried for every such offence. Section 234 would allow the trial of two cases of kidnapping together. Similarly s. 235 would allow the trial of the offence of kidnapping with respect to one girl and cheating with respect to the same girl in one trial. Sections 236 and 239 have no application to the facts of this case. The question now is whether ss. 234 and 235 allow a combination of charges so that there may be one joint trial in respect of one kidnapping and cheating as a part of the same transaction with another and independent offence of kidnapping together with cheating with respect to the girl kidnapped as a part of the same transaction. Even if there were no authority for the proposition, I would have had no hesitation in coming to the conclusion that the operations of the two ss. 234 and 235 cannot be combined. The reasons are obvious. If this were permitted the whole object of the rule laid down in s. 233 would have been frustrated. The main principle is that there should be a separate trial for every distinct offence. Two exceptions are allowed (so far as the facts of this case are concerned), *viz.*, those enacted in ss. 234 and 235. The present case in its entirety does not come under s. 234 nor does it come in its entirety within s. 235. If we permit a joint trial in respect of two sets of separate and independent transactions in which different offences have been committed, we would create such an amount of confusion as would, in most cases, end in a distraction of the minds of the Judges and Jury and the accused persons themselves.

This case is much stronger than the cases of *Shuja-ud-din Ahmad* v. *Emperor* (1) and *Sheo Saran Lal* v. *Emperor* (2) quoted by the learned Counsel for the appellants as authority.

The result is that I accept the appeal, set aside the convictions and the sentences and order a re-trial of the case or cases by the learned Sessions Judge after proper joinder of charges.

A question of jurisdiction was also argued before me. It was pointed out that the two offences of kidnapping really took place within the jurisdiction of some Court in the Province of Bihar and Orissa. This is a matter which should also be looked into by the learned Sessions Judge at the fresh trial.

Z. K. *Appeal accepted.*

(1) 65 Ind. Cas. 322; 20 A. L. J. 320; 23 Cr. L. J 253; (1922) A. I. R. (A.) 214; 44 A. 540.

(2) 5 Ind. Cas. 893; 32 A. 219; 7 A. L. J. 225; 11 Cr. L. J. 285.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 22 OF 1923.

July 28, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Madgavkar.

RUPCHAND BALMUKUND AHARWALA—PLAINTIFF—APPELLANT

versus

JANKIBAI KANHYALAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (1) (b)—Transfer of Property Act (IV of 1882), s. 54—Agreement between parties to suit to divide property after decision of suit—Arrangement for division of profits during pendency of suit—Registration, whether necessary.

During the pendency of a suit the parties to the suit entered into an agreement that the litigation should pursue its full course and that whatever the result of the litigation might be the parties at the end of the litigation should divide the property in suit in a certain proportion. The agreement also provided for an arrangement with regard to the division of the profits during the pendency of the suit :

Held, (1) that the agreement to divide the property at the expiration of the litigation did not create any interest in the property under the provisions of s. 54 of the Transfer of Property Act ; [p. 818, cols. 1 & 2.]

(2) that the temporary arrangement for the management of the property and the division of the profits during the litigation did not declare or create an interest in the property ; [p. 818, col 2.]

(3) that, consequently, the agreement did not require registration. [*ibid.*]

First appeal from the decision of the First Class Subordinate Judge, at Jalgaon, in Suit No. 409 of 1920.

Mr. *Kanga*, Advocate-General (with him Mr. *D. C. Virkar*), for the Appellant.

Mr. *G. N. Thakor* (with him Mr. *P. B. Shingne*), for the Respondents.

JUDGMENT.—The plaintiff sued to have it declared that he had got one-fifth share in the properties left by one Balmukund, and that he was not liable for more than one-fifth of the debts due. Further he sued for an equitable partition of the properties and for separation of his one-fifth share therein, and for mesne profits before suit and future profits.

Balmukund died in 1904 leaving two widows. The plaintiff was adopted by the senior widow, while the junior widow also adopted one Hanumandas. When the widows died the reversioners disputed the adoptions. Two separate suits were filed against the two adopted sons, asking for a declaration that the adoptions were invalid. Both the adoptions have been held to be invalid, and the reversioners have been declared to be the real owners of the property. The suits were not finally concluded until 1918.

In April 1918 while the appeal was pending in the High Court, an application was made on behalf of the present plaintiff to file an alleged agreement of compromise under O. XXIII, r. 3. The defendants objected. The Court was of opinion that the suit had not been adjusted by this agreement, that the condition of the agreement was, not that the pending suit should be settled or abandoned, but that it should continue to its normal end, and that thereupon whatever decree the Court should ultimately make should be replaced by the private arrangement between the parties.

The defendants are the natural father of Rupchand and his three brothers. The second defendant contested the plaintiff's claim. He admitted that the document on which the plaintiff sued had been passed, but he contended the same was unregistered and had not been properly stamped and could not be relied upon in proof of the plaintiff's claim. The Judge decided that these two documents, which were passed by the plaintiff and his opponents respectively, being counter-parts of each other required registration. As he thought the defendants were resiling from the settlement on a technical ground and were in a way taking an unfair advantage of the plaintiff's position, though he felt himself bound to dismiss the plaintiff's suit on that ground, he did not allow the defendants their costs. He considered mainly on the construction of the plaint that the documents referred to created and declared the interest of the parties in the properties mentioned therein.

It is quite true that the form of the plaint and the prayers annexed thereto were not as correct as they should have been if they had been drafted by a skilled lawyer. But the form in which the plaint was framed cannot possibly affect the question whether these particular documents required registration or not. The Judge thought that the creation or declaration of rights was completed at once by the deeds themselves, and was not to depend on the execution of regular registered deeds. He accepted that construction placed on the documents by the defendants as quite reasonable.

We must, therefore, turn to the documents to see whether they were compulsorily registrable under s. 17 (1) (*b*) of the Indian Registration Act. Each document

recites the facts which gave rise to their execution, and the operative words in the agreement signed by Rupchand are as follows :—

"Even if I succeed fully in the Court or privately out of Court in the suit brought by me and even if I become full owner, I will keep in my possession 1 5th of the property and will give in your possession the property of the remaining 4 5th out of Balmukund's properties, moveable and immoveable now included in the above suits as also in the other properties not included in the above suits, but that may subsequently be found belonging to Balmukund. We shall first discharge out of the moveable and immoveable property the debts now existing on the estate as also all the debts that I may have incurred up to the present day, and the expenses that may be required for your and my suits up to the decision of the final Court, and then we shall divide the property in proportion to above shares between ourselves. At present there are various disputes, and, therefore, I cannot properly realise the profits of the estate and the *gumastas* do not work properly and in this manner the estate is being wasted. For all these reasons I have given in your *vahivat* all the properties that were in my possession. You should give me the profits of 1/5th of share out of the profits that may be realised from the properties and you should take in equal shares the remaining 4/5th share's profits for your expense and spend the same as you like. In this manner we have come to an agreement of compromise and I will file the proper legal documents as regards this compromise whenever you will ask me to do so or will pass to you privately a registered document"

Now let us see whether it can be said that that document creates, declares, assigns, limits or extinguishes any right, whether in present or in future to immoveable property of the value of over Rs. 100. These parties were fighting for the succession to the property of Balmukund which fell in on the death of his widows, and while the litigation was still going on the contestants came to an agreement. The effect of that agreement was that the litigation should pursue its full course, and whatever the result might be the contestants would at the end of the litigation divide the property. That was, therefore, an agreement to divide the property at the expiration of the litigation, and could not create any interest in the property under the provisions of s. 54 of the Transfer of Property Act.

It was suggested that because there was an arrangement with regard to the profits pending the litigation, therefore, there was an interest in the property declared or created. That was merely a temporary arrangement for the management of the property during the litigation, and the mere fact that the plaintiff gave up the management of the property, because he said that the *gumastas* did not work properly, into the hands of the defendants agreeing that they should pay him 1/5th, would not possibly bring the document within the provisions of s. 17 (1) (*b*) of the Indian Registration Act.

It was not suggested, when the plaintiff attempted to have this document filed in the High Court under O. XXIII, r. 3, that it was anything more than an agreement to compromise disputes which were pending between the parties at that time. It was never suggested by virtue of those documents that any interest passed or any rights in the property were declared. It seems to me, then, that the plaintiff cannot be penalised because he has prayed in the plaint that it may be declared that he is the owner of the 1/5th property of Balmukund. What he really sued for appears in the second prayer of the plaint, namely, specific performance of the agreement by partition of the property.

We are not concerned in this appeal whether the question regarding mesne profits should be decided in the plaintiff's favour. It certainly would appear that a claim for mesne profits would be based on a present interest resting in the plaintiff, but if he obtained no present interest in the property under the agreement, then the question as regards the mesne profits will, no doubt, be correctly dealt with by the Court below. We are not concerned with that question in this appeal.

We may refer to the decision of the Privy Council in *Rajangam Ayyar* v. *Rajangam Ayyar* (1), where it was held that a document which was a memorandum regarding the cesser of jointness of the parties which amounted to a declaration that from that time forth the parties became entitled to the possession and enjoyment of their pro-

(1) 69 Ind. Cas. 123; 46 M. 373; 31 M. L. T. 136; 4 U. P. L. R. (P. C.) 85; 16 L. W. 615; (1922) A. I. R. (P. C.) 266; 27 C. W. N. 561; 44 M. L. J 745; 37 C. L. J. 135; 21 A. L. J. 460; 50 I. A. 134 (P. C.).

perties in separate shares, and provided for the execution of a further deed effectuating the partition, was not a document which by itself created, or declared, or assigned, or limited or extinguished any right or interest in the immoveable property.

That is a stronger case than the present, because the document even went so far as to declare that the parties who ceased to be joint should be entitled to their shares in the family property.

We think, therefore, that the appeal must be allowed on the ground that these documents do not require registration, and are, therefore, admissible in evidence. The case will have, therefore, to go back to the Trial Court for disposal on the merits. We make it clear that we have only decided the question whether these documents are admissible in evidence or not. All other questions remain to be decided by the Judge in the Trial Court. Some of these points he has already decided, and after deciding the remaining issues, he will pass final judgment. Then on the whole case except on the point of registration, an appeal will be open.

Appellants to get their costs of the appeal.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 124 OF 1925.

August 6, 1925.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

BASANTA KUMAR CHOUDHURY AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

Rai BAIKUNTA NATH CHAKRAVARTY BAHADUR—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 66—Execution of decree—Sale proclamation—Duty of Executing Court—Particulars with regard to property to be sold, necessity of—Dispute as to valuation—Valuation suggested by judgment-debtor, whether may be entered in sale proclamation—Order settling terms of sale proclamation—Appeal, whether lies.

An Executing Court is bound to execute the decree as it stands and has no power to go behind it. But it is always open to an Executing Court to insist that the correct description of the properties and everything which is material for a purchaser to know in order to judge the nature and value of the properties to be sold should be supplied so that it may be inserted in the sale proclamation. [p. 820, col. 1.]

Where there is a wide difference between the valuation placed by the judgment-debtor upon the property to be sold and that placed upon it by the decree-holder, the valuation given by the judgment-debtor should also be inserted in the sale proclamation. [p. 820, cols. 1 & 2.]

An order under r. 66 of O. XXI of the C. P. C. merely fixing the value of the property to be sold is not as such open to appeal. Where, however, the Court has to decide other questions relating to the sale proclamation in addition to the valuation of the property, an order passed under r. 66 of O. XXI may also amount to an order under s. 47 of the Code, and in such a case the order would be open to appeal. [p. 820, col. 2.]

Appeal against an order of the Subordinate Judge, First Court, Sylhet, dated the 25th of March 1925.

Babu *Hamendra Kumar Das*, for the Appellants.

Mr. *G. C. Das*, Babus *Bhuban Mohan Saha* and *Ananta Kumar Banerji*, for the Respondent.

JUDGMENT.

Mukerji, J.—This appeal is preferred by the judgment-debtors and it arises out of an order which purports to have been made under the provisions of O. XXI, r. 66, C. P. C., the execution proceeding in connection with which the order in question has been passed relate to a mortgage decree. The judgment-debtors put in an objection on the 21st March 1925 dealing with various matters. One of those objections was to the effect that the Cadastral Survey Dags should have been inserted in the description of the properties mentioned in the application for execution. Another objection was that the values of the properties had been understated in the application for execution. A third objection related to one of the plots mentioned in the decree, namely, plot No. 11 it being stated that, so far as that plot was concerned, the mortgage was only in respect of an eight-annas share and not in respect of the entire sixteen-annas. There was also an objection relating to the number of the *taluq* as given in the application in respect of plot No. 1 of the mortgaged properties, it being stated that the correct number was 58129 and not 58129-1. There were other objections also which need not be specially set forth here. The learned Judge dealt with all these objections in his order passed on the 25th March 1925 and, against this order, the present appeal has been preferred.

The learned Judge held that the Execut-

ing Court was not competent to go behind the decree and, therefore, the objection of the judgment-debtors should be overruled. So far as the valuation of the properties was concerned, he was of opinion that a previous decision passed by the Court operated as *res judicata*. In dealing with these objections of the judgment-debtors, the learned Judge, it seems to me, did not properly take into account the nature and weight of the objections. It appears that, at a previous stage of the execution proceedings by an order passed on the 13th September 1924, the learned Judge fixed the value of the properties at certain figures and, by a further order passed on the 20th November, 1924, he directed the decree-holder to put in the Cadastral Survey Dags in the description of the mortgaged properties given in the sale proclamation, and, on the failure of the decree-holder to comply with this latter order, he on the 3rd December 1924 ordered the execution proceedings to be dismissed for default. With regard to some of the objections taken on behalf of the judgment-debtors, it is true that they are objections which cannot properly be taken before the Executing Court; for the Executing Court is bound to execute the decree as it is and cannot go behind it. But it is always open to the Executing Court to take care that the correct description of the properties and everything which is material for the purchaser to know in order to judge of the nature and values of the properties are given in the sale proclamation. I am not satisfied at all that the matter has been properly dealt with by the learned Judge in this case. I am of opinion that the order passed by the learned Judge on the 25th March 1925 should be set aside and the case sent back to him for re-consideration. He will, in the first instance, obtain from the judgment-debtors the Cadastral Survey numbers of the properties which are to be sold and for this purpose he should give them a reasonable opportunity. On the judgment-debtors supplying the *dag* numbers to the Court, the learned Judge will verify them as far as practicable and have those numbers inserted in the sale proclamation. On the question of valuation having regard to the fact that no appeal has been taken from the order dated 13th September 1924, and the wide difference between the values given by the two parties it seems to be one of those exceptional cases in which the valuation as given by the judgment-debtors should also be inserted in the sale proclamation. The learned Judge will also deal with the other objections which have been taken on behalf of the judgment-debtors in these proceedings and to which I have already referred; and after dealing with all these matters, he will pass such orders as may appear to him fit and proper in the circumstances of the case.

As regards the preliminary objection taken on behalf of the respondent to the hearing of this appeal, it is true that an order merely fixing the value of a property under O. XXI, r. 66, C. P. C., is not one as such open to appeal. But as has been held by this Court in the case of *Devendra Nath Basu* v. *Kailash Chandra Kalu* (1), an order under O. XXI, r. 66 may in certain circumstances also amount to an order under s. 47 of the Code; and, in my opinion, the order against which the present appeal has been preferred is one which may very well be treated as having been passed also under the provisions of s. 47, C. P. C. The appeal, therefore, in my opinion, is maintainable.

The result, therefore, is that the appeal is allowed, the order of the Subordinate Judge dated the 25th March 1925 is set aside and the case sent back to him to be dealt with in the light of the observations made above. No order is made as to costs.

Walmsley, J.—I agree.

Z. K. *Appeal allowed.*

(1) 80 Ind. Cas. 861; 29 C. W. N. 556; (1925) A. I. R. (C.) 318.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 169 OF 1925.

September 15, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

R. V. SRINIVASA AIYANGAR AND ANOTHER—PETITIONERS—APPELLANTS

versus

PRATAPA SIMHA RAJAH SAHEB, THE JUNIOR PRINCE, TANJORE, TANJORE PALACE—DEFENDANT No. 2—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10—Mortgage by party to suit after decree—Mortgage attacked as usurious and without consideration—Mortagee, whether can be added as party.

Order XXII, r. 10 of the C. P. C., applies only to

pending suits whereby a person who derives title from a party will be entitled to be brought on the record of the suit if it is shown that he has secured a good title from that party and that it is to his interest to be brought on record of the suit. [p. 821, col. 2.]

Where after the passing of a decree in a suit, a person obtains a mortgage over the interest of the decree-holder, but the mortgage is attacked by the mortgagor as being an usurious transaction and also on the ground that the consideration recited in it did not actually pass, a Court would not be justified in making him a party to the suit and thereby preventing the person from whom he derived title from disputing his right to receive the amount. [*ibid.*]

Lajwanti v. *Safa Chand*, 88 Ind. Cas. 198; 22 L. W. 304; (1925) A. I. R. (P. C.) 168; 23 A. L. J. 643; L. R. 6 A. (P. C.) 125; (1925) M. W. N. 534; 30 C. W. N. 56 (P. C.), referred to.

Appeal against an order of the District Court, West Tanjore, at Tanjore, dated the 21st November 1924, in I. A. No. 335 of 1924, in O. S. No. 3 of 1919.

Mr. *A. Krishnaswami Iyer*, for the Appellants.

Mr. *T. V. Muthukrishna Iyer*, for the Respondent.

JUDGMENT.—This appeal is against the order of the District Judge of West Tanjore declining to make the appellants parties to O. S. No. 3 of 1919 on the file of the Court. The appellants applied to the lower Court to be made parties to the suit on the ground that they were mortgagees of the interest of Pratapa Simha Rajah the 2nd defendant in O. S. No. 3 of 1919. The contention of the appellants is that they have got a mortgage of the interest of the 2nd defendant in the suit and that they are, therefore entitled to be made parties to the suit. The learned Judge has considered the petition on the merits and has declined to make them parties. The petitioners have taken a mortgage of the share of the 2nd defendant for Rs. 1,70,000. The suit was decreed some time ago and the appeal against the decree of the Subordinate Judge was disposed of by this Court in 1923. Pursuant to the decree of the High Court, the properties in suit are being divided, and a sum of about Rs. 70,000 is said to be in deposit in the District Court to the credit of the suit. The objection of the 2nd defendant to the petitioners being brought on record is that the transaction evidenced by the mortgage is an usurious transaction and that out of Rs. 1,70,000, not even Rs. 50,000 was spent on behalf of him. The answer of the appellants is that at least Rs. 50,000 is admitted to have been received by the 2nd defendant and, therefore, so far as that amount is concerned the appellants are entitled to be paid by the 2nd defendant. It is unnecessary to consider this question in a matter like this. The suit was disposed of some time ago and the application is made under O. XXII, r. 10 of the C. P. C. That rule applies only to pending suits whereby a person who derives title from a party will be entitled to be brought on record if it is shown that he has secured a good title from the party, and that it is to his interest to be brought on record in the suit. In this case the suit has come to a termination and a decree has been passed. The object of the appellants is to secure the amount in Court in part discharge of the mortgage amount.

The contention of Mr. Alladi Krishnaswami Iyer is that he being a mortgagee of immoveable property is entitled to be paid the amount in Court. No doubt in cases of ordinary mortgage of a fund or sum of money, the mortgagee would be entitled to be paid out of the amount but where the claim is resisted on the ground that the transaction is an usurious transaction and the consideration recited in the mortgage document did not actually pass, we do not think the Court will be justified in making a person a party to the suit and, thereby prevent the person from whom he derived title from disputing his right to receive the amount. By making the appellants parties to the suit, very serious complication will arise. They can have their remedy by bringing a suit against the 2nd defendant. It would not be right at this stage to make the appellants parties to the suit and thereby prevent the 2nd defendant from putting forward any defence he may have to the claim of the appellants. In this connection we may refer to a recent judgment of the Privy Council reported as *Lajwanti* v. *Safa Chand* (1) where their Lordships observe :—

"It is out of the question that persons, who assert that they have a derivative interest, in the stake of a suit, can by getting added as plaintiffs, be associated in a decree, in favour of the person, who has the only real title."

In this case there has been no devolution of interest in the sense that all the interest of the 2nd defendant has come to the appellants. The appellants have only a

(1) 88 Ind. Cas. 198; 22 L. W. 304; (1925) A. I. R. (P. C.) 168; 23 A. L. J. 643; L. R. 6 A. (P. C.) 125; (1925) M. W. N. 534; 30 C. W. N. 56 (P. C.).

mortgage interest and they have to enforce the mortgage right in the ordinary course. We think the order of the learned Judge is correct and we dismiss the appeal with costs.

V. N. V. *Appeal dismissed.*
Z. K.

PATNA HIGH COURT.

CIVIL REVISION NO. 18 OF 1924.
April 29, 1925.
Present:—Mr. Justice Das and
Mr. Justice Ross.
Nawab Syed MUHAMMAD AKBAR ALI KHAN—DEFENDANT—PETITIONER
versus
HERBERT FRANCIS—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XXVI, r. 5—Plaintiff, examination of, on commission, whether should be permitted—Discretion of Court—Revision—Interference by High Court.

An order for the examination of a plaintiff on commission at his own request is a very strong order to pass in any case. A plaintiff is entitled to choose his own *forum*; and having chosen his *forum* he is not entitled to say, "I reside outside the jurisdiction of the Court, therefore, I ask to be allowed to examine myself on commission." [p. 823, col. 1.]

When an application is made to a Court for the issue of a commission the Court has to exercise its discretion as to whether it should grant the application, and the High Court will be very unwilling to interfere with the exercise of that discretion by the Trial Court. Each case must, however, depend upon its own circumstances and no rule as to the exercise of such discretion can be laid down. If the High Court finds that the discretion has been wrongly exercised, or that the case in all its bearings was not laid before the Court below, or that the Court below misapprehended an important part of the case, for instance where the Trial Court treats an application by the plaintiff to examine himself on commission as if it were merely an application to examine witnesses on commission, the High Court will interfere in revision with the exercise of the discretion of the Trial Court. [p. 823, col. 2; p. 824, col. 1.]

Appeal against an order of the Subordinate Judge, Patna, dated the 1st December 1923.

Messrs. *Sultan Ahmed*, *Janak Kishor* and *Saiyid Ali Khan*, for the Petitioner.

Mr. *Baikuntha Nath Mitter*, for the Opposite Party.

JUDGMENT.

Das, J.—This application is directed against the order of the learned Subordinate Judge of Patna, dated the 1st of December 1923. An application was made before him for the examination of certain persons including the plaintiff in London. The learned Subordinate Judge has acceded to the application. The suit in which the application was made was instituted by one Herbert Francis, residing at No. 21, Bedford Row, London, against Nawab Syed Muhammad Akbar Ali, residing in Patna, and certain other persons. The allegations on which the suit was brought were these: That on the 15th of September 1919 Nawab Wasig Hussain Mobarak Jung, the son of the first defendant then residing in London, executed a bond in favour of the plaintiff by which he agreed to pay to the plaintiff the sum of £1,400 in five years and to pay interest at 15 per cent. per annum annually. The plaint goes on to assert that the bond "was intended to constitute a mortgage and was sent to India to be registered, where it was lost, was never registered" and the plaintiff says that he does not rely on the agreement between him and the deceased as a mortgage. The plaintiff then states that there are three instalments of interest due to him amounting to £630. It is then asserted that on the 2nd of December 1919, the deceased executed a promissory note by which he agreed to pay to the plaintiff the sum of £35 six months after that date. The suit was instituted to recover £35 and interest thereon £6-8-6, and the sum of £630 due as interest upon the bond which according to the plaintiff is lost.

Now this is the suit and the plaintiff applied before the Subordinate Judge for an order permitting him to examine on commission himself, his two clerks, Doctor Abdul Mazid now in England, and the widow of the deceased Mrs. Jung. The learned Subordinate Judge thought that the application was a reasonable one and he saw no objection whatever in granting it. Mr. Sultan Ahmed on behalf of the defendant No. 1, the petitioner in this Court, objects to the order passed by the learned Subordinate Judge.

A distinction must, in my opinion, be drawn between the plaintiff himself and the witnesses whom he seeks to examine on his behalf. The provision of law under which the application was made is contained in O. XXVI, r. 5 of the C. P. C. which provides as follows:—"Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary,

the Court may issue such commission or a letter of request." There was undoubtedly a jurisdiction in the Court to allow the examination of the plaintiff on commission, but the question, in my opinion, is, whether the exercise of that jurisdiction in this case does not amount to a denial of justice to the defendant. In my opinion, an order for the examination of the plaintiff on commission is a very strong order to pass in any case. The case of the defendant stands on an entirely different footing. As was pointed out in the case of *Sarat Kumar Ray* v. *Ram Chandra Chatterjee* (1), "Where an application is made by a defendant...who lawfully resides out of the jurisdiction of the Court, according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a *forum* of his choice though he resides beyond the jurisdiction of such Court." It is not difficult to understand the principle upon which the distinction is drawn between the case of a plaintiff and the case of a defendant. The plaintiff is entitled to choose his own *forum*; and having chosen his *forum* he is not entitled to say, "I reside outside the jurisdiction of the Court, therefore, I ask to be allowed to examine myself on commission." The obvious reply is, "Why did you choose that particular *forum*? It was open to you to bring the suit in the Court where you reside." So far as the defendant is concerned, obviously the same argument does not apply in his case. In the case of *Nadin* v *Basett* (2) the plaintiff residing in New Zealand brought an action in England for redemption, alleging himself to be the heir-at-law of a person who had died intestate entitled to a remainder in fee in the equity of redemption which had fallen into possession since his death. As was pointed out by Kay, J., in the Court of first instance, and Cotton, L, J., in the Court of Appeal, in order to make out his personal identity it was necessary for him "to produce evidence showing himself to be the person who landed in New Zealand from such ship and in such a year." He applied for his own examination and the examination of certain number of witnesses in New Zealand. Kay, J., thought that to compel him to come to England and to give evidence in his favour would be to deny him justice, for it was not possible for him to incur the expenses involved in a journey to England from New Zealand; and he allowed the application. In appeal a different view was taken. The decision of Cotton, L. J., on this point is as follows: "The great contest, however, is as to the examination of the plaintiff. The examination before a special examiner may be ordered if the Court considers it 'necessary for the purposes of justice.' No case is made that it is practically impossible for the plaintiff to attend at the trial, and what we have to consider is whether under the circumstances of the particular case justice requires that he should be examined in this way. It appears to me that it is not consistent with the due administration of justice to allow the plaintiff to give evidence in his own behalf without attending to be orally cross-examined." In the result the learned Judge qualified the order passed by the Court of first instance by inserting a proviso that the depositions of the plaintiff are not to be read if the defendant requires him to appear at the trial to be examined and cross-examined. We offered to pass an order in these terms in this case, but Mr. B. N. Mitter on behalf of the plaintiff opposite party says that an order in this form will be perfectly useless so far as he is concerned. That being so, the question is, whether we ought to maintain the order passed by the learned Judge in the Court below for the examination of the plaintiff on commission in England. It is contended before us by Mr. Mitter that the learned Subordinate Judge acted with jurisdiction; and that we ought not to interfere in this case, since it is not shown that he had no jurisdiction to act in the way that he has done. This question was also investigated by Sir Asutosh Mookerjee in the case to which I have already referred. The learned Judge cited the following passage of Lord Esher, M. R., in *Emanuel* v. *Soltykoff* (3): "The Court had to exercise its discretion as to granting a commission, and this Court would be very unwilling to interfere with the exercise of that discretion by the Court below. Each case must depend upon its own circumstances and no rule as to the

(1) 68 Ind. Cas. 9; 35 C. L. J. 78; (1922) A. I. R. (C.) 42.

(2) (1881) 25 Ch. D. 21; 53 L. J. Ch. 253; 49 L. T. 454; 32 W. R. 70.

(3) (1892) 8 T. L. R. 331.

exercise of that discretion could be laid down. If this Court saw that the discretion had been wrongly exercised, if it saw that the case in all its bearings was not laid before the Court below, if it saw that the Court below misapprehended an important part of the case, this Court would interfere. The Court below seemed to have treated the matter as if it was merely a commission to examine witnesses." This is exactly the point here. In my opinion the learned Judge in the Court below dealt with the application as if it was merely an application for examination of witnesses on commission. He conceded, it is true, that ordinarily a party himself or his servants should not be allowed to be examined on commission ; but he did not sufficiently realise that even in the case of parties to the suit the case of a plaintiff stands entirely on a different footing and that it is an extraordinary thing to pass an order for the examination of a plaintiff on commission. That being so, I arrive at the conclusion that the learned Judge in the Court below exercised his jurisdiction with material irregularity and that this Court sitting in revision is entitled to interfere with that order in aid of justice. The order of the learned Subordinate Judge must accordingly be set aside so far as this point is concerned.

The other question is whether the rest of his order ought to stand. It is urged that two of the witnesses are the servants of the plaintiff, and that in any case there is no justification for the examination of all these witnesses in England especially as the whole case will then have to be tried in India on dead evidence. That may be so ; but we cannot at this stage say that the plaintiff is not entitled to have the evidence of his own witnesses. It is not shown that the plaintiff can procure their attendance in India. They may refuse to come to India ; and, to say at this stage, that the plaintiff is not entitled to have them examined on commission, is practically to deprive the plaintiff of justice. I am not willing to take this risk in this case. It was suggested that their evidence is really irrelevant. That may be so, but I am not prepared at this stage to say how their evidence will affect this case.

The result is that the order of the learned Subordinate Judge in so far as he has directed the examination of the plaintiff on commission is set aside. The rest of the order will stand. The petitioner is entitled to the costs of this application. Hearing fee five good *mohurs*.

Ross, J.—I agree.

Order set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 173 OF 1924.

July 27, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Buckland.

JAGAT CHANDRA BHATTACHARYYA AND OTHERS—APPELLANTS

versus

GUNNY HAJEE AHMED—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 50, O. XXX, r. 3—Contract Act (IX of 1872), ss. 254, 264—Partnership—Suit against firm—Execution of decree—Leave to execute decree against partner—Denial of liability—Procedure—Lunacy of partner, whether dissolves partnership—Persons dealing with firm after dissolution—Notice of dissolution, absence of, effect of—Construction of Statute in previous judgment, whether precedent.

Where a decree has been obtained against a firm and the decree-holder desires to execute the decree against any person other than those mentioned in cls. (*b*) and (*c*) of sub-r. (1) of r. 50 of O. XXI of the C. P. C., alleging that the person against whom he desires to proceed is a partner in the firm, he must apply for leave to execute the decree against such person under sub-r. (2) of r. 50 of the Order. The intention of the latter sub-rule is that when an application for leave is made it should be on notice to the person who is alleged to be liable as a partner; he is to be served with a summons to answer the application. Then if the Court finds that the liability is not disputed, the Court may grant leave to execute the decree against the person who does not dispute the liability. If the liability is disputed, then an issue is to be tried in any manner in which any issue in a suit may be tried and determined. [p. 827, cols. 1 & 2.]

Clauses (*b*) and (*c*) of sub-r. (1) of r. 50 of O. XXI of the C. P. C. refer to persons who have appeared or who have been individually served as partners in the suit itself and have failed to appear. A person, therefore, who has been served with the writ of summons in the suit itself is not one of the persons contemplated by sub-r. (2) of r. 50. [p. 827, col. 2.]

The effect of sub-rr. (2) and (4) of r. 50 of O. XXI of the C. P. C. is that a decree obtained against a firm cannot be enforced, except as to partnership property, against a person alleged to be a partner, and against whom an application has been made under sub-r. (2), unless he has been served with a summons to appear and answer the application specified in sub-r. (2), and has had an opportunity of disputing his liability as a partner, if he desires to do so. [*ibid.*]

The lunacy of a partner does not of itself dissolve a partnership, but confirmed lunacy is a ground for

dissolution of the partnership if the other partners apply to the Court for a decree of dissolution on that ground. [p. 828, col. 2.]

Section 264 of the Contract Act applies not only to persons who had dealt with a firm before its dissolution but also to persons who deal with a firm after a dissolution or change of partners. [p. 829, col. 2.]

Per *Buckland, J.*—Under O. XXI, r. 50 (2) of the C. P. C. the question of liability should be tried and determined like an issue in a suit on the evidence, oral or documentary, which may be produced by the parties. It is desirable that the issue to be tried should be framed and recorded and that any admissions made by the parties which may be held to render oral evidence unnecessary, either in whole or in part, should also be recorded. [p. 832, cols. 1 & 2; p. 833, col. 1.]

An interpretation of a Statute directly necessitated in order to apply its provisions to the facts of a case cannot be described as *obiter dictum* merely because it involves reference to facts other than those before the Court. [p. 833, col. 1.]

Appeal against a judgment of Mr. Justice C. C. Ghose, dated the 24th August 1924, passed in the exercise of Ordinary Original Civil Jurisdiction.

Sir *B. C. Mitter*, Messrs. *S. N. Banerjee* and *N. C. Chatterjee*, for the Appellants.

Messrs. *B. K. Ghose* and *P. C. Ghose*, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by Jagat Chandra Bhattacharyya, Jogesh Chandra Bhattacharyya and Jyotish Chandra Bhattacharyya, who were sued as representatives of Kush Chandra Bhattacharyya: and, the appeal is against an order of my learned brother Mr. Justice C. C. Ghose, which was delivered on the 24th of August 1924.

The suit was based on a *hundi* for Rs. 2,009 drawn by the firm of Kush Chandra Bhattacharyya, carrying on business in Calcutta, in favour of the plaintiff and dated the 24th of February 1921.

The facts which it is necessary for me to state for the purpose of my judgment are as follows:—

Kush Chandra Bhattacharyya started the firm of Kush Chandra Bhattacharyya & Co. in 1907—the other partners were Anukul Chandra Bhattacharyya, Atul Krishna Bhattacharyya and one Raj Krishna Sinha: and the firm carried on business in Calcutta.

In 1914, Kush Chandra Bhattacharyya became a lunatic, and the business, as far as I know, was managed by the other partners.

It was alleged that the wife of Kush Chandra sometime in March 1919 caused a letter to be sent to the partners, referring to the lunacy of her husband and claiming a dissolution. That letter, however, was not produced at the hearing of this case.

The suit was brought on the 16th of July 1921. Kush Chandra Bhattacharyya was not personally served, but the writ of summons was served upon the firm in the way provided by the C. P. C.

The decree was made on the 8th of August 1921, for the amount of the *hundi* and interest, and was *ex parte*. After the decree was made it was assigned to Hajee Gunny Ahmed, who was joined as a party to this appeal.

In September 1921, the partners of the firm other than Kush Chandra Bhattacharyya petitioned the Court and, on their petition the firm was adjudicated insolvent. Kush Chandra Bhattacharyya died on the 27th of August 1920.

On the 7th of April 1924, the plaintiff made an application *ex parte* to the learned Judge for an order that he should be at liberty to execute the decree against the three appellants describing them as the sons, heirs and legal representatives of Kush Chandra Bhattacharyya, deceased, who was a partner of the defendant firm, by attachment of the house and premises No. 90, Raja Nobo Krishna Street in Calcutta. This house was not partnership property, but was the private property of Kush Chandra Bhattacharyya.

The learned Judge upon this application made the order, as prayed, *ex parte*.

On the 8th of April 1924, the plaintiff caused a notice to be served upon the three appellants describing them as the sons, heirs and legal representatives of Kush Chandra Bhattacharyya, a partner of the defendant firm This notice purported to be given in the suit, *Gunny Hajee Ahmed* v. *Messrs. Kush Chandra Bhattacharyya & Co.*, and to be under r. 22 (1) (*a*) (*b*) of O. XXI, of the C. P. C., and called upon them to appear on the day mentioned, to show cause why the decree passed against them on the 8th of August 1921, in the said suit should not be executed against them: and, on the same day the plaintiff filed a tabular statement setting out the plaintiff's claim against the defendant firm and praying that the decree might be realized by the attachment and sale of the premises in question, which belonged to Kush Chandra Bhattacharyya, a partner of the defendant firm, which, since his death, passed into the hands of his sons

an l legal representatives, the appellants. The tabular statement concluded as follows: "Leave was granted on the 7th day of April 1924 to execute the decree against the legal representatives of Kush Chandra Bhattacharyya, who was one of the partners of the defendant firm."

The matter came before the learned Judge on the 21st of May 1924, and on the 29th of May 1924, when the issue between the parties was tried. I do not find that the issue was specifically stated, but I assume for the purpose of my judgment that the issue raised was whether Kush Chandra Bhattacharyya was a partner in the firm at the time the *hundi* was executed by the firm, namely, the 24th of February 1921.

The learned Judge after hearing the parties made an order granting the plaintiff leave to execute the decree by attachment and sale of the house and premises No. 90, Raja Nobo Krishna Street.

The matter was determined upon statements contained in the affidavits which were filed and upon certain admissions which were made at the hearing on the 21st and on the 29th of May 1924.

It appears that Mr. Bannerjee, who appeared for the appellants, examined a witness on the 21st May and then Mr. Sircar, who appeared for the plaintiff, stated that it was not necessary to cross-examine the witness, as for the purposes of the case he was willing to proceed on the footing that Kush Chandra Bhattacharyya was a lunatic. Then Mr. Bannerjee, apparently, having regard to what Mr. Sircar said, withdrew the witness.

On the 29th of May, there was a further admission made, as appears from the minutes. Mr. Bannerjee, who appeared for the appellants, admitted that Mr. Sircar's client knew that Kush Chandra Bhattacharya was a partner of the firm prior to the lunacy, and Mr. Sircar said that he was willing to proceed on the footing that Kush Chandra Bhattacharyya was a lunatic from 1914 onwards and Mr. Bannerjee said that he was willing to proceed on that footing.

There is one other fact which I ought to mention and that is that on the 11th of July 1921 the wife of Kush Chandra Bhattacharyya instituted a suit on the Original Side of this Court for dissolution of the partnership. That was before Kush's death, who, as I have said, died in August 1923.

After Kush's death, the appellants were substituted as defendants in the partnership suit: and, on the 19th June 1924, a decree dissolving the partnership was made: and, it was directed that the dissolution should take effect as from the 19th of March 1919.

The application upon which the learned Judge's decision was given was alleged to have been made in pursuance of the provisions of O. XXI, r. 50 (2). It was based upon the fact that the plaintiff's decree was against the firm, and upon the allegation that the plaintiff was entitled to execute the decree against Kush Chandra Bhattacharyya, as being a partner in the firm, and inasmuch as Kush Chandra Bhattacharyya was dead, against the appellants as his representatives.

There is no doubt that the procedure adopted by the plaintiff was irregular.

The application to execute the decree against the appellants should not have been made *ex parte*, and the order of the 7th of April giving the plaintiff leave to attach the premises should not have been made *ex parte*, as it was in this case.

That order was made upon the assumption that Kush Chandra Bhattacharyya was a partner in the firm—but the question whether he was a partner had not been decided, either at the trial of the suit or at any other time.

It was admitted by the learned Advocate for the respondent that a summons should have been issued under the provisions of O. XXI, r. 50 (4) reciting the decree against the firm, and calling upon the appellants to appear and answer the allegation made by the plaintiff that Kush Chandra Bhattacharyya was a partner in the firm and to meet the claim that execution should issue against the appellants as Kush Chandra Bhattacharyya's representatives.

This irregularity, however, in my opinion, should not be allowed to vitiate the proceedings, and it is not by itself sufficient to justify a reversal of the learned Judge's order because notice was subsequently given to the appellants. They appeared before the learned Judge and contested the question whether Kush Chandra Bhattacharyya was a partner in the firm and whether the plaintiff was entitled to execute the decree against the appellants and the property in question, and the irregularity,

in my opinion, did not in any way affect the merits of the case.

The first point raised by the learned Advocate for the appellants was that the plaintiff was not entitled to execute the decree against Kush Chandra Bhattacharyya or his representatives or their private property, because Kush Chandra Bhattacharyya had not been served with the writ of summons by which the suit was instituted.

He based his argument on O. XXI, r. 50 (4), which provides as follows: "Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer." His argument was to the effect that unless a person who was a partner in a firm, against which a decree had been obtained, had been served with the writ of summons by which the suit was instituted, he or his private property could not be made liable under the decree, and the plaintiff's right to execute the decree was limited to proceedings against the property of the partnership.

I am not able to accept that argument. If it were held that in no event could a decree, obtained against a firm, be executed against a partner personally or his personal property unless he had been served with the writ of summons in the suit, the object of O. XXI, r. 50 (2) would be rendered nugatory.

The result would be that in any case when a plaintiff sued a firm, he would have to determine at the outset and before he issued the writ of summons who were the persons against whom he would execute the decree when it was obtained.

In many cases it might be difficult and in some cases impossible for a plaintiff, who had been dealing with a firm and who has been obliged to sue the firm, to ascertain before he brought his suit against the firm, who were the partners against whom he must eventually execute the decree.

The Code enables the plaintiff to bring the suit against the firm, and if after the decree has been obtained against the firm the decree-holder claims to execute it against any person other than those mentioned in O. XXI, r 50, sub-r. (1), cls. (*b*) and (*c*) as being a partner, he is enabled by sub-r. (2) to apply for leave: and that rule provides what procedure is then to be adopted.

In my judgment the intention of the rule is that when an application under the rule is made it should be on notice to the person, who is alleged to be liable as a partner; he is to be served with a summons and called upon to answer the application. Then if the Court finds that the liability is not disputed, the Court may grant leave to execute the decree against the person who does not dispute the liability.

If the person who is sought to be made liable as a partner having been served with the summons and having appeared to answer, disputes his liability, then the issue is to be tried in any manner in which any issue in a suit may be tried and determined.

There is a further reason which militates against the argument of the learned Advocate for the appellants. If it were adopted, it seems to me that it would render the provisions of sub r. (2) meaningless.

Sub-r. (2) applies to the case of persons, against whom the decree-holder seeks to execute the decree, other than the persons mentioned in sub-r. (1), cls. (*b*) and (*c*).

Clauses (*b*) and (*c*) refer to persons who have appeared or who have been individually served as partners and who have failed to appear.

A person, therefore, who has been served with the writ of summons is not one of those contemplated by sub-r. (2): and, if the learned Advocate's argument be accepted and the decree-holder's remedy under his decree against a firm is limited to partnership property, unless the person sought to be made liable as a partner has been served with the writ of summons in the suit, sub-r. (2) would be unnecessary, for the decree against the firm can be executed against partnership property under the provisions of O. XXI, r. 50, sub-r. 1 (*a*).

In my judgment the meaning of O. XXI r. 50, sub-rr. (2) and (4), is that a decree, obtained against the firm, cannot be enforced, except as to partnership property, against a person alleged to be a partner, and against whom an application has been made under sub-r. (2) unless he has been served with a summons to appear and answer the application specified in sub-r. (2) and he has had an opportunity of disputing his liability as a partner, if he desires so to do.

It was argued by the learned Advocate for the appellants that this could not be the meaning, for it might be that the per-

son sought to be made liable as a partner might desire to contest the validity of the decree, and if he had not been served with the writ of summons he would not have had any opportunity of so doing.

In my opinion, there is no substance in that argument. If on the trial of the issue contemplated by O. XXI, r. 50 (2) it is decided that the person, alleged by the decree-holder to be a partner, was a partner in the defendant firm, then it seems to me he has no cause for complaint.

Order XXX, r. 3 provides for the service of the summons in a case where persons are sued as partners in the name of the firm. Assuming that the summons has been served in one of the ways specified in O. XXX, r. 3 and that the person, sought to be made liable as a partner, was found in fact to be a partner, he would have had an opportunity to defend the suit either by himself or through his other partners who were his agents.

In my judgment, therefore, the first point, on which the learned Advocate for the appellants relied, must fail.

The second point upon which the learned Advocate for the appellants relied was, that the lunacy of Kush Chandra Bhattacharyya, which occurred in 1914, dissolved the partnership between him and the other members of the firm as from that time. He based his argument on the allegation that in India a lunatic cannot have a contractual relationship with any one. There is, however, no doubt that Kush Chandra Bhattacharyya was of sound mind when he entered into the partnership in 1907; and it remains to be considered whether the partnership came to an end as far as he was concerned by reason of his becoming a lunatic.

The learned Counsel argued that it was a partnership at will, and that as soon as Kush Chandra Bhattacharyya became lunatic, he became incapable of exercising his will and making a contract and consequently the contract of partnership came to an end.

I find some difficulty in following this argument.

Kush Chandra Bhattacharyya was a partner from 1907; if he became incapable of exercising his will-power when he became a lunatic in 1914, as alleged, it seems to me that it would follow that he was incapable of expressing his will and determination to put an end to the contract of partnership and that in the absence of an order of the Court dissolving the partnership or any action by a person duly appointed to represent the interests of the lunatic, the partnership would continue. A man, who has been of sound mind, and who becomes of unsound mind, may recover his sanity: and, in my judgment the, lunacy of a partner does not of itself dissolve a partnership, but confirmed lunacy is a ground for dissolution if the other partners apply to the Court for a decree of dissolution on that ground.

Section 254 of the Contract Act provides that "at the suit of a partner the Court may dissolve the partnership in the following cases :—

"(1) when a partner becomes of unsound mind. . . . . "

This contemplates that an order of the Court is necessary to dissolve a partnership on the ground of the unsoundness of mind of one of the partners—such an order would not be necessary if the unsoundness of mind by itself dissolved the partnership.

It was then argued that by the decree of the Court, dated the 19th of June 1924, the partnership was in fact dissolved as from the 19th of March 1919.

It was alleged on behalf of the respondent that the suit, in which this decree was made, was a collusive suit : having regard to the parties to it and the date when the suit was instituted, *viz.*, the 11th of July 1921, and the date of the decree, *viz.*, the 19th of June 1924 and the date when the suit on the *hundi* against the firm was instituted, *viz.*, the 16th of July 1921, there seems some ground for that allegation.

The decree of the Court for dissolution, however, was made and still remains, and I assume, therefore, for the purpose of my judgment, that the partnership as between Kush Chandra Bhattacharyya and the other partners was dissolved as from 19th March 1919.

The question still remains whether that fact is sufficient to relieve Kush Chandra Bhattacharyya and his estate from liability to the plaintiff in this suit.

Section 264 of the Contract Act provides as follows :—

"Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution."

The learned Advocate for the appellants

argued that this section applies only to persons who dealt with the firm before the dissolution and, therefore, the plaintiff, who, he alleged, had not dealt with the firm before the dissolution, was not entitled to notice, and he could only make liable those who were in fact partners, at the time the *hundis* were executed.

There is no express decision by tbe learned Judge on the question whether the plaintiff had dealings with the firm before the dissolution, although the learned Judge held that the plaintiff had many dealings with the defendant firm before the execution of the *hundis*. If the appellants' contention on the above-mentioned point were correct, I should be of opinion that it would be necessary to remand the case for a further hearing in order to have a decision on the question whether the plaintiff had dealings with the firm before the dissolution in March 1919.

I am of opinion, however, that no remand is necessary for I do not think the appellants' contention in this respect is correct.

In the first place the section says: "persons dealing with a firm." It does not say "persons dealing with a firm before its dissolution;" and I see no reason why the words "before its dissolution" should be interpolated in the section.

In the second place the appellants' contention is, in my opinion, contrary to the decision in *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee* (1) which is a decision of a Bench of this Court, consisting of Garth, C. J., and White, J.

In that case the learned Chief Justice said that he felt a difficulty as to the meaning of s. 264 of the Contract Act especially as regards old customers who like the plaintiff in that case had dealt with the firm before its change or dissolution.

He proceeded as follows (page 683*):—"I suppose the section means that all persons dealing with a firm, whether old customers or new, will be affected by any dissolution of the firm or any change of its members if they have actual notice of the fact. This would be quite in conformity with the Law of England. But supposing they have no actual knowledge of the fact, is it intended that all persons dealing with the firm, whether old or new customers, are to be bound by public notice of such dissolution or change, whatever the words 'public notice' may mean?" Again at page 684* the learned Chief Justice is reported to have said: "The law which regulates the liability of partners for the acts of their co-partners is a branch of the law of agency; and in the absence of any specific rule upon the subject under the head of partnership, we must look to the law of agency for the solution of our present question. Each partner is the agent of his co-partners for the purpose of conducting debts and obligations in the usual course of partnership (see ss. 249 and 251 of the Contract Act, Lindley on Partnership, 3rd Edition, p. 248). And when this agency has once been established, it does not cease as regards third persons, until its termination has become known to them (see s. 208 of the Contract Act)."

"In the case, therefore, of a dissolution of the partnership or of the retirement of one of its members, the agency as between the partners themselves would cease from the time of such dissolution or retirement; but as regards third persons the agency would continue until it had been duly notified. And the mode of notification which the law requires is different in the case of old and new customers of the firm from what it is in the case of other persons."

In my judgment it is clear that the above-mentioned case is an authority for the proposition that the section applies not only to persons who dealt with the firm before the dissolution but also to persons dealing with the firm after the dissolution or change of partners.

This, as already stated, is the natural construction of the section giving the ordinary meaning to the words used in section.

In this case it was admitted that the plaintiff knew that Kush Chandra Bhattacharyya was a partner of the firm prior to the lunacy: and it has not been suggested that any public notice of the dissolution or change of partners was given, or that the plaintiff himself had notice of the dissolution.

In my judgment, therefore, the plaintiff dealing with the defendant firm, of which he knew Kush Chandra Bhattacharyya was a partner, and having had no notice of the alleged dissolution was not

(1) 8 C. 678; 11 C. L. R. 225; 4 Ind. Dec. (N. S.) 437.

*Pages of 8 C.—[*Ed.*]

affected by the dissolution.

For these reasons, I am of opinion that the appeal should be dismissed with costs.

Buckland, J.—On the 8th of August 1921 Gunny Hajee Ahmed obtained a decree against the firm of Kush Chandra Bhattacharyya and Co., for Rs. 2,009 and costs upon a *hundi* dated the 24th February 1921, and executed on behalf of the defendant firm. Subsequently an application was made under O. XXI, r. 50 (2) for an order for leave to execute the decree against the present appellants as the sons and legal representatives of their deceased father Kush Chandra Bhattacharyya by attachment of the house and premises No. 90, Raja Nobo Krishna Street which is a part of the personal estate of their deceased father.

The applicant has since assigned his decree, but that does not affect the points which now arise for decision.

On the 8th of April notice was issued to the appellants under r. 22 (1) (*a*) (*b*) of O. XXI of the C. P. C. to show cause why the decree in question should not be executed against them. To that notice I shall have to refer later in more detail.

The appellants, as observed, are the sons of Kush Chandra Bhattacharyya who is admitted to have been a member of the firm of Kush Chandra Bhattacharyya and Co., from the year 1907 onwards. It is also admitted that in the year 1914 he became of unsound mind.

In the year 1923 he died. It is also alleged and not denied that in March 1919 the wife of the deceased wrote through her Solicitors on behalf of her husband to his partners giving notice of dissolution of the firm carried on under the name of Kush Chandra Bhattacharyya and Co.

The applicant Gunny Hajee Ahmed alleged that he dealt with the firm knowing Kush Chandra Bhattacharyya was partner and that no notice of dissolution was given to him or by public advertisement.

The learned Judge made an order granting leave to the plaintiff to execute the decree in the manner desired. There is no finding as to dissolution, though the learned Judge appears to have dealt with the matter upon the basis of a dissolution in March 1919.

The first point argued is that under O. XXI, r. 50 of the C. P. C. no execution can issue against property other than the partnership property unless the alleged partner has been served with the writ of summons in the suit. This is based on O. XXI, r. 50 (4) which is said to extend to the whole rule.

Under O. XXX, r. 3 the summons in a suit against partners in the name of their firm may be served either upon any one or more of the partners, or at the principal place at which the business is carried on upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct. Order XXX, r. 6 provides: "Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm;" and r. 7 provides: "Where a summons is served in the manner provided by r. 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued."

Execution in a suit decreed against a firm is provided for by O. XXI, r. 50. As regards the partnership property no difficulty arises. Execution may issue in every case. As regards private property of individual partners rr. 50 (1) (*b*) (*c*) limit it to cases of persons who have appeared under O. XXX, rr. 6 or 7 or who have admitted that they are or have been adjudged to be partners or who have been individually served as partners and failed to appear. The persons so classified comprise all who prior to execution against their private estate for one reason or another may be held to be aware of their personal liability to satisfy the decree against the firm.

Sub-r. (2) deals with cases of persons said to be partners who are not within the foregoing categories and who, therefore, may be held not to be aware of their personal liability. Hence the need for sub-r. (4).

The principle underlying this rule is that as regards the firm and the partnership property there has been a complete adjudication prior to decree. Service in the manner prescribed by O. XXX ensures that due notice shall be given to the firm as such. Then, as regards the liability of individual partners, the object of the rule is to ensure that no partner shall be held personally liable unless he shall have had individual notice or may be held to be aware of his liability.

It has been argued that sub-r. (4) is generally applicable and that its effect is to limit execution against individual partners to execution against those who have been served with a writ of summons under O. XXX. Such a construction cannot be reconciled with sub-r. (1). It would involve both repetition and inconsistency and be so meaningless as to be inconceivable. If "summons to appear and answer" means the writ of summons, as argued, this leads to the anomalous conclusion, that service on partners is twice ensured, by sub-r. (1) (*c*) and by sub-r. (4) while sub-r. (2) is ineffective and cannot be utilised.

The only sensible interpretation is that sub-r. (4) is intended to apply to persons against whose property execution is sought under sub-r. (2)

This rule is adapted from the English O. XLVIIIA, r. 8, reference to which makes it clear that the provision as regards service in sub-r. (4) was intended to be applicable to persons against whom execution was asked for other than those against whom the decree-holder was entitled to execution by reason of sub-r. (1). The sub-division of the English rule into O. XXI, rr. 50 (2) and (4) has led to the elaborate argument which we have heard. The two would more appropriately have been combined in one sub-rule which would have made the intention clear.

The English rule of course is in no way binding as an authoritative guide to interpretation, but I am fully satisfied both as to the genesis and the meaning of the rule which we have to construe.

The form of summons is challenged and it is argued that by reason of the form there has been no proper service. Reference has been made to the words in sub-r. (4) "summons to appear and answer" and it is rightly contended that in relation to sub-r. (2) they mean that proper notice of what is intended shall be given. The summons should recite the decree, that it is against the firm, and that the decree-holder claims to be entitled to execute it against the individual to be charged on the ground of his liability as a partner in such firm.

In this particular case the summons was issued by the master under O. XXI, r. 22 (1) of which sub-rr. (*a*) and (*b*) are both applicable. Where necessary the summons should issue under both rules of O. XXI and the requirements of each should be complied with.

Applications for execution are ordinarily made *ex parte* on a tabular statement. In cases to which O. XXI, r. 22 applies it appears to be the practice, to file the tabular statement and at the same time to take out of summons under that rule. This practice appears to be convenient, and it might well be followed where O. XXI, r. 50 (2) applies, whether in conjunction with O. XXI, r. 22 or not, but the summons should be served before any order is made against the persons to be held liable.

To conclude these observations on the practice under O. XXI, r. 50 (2) which does not seem to be well settled it also appears to me that the effect of the language of the sub-rule as to granting leave or trying the liability of the person to be charged, where disputed, is that upon the parties being before the Court or properly served, as the case may be, if liability is not disputed, the Court may grant leave forthwith, but if liability is disputed, leave may only be given after such liability has been tried and determined in favour of the decree-holder.

In this particular case, the summons does not conform strictly to what, in my opinion, is required by the Code. But I am not prepared to say that on that ground the appeal must succeed.

Though no reference is made in the summons to O. XXI, r. 50 (2) nevertheless it contains the title to the suit indicating that the firm was the defendant against whom the decree referred to later was made. It is addressed to the appellants as legal representatives of Kush Chandra Bhattacharyya, "a partner of the defendant firm above-named," and calls upon them to show cause why the decree should not be executed against them, which must mean in the capacity in which they are summoned. They appeared and they took no objection. They met the case made against them on its merits, though it was not open to them at that stage to challenge the decree, for the liability of the firm and of its partners, whoever they might be, had been thereby established. How can they now complain? In my opinion, there is no substance in this objection. Section 99 of the C. P. C. has been referred to and it provides: "No decree shall be reversed or substantially varied . . . . on account of any . . . . ,

error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court." If necessary I should be prepared to say that this section applied.

The next point argued is that Kush Chandra Bhattacharyya's lunacy in 1914 *ipso facto* dissolved the partnership. This argument is based upon an alleged analogy to infancy which, however, in my opinion, does not exist. An infant is under a continuing contractual disability which is finally removed when he attains majority. The disability of a person of unsound mind may begin and end at any time; it may be continuous or it may be intermittent. Section 12 of the Indian Contract Act is consistent with this for the second paragraph provides that, "a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind" and the third paragraph of the section provides for the converse case Section 254 provides that "at the suit of a partner the Court may dissolve the partnership when a partner becomes of unsound mind." The provision of the law is wholly inconsistent with the proposition that the lunacy of a partner *ipso facto* dissolves the partnership. It shows that lunacy provides a ground for dissolution and whether or not it affords a ground for dissolution and whether or not it is open to another partner to dissolve a partnership without an order of the Court, in the circumstances it is not necessary to consider. It may be necessary, therefore, in cases where a partner has become of unsound mind, to consider whether there has been a dissolution in fact, otherwise the partnership must be deemed as continuing. In these circumstances, I find that the partnership continued after 1914.

In this case no dissolution in 1919 as is alleged to have taken place was actually proved before the learned Judge, nor is there any finding by him to that effect, for the judgment of the Court declaring the partnership to have been dissolved at that date was delivered between the time when the learned Judge heard the application and the date when he made the order which has been appealed against. He assumed, however, that there had been a dissolution in 1919 and seems to have dealt with this matter upon that basis.

I may digress at this point to draw attention to the fact that under O. XXI, r. 50 (2) the question of liability should be tried and determined like an issue in a suit. That means on evidence which may be oral or documentary. This ordinarily should be the course pursued. A form of issue which would probably be appropriate to most cases was considered and approved in *Davis* v. *Hyman & Co.* (2).

In this particular instance the admission by learned Counsel on the one hand of the lunacy in 1914 of Kush Chandra Bhattacharyya, of partnership and of the plaintiff's knowledge of the partnership before that date on the other, made this unnecessary. Assuming, therefore, that there was no dissolution in 1919, the appellants are clearly liable.

The only remaining question is whether upon the materials before the learned Judge he was able to decide the case, having regard to the state of the law, seeing that the transaction upon which the decree was founded did not occur till 1921.

It is not alleged that any notice of dissolution was given to Gunny Hajee Ahmed or that the alleged dissolution was publicly advertised. It may, therefore, reasonably be assumed that neither of these things was done.

It is put on issue upon the affidavits whether Gunny Hajee Ahmed ever dealt with Kush Chandra Bhattacharyya & Co., prior to 1921 when the *hundi* on which the decree was made was executed. I will, therefore, assume that Gunny Hajee Ahmed was a new customer of the firm in the sense that he had not dealt with the firm before 1921.

The position, therefore, may be summarised as follows:—That prior and up to 1914 Kush Chandra Bhattacharyya was a member of Kush Chandra Chattacharyya &. Co., that he then became a lunatic, that his widow on his behalf gave notice of dissolution to his co-partners in March 1919, that no further notice of dissolution was given nor notice to Gunny Hajee Ahmed, that Gunny Hajee Ahmed knew prior to 1914 of the constitution of the firm and was a new customer in August 1921. On these facts is the estate of Kush Chandra Bhattacharyya liable to satisfy the decree against the firm?

The matter appears to be governed in part by s. 264 of the Contract Act, Gunny Hajee Ahmed was a person dealing with a

(2) (1903) 1 K. B. 854; 72 L. J. K. B. 426; 51 W. R. 598; 88 L. T. 284; 19 T. L. R. 348.

firm. *Prima facie*, he was not affected by the alleged dissolution.

It has been argued that as a new customer he is not within that section. The law of partnership depends on the law of agency. Section 201 of the Contract Act provides that an agency is terminated by the principal becoming of unsound mind, but s. 208 provides that the "termination of the authority of an agent does not...take effect . . . . so far as regards third persons, before it becomes known to them." Apart from authority ss. 201, 208 and 264 appear to conclude the matter. But we have the authority of this Court in *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee* (1) in which the effect of s. 264 was fully considered by Garth, C. J., who was clearly of the opinion that as regards persons who had not dealt with the firm the implied agency of partners would continue until its termination had been publicly notified.

It has been submitted that inasmuch as the question in that case was one of liability to an old customer the learned Chief Justice's observations were but *obiter*. With this I cannot agree. It does not seem to me that an interpretation of a Statute directly necessitated in order to apply its provisions to the facts of a case should be described as *obiter dictum* because it involves reference to facts other than those before the Court.

I had some doubt at one time whether it would not be necessary to remand the case for trial upon the points last discussed, but in view of the admissions and the law as I conceive it to be, that course now seems to me to be unnecessary.

The directions contained in O. XXI, r. 50 (2) as to the trial of an issue should, however, not be overlooked, and it is very desirable that the issue to be tried should be framed and recorded. The same applies to any admissions which may be held to render oral evidence unnecessary either in whole or in part.

I have no doubt that the learned Judge who tried this case was fully cognizant of the position, but the absence of any full and accurate record of what occurred before him, resulting in the prescribed procedure not being strictly followed has added considerably to the difficulties in dealing with this matter on appeal.

I agree that this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

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MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 3 OF 1924.

April 8, 1925.

Present:—Mr. Justice Madhavan Nair.

ALAYIL KALATHIL KAMBIL ACHUTHAN—RESPONDENT No. 2—PETITIONER'S LEGAL REPRESENTATIVE—APPELLANT

versus

KUNNAMBRATH ABDU AND OTHERS—APPELLANTS—COUNTER-PETITIONERS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 14, 19—Right litigated in prior suit—Extension of limitation—Acknowledgment, what amounts to—Statement by judgment-debtor that decree had been passed against him, whether acknowledgment of subsisting liability.

To constitute an acknowledgment within the meaning of s. 19 of the Limitation Act, it is not necessary that the legal consequences that may flow from the obligation acknowledged should be specified, but the acknowledgment must itself import that the person making the acknowledgment is then under an existing liability. Such liability cannot be read into the statement which is relied upon as an acknowledgment by proof *aliunde*. [p. 837, cols. 1 & 2]

A mere statement of fact by a judgment-debtor that a decree had been passed against him on a certain date for a certain amount, does not amount to an acknowledgment that the decree still subsists and is capable of execution, so as to extend the period of limitation for the execution of the decree under s. 19 of the Limitation Act. [p. 837, col. 1.]

In order to determine whether a plaintiff is entitled to claim the benefit of s. 14 of the Limitation Act, the question to be considered is whether the right which is sought to be enforced in the subsequent suit is the same as that which was litigated in the prior suit. [p. 839, col. 2]

Appeal against a decree of the District Court, Narth Malabar, in A. S. No. 24 of 1923, dated the 13th August 1923, presented against an order of the Court of the District Munsif, Cannanore, in R. M. P. No. 1760 of 1922, in O. S. No. 733 of 1915 (A. S. No. 273 of 1918).

Mr. *T. S. Viswanatha Iyer*, for the Appellant.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondents.

JUDGMENT.—This civil miscellaneous second appeal arises in connection with the execution of the appellants' decree in A S. No. 273 of 1918, filed against the decision in O. S. No. 733 of 1915, on the file of the District Munsif's Court at Cannanore. The legal representative of the 1st plaintiff, petitioner, is the appellant.

The point for decision is a pure question of law, *viz.*, whether the petitioner's application for execution is not barred by limitation. The application for execution was filed on the 26th of September 1922. The

date of the appellate decree, is the 27th of February 1919. The application is, therefore, clearly barred by limitation. But the petitioner states that his application is saved from the bar of limitation, either under s. 19 or under s. 14 of the Limitation Act, as the 2nd defendant, in O. S. No. 733 of 1915, has made an acknowledgment of liability by referring to the existence of this decree in his plaint, in O. S. No. 348 of 1921 and also that he is entitled to deduct the time taken by him, in defending the said suit (O. S. No. 348 of 1921). If he succeeds in either of these contentions, the lower Court's order will have to be set aside. The plaint in O. S. No. 348 of 1921 was filed on the 11th of July 1921, and the suit was finally withdrawn on the 28th of July, 1922.

To appreciate the questions raised in this case, it is necessary to give a somewhat detailed statement of the facts, regarding O. S. No. 733 of 1915 (A. S. No. 273 of 1918) and O. S. No. 348 of 1921. The 1st plaintiff, namely, the petitioner in the execution application, along with others, instituted O. S. No. 733 of 1915, for removing the 1st defendant in that suit, their *karnavan*, from his *karnavan*-ship and also for recovery, with future mesne profits, of possession of certain items of property, which he had given on a *kanom* of Rs. 500, in favour of the 2nd defendant, after declaring that the *kanom* was not valid and binding on their *trawad*. The properties though given to the 2nd defendant on *kanom* were in the possession of the *karnavan*, as he had taken them, on a lease from the 2nd defendant, agreeing to pay an annual rent. It was decreed that on plaintiff's paying Rs. 148-14 1 to the 2nd defendant, the 1st plaintiff, as the next *karnavan* of the *tarwad*, be put in possession of the properties, mentioned in the plaint. In the appeal against this decree, filed by the 2nd defendant and decided on the 27th of February 1919, the amount payable to him was enhanced from Rs. 148-14-1 to Rs. 266-14-1, the decree of the lower Court being confirmed in other respects. On the 11th of July, 1921, the 2nd defendant, in O. S. No. 733 of 1915, filed O. S. No. 348 of 1921 in the District Munsif's Court of Tellichery to recover from the 1st defendant and the 1st plaintiff in O. S. No. 733 of 1915, this sum of Rs. 266-14-1, as well as the rent due under the lease. It will be noticed, that, instead of claiming the sum of Rs. 500 for his *kanom*, he claimed only Rs. 266-14-1, the amount actually allowed to him, as per the appellate decree, which is now sought to be executed. This suit, as I have already said, was eventually withdrawn by him. As mentioned above, the statements made by him in the plaint in this suit are now relied upon by the petitioner in the execution application, to save his petition from the bar of limitation, under s. 19 of the Limitation Act and he also claims that he is entitled to exclude in computing the period of limitation, the time spent by him in defending the suit, O. S. No. 348 of 1921, from the date of institution, namely, the 11th of July 1921 to the 28th of July 1922, when it was ultimately withdrawn.

I shall first deal with the plea regarding s. 19 of the Limitation Act. The petitioner refers to paras. 6, 7 and 8 of the plaint, in O. S. No. 348 of 1921, to show that an acknowledgment of liability under the decree in O. S. No. 733 of 1915, within the meaning of s. 19 of the Limitation Act was made by the 2nd defendant in that suit. The material portions of the paragraphs relied upon by the appellant's learned Vakil run as follows:

Paragraph 6:-" .....In O. S. No 733 of 1915, presented in the same Court.....it has been declared, that out of the *kanom* of Rs. 500, Rs. 266-14-1 only is binding on the properties in the schedule and on the defendant's *tarwad*. But the *marupet* executed by the 1st defendant to the plaintiff, in respect of the scheduled properties, has not become cancelled by the decree in O. S. No. 733 of 1915. The plaintiff is, therefore, entitled to get the whole *parupad* due under the *marupet* and he should get it by sale of the properties in the schedule."

Paragraph 7:—"As the period required for conducting O. S. No. 733 of 1915, Appeal No. 273 of 1918, preferred therefrom E. P. No. 952 of 1919, presented by him (plaintiff) against the defendants and the appeal against it is to be excluded from the period of limitation, the claim made for any amount in this suit is not barred by limitarion."

Paragraph 8:—"The plaintiff now claims only Rs. 266-14-1 charged on the properties in the schedule under the decree, in O. S. No. 733 of 1915, out of the *kanom* amount

of Rs. 500 and the balance *parupad* due under the *marupat*."

The question that I have to consider is this, namely, do these statements in the plaint, in O. S. No. 348 of 1921, referring to the decrees, in O. S. No. 733 of 1915 and A. S. No. 273 of 1918, amount to an acknowledgment, by the 2nd defendant, of his liability in respect of the petitioner's right, to execute the decree, in A. S. No. 273 of 1918, within the meaning of s. 19 of the Limitation Act? In my view, the correctness of the answer to this question would depend upon a proper appreciation of the circumstances, under which reference to the two decrees was made by the 2nd defendant in his plaint in O. S. No. 348 of 1921 (Ex. A). For what purpose were they referred to, in the plaint? It will be observed that the plaintiff, that is the 2nd defendant, in O. S. No. 733 of 1915 claimed in O. S. No. 348 of 1921 Rs. 266-14-1, out of the *kanom* of Rs. 500, together with the balance of *parupad*. Ordinarily the plaintiff would be entitled to claim Rs. 500 under the *kanom* but his claim in the suit as regards the *kanom* amount was confined to Rs. 266-14-1. Apart from the circumstances, relating to the explanation of the balance of *parupad*, which he is entitled to get and which for the present may be omitted from our consideration, as immaterial for the present enquiry, it seems to me that the whole of the plaint is devoted to a narration of the circumstances, to show why it was that he claimed only Rs. 266-14-1, instead of Rs.500 and the fact that the decrees in question were passed, is mentioned by him, only for the purpose of explaining this difference. Very briefly stated, the 1st five paragraphs deal essentially with the *kanom* of the *tarwad* properties, taken by him for Rs. 500 and the *marupet*, under which the *karnavan* took the properties back on lease, and the other details relate to these transactions. In para. 6, and this is the important paragraph, he says practically that he is not entitled to get Rs. 500 because in O. S. No. 733 of 1915, it was declared that only Rs. 266-14-1 was binding on the properties and the *marupet* had not become cancelled, by O. S. No. 733 of 1915. It is clear that the first reference to the decree, in O. S. No. 733 of 1915 is to explain the particular circumstance, namely, the reduction of the *kanom* amount, and the second reference simply states that the decree, in O. S. No. 733 of 1915, has not cancelled the *marupet*. It seems to me that the statements, regarding the decree in O. S. No.733 of 1915, do not show that the plaintiff in that suit (the 2nd defendant in O. S. No. 733) thought, at that time anything about any subsisting liability, under that decree, or of the petitioner's right, in respect to that decree. It is clear that without referring to them, he could not have stated the fact, that he was only entitled to claim Rs. 266-14-1, under a *kanom* of Rs. 500. I do not think that from such incidental, though necessary, references, it can be said that, thereby the 2nd defendant intended to make an acknowledgment of liability in respect of the petitioner's right, to execute the decree. This is the view of the learned District Judge and I agree with him; The passage in para. 7 of the plaint extracted above and referred to, by the learned Vakil, does not, in any way, further advance the case of the petitioner. As a result of what he said in the preceding paragraphs he stated in para, 8, that he now claimed only Rs. 266-14-1 charged on the properties under the decree in O. S. No. 733 of 1915. Here again, the reference to the decree is simple for the purpose of showing the amount. I may here state that strictly speaking this amount claimed is the amount, increased by the appellate decree and not given by the original decree. In these circumstances, I am satisfied that, by referring to the decrees, in O. S. No. 733 of 1915 and A. S. No. 273 of 1918, in paras. 6, 7 and 8 of the plaint, the 2nd defendant did not, either expressly or impliedly, make an acknowledgment of liability, with respect to the petitioner's right to execute the decree, in O. S. No. 733 of 1915, within the meaning of s. 19 of the Limitation Act.

But it has been argued, by the learned Vakil for the appellant, relying upon decisions, which I shall presently examine that, for the purposes of claiming exemption under s. 19 of the Limitation Act, a mere statement of a fact that a decree was passed against a party is sufficient; and that it is not necessary that all the legal consequences that may flow from the decree should be stated to constitute an acknowledgment. He has also argued that to explain the exact nature of the right of liability, if it is not clear from the mere reference to the decree, evidence *dehors* the written acknowledgment may be given and the contents of the decree may be ex-

amined to explain the liability. I do not think the authorities cited by him support these arguments.

In *Sukhamoni Choudhrani* v *Ishan Chunder Roy* (1) which was a suit for contribution, in respect of a joint debt, it was held that the mere acknowledgment by the defendant, a co-owner, in a petition that a debt was a joint debt was sufficient to save the bar of limitation, under s. 19 of the Limitation Act. Their Lordships of the Privy Council, no doubt, stated that:—

"It is not required that an acknowledgment within the Statute shall specify every legal consequence of the thing acknowledged. The defendant acknowledged a joint debt. From that follow the legal incidents of her position as a joint debtor with the plaintiff, one of which is that he may sue her for contribution."

This case does not help the appellant, because when the defendant acknowledged the joint debt, clearly there was an admission of liability to pay his share of the joint debt. When the liability was thus admitted, there was no need to specify the legal consequences, arising from such admission. In the case before us, the mere reference to the decree in the various paragraphs of the plaint does not indicate any such admission of liability. In *Maniram Seth* v. *Seth Rupchand* (2) the respondent, who was named, as one of the executors of the Will of a creditor, was one of the applicants for Probate. In the Probate proceedings, in answer to an objection that he was indebted to the estate, he, in a petition signed by him stated "that for the last five years, he had current accounts with the deceased. The alleged indebtedness does not affect his right to apply for Probate." It was held that the statement amounted to a sufficient acknowledgment, within the meaning of s. 19 of the Limitation Act. In this case, there was a clear admission that there were open and current accounts between the parties. This implied two things; (1) At that date either of them had a right, as against the other to an account; (2) that whoever on the account should be shown to be the debtor to the other was bound to pay the debt to the other. Thus "the inevitable deduction from the admission was that the respondent acknowledged his liability to pay his debt to Motiram or his representative, if the balance should be ascertained to be against him." It was, therefore, held that the statement that there were open and current accounts between the parties amounted to a valid ackowledgment. As there was a clear admission in the statement, there was no need to mention all the legal consequences involved in that admission to make that statement a valid acknowledgment. This decision also does not, therefore, give us much help, in deciding whether the mere statements of fact that decrees were passed against a party amount to acknowledgments of any subsisting liability, with respect to the plaintiff's right to execute the decrees. In *Bacharaj Nyahalchand* v. *Babaji Tukaram* (3) it was pointed out that the application, which contained the acknowledgment referred to the decree "as an outstanding decree." The learned Judges say:—

"Having regard to the terms in which the decree is referred to in this application by the plaintiff, we think that it clearly contains an acknowledgment within the meaning of s. 19. The decree, as we read the application, is referred to therein as an outstanding decree, and the payments mentioned in the application are mentioned as payments made on account of the decree."

The reference to the decree in O. S. No. 733 of 1915, in the various paragraphs of the plaint in O. S. No. 348 of 1921 certainly does not make out, that it is an outstanding decree. For the purposes of the plaintiff in that case, that decree might have been either an outstanding, or an extinct one. The question whether that decree was subsisting or not was entirely immaterial, in O. S. No. 348 of 1921, which was a suit, for enforcing a money claim. He referred to it, as I have said, simply to state that according to that decree his *kanom* was declared binding, only to the extent of Rs. 266-14-1 and for nothing more. In *Kalliani Amma* v. *Narayanan Nambiar* (4) which was a suit for redemption, the acknowledgment relied upon, to save limitation, under s. 19 of the Limitation Act, was the statement contained in Ex. C in

(1) 25 C. 844; 25 I. A. 95; 2 C. W. N. 402; 7 Sar. P. C. J. 294; 13 Ind. Dec. (N. S.) 550 (P. C.).

(2) 33 C. 1047; 33 I. A. 165; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 834; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130 (P. C.).

(3) 21 Ind. Cas. 407; 38 B. 47; 15 Bom. L. R. 930.

(4) 28 Ind. Cas. 69; 28 M. L. J 266; (1915) M. W. N. 105; 17 M. L. T. 170.

that case which was a written statement, filed by the predecessor-in-title of the defendants in the prior suit. In that document, it was stated that the predecessors-in-title "took the property on *kanom* and that the same right devolved upon the writer of Ex.C', through an assignee." It was held that the reference to the *kanom* was for the purpose of showing that the lands were held by the declarant, clearly showing that the *kanom* was subsisting, (see Tyabji, J.'s judgment). That being the case, there was clearly no need to specify the legal consequences of the obligation acknowleged in order to constitute the statement of valid acknowledgment. In *Uppi Haji* v. *Mammavan* (5) the lands were described by the testator in his Will, as "demised to me on *kanom*." It was held that this description amounted to a sufficient and valid acknowledgment. In support of his argument, the learned Vakil for the appellant referred also to the decisions in *Kadri Pakirappa* v. *Manki Husan Saheb* (6) and *Sheikh Mahomed* v. *Jamaluddin Mahamed* (7). In all the cases, which we have examined above, the learned Judges, taking into consideration the circumstances of each case, were satisfied that the recitals, in the documents brought to their notice, contained admissions of an existing liability, at the time when the statements were made, and, therefore, they held in these cases that "for the purposes of s. 19 of the Limitation Act, it was not necessary that all the legal consequences that may flow from the obligation acknowledged should be specified, to constitute an acknowledgment." A similar observation cannot be made, in the present case, with respect to the bare mention of the decree in O. S. No. 733 of 1915, in the plaint, in O. S. No. 348 of 1921. The reference to the decree, as I have shown, does not, in any sense, suggest an admission of a subsisting liability, regarding the petitioner's right to execute the decree.

In this connection, it was also argued that, if the statement that a decree was passed against a party does not amount to an acknowledgment, within the meaning of s. 19, then a reference to the contents of the decree may be made, to prove the real nature of the acknowledgment relied upon; but the cases cited, *viz.*, *Ittappan Kuttiravattat Nayer* v. *Nanu Sastri* (8) *Prasanna Kumal Ray* v. *Niranjan Ray* (9) do not support the argument. In *Ittipan Kuttiravattat Nayer* v. *Nanu Sastri* (8) while pointing out that the exact nature of the right of liability may be established by evidence *dehors* of the written acknowledgment, the learned Judge takes care to point out that "the acknowledgment in itself should import that the person making the acknowledgment, is then under an existing liability and such liability cannot be read into it by proof *aliunde*....."

The decision in *Prasanna Kumal Ray* v. *Niranjan Ray* (9) does not contain anything relevant regarding this aspect of the argument.

The cases relied upon, by the respondent, *viz.*, *Kandasami Reddi* v. *Suppammal* (10) and *Muthu Kumara Mudaliar* v. *Chockalinga Mudaliar* (11), in support of his argument that the acknowledgment relied upon, in the present case, does not fall, within the meaning of s. 19 of the Limitation Act, may now be examined. In *Kandaswami Reddi* v. *Suppammal* (10), the plaintiffs sued on a mortgage, Ex. A, and it was admitted that the suit was time-barred unless a certain passage in the plaint, Ex. B (O. S. No. 1011 of 1912), filed by the defendant against the plaintiffs, could be relied upon, as an acknowledgment of liability, under s. 19. The passage in the plaint stated that the two plaintiffs in suit, *i. e.*, defendants Nos. 1 and 2, jointly executed to the 1st defendant therein, on the said date, a hypothecation deed for Rs. 200, after deducting the sums paid towards the said *othi* amount of Rs. 275. Along with the said deed, a deed of *othi* executed in the year 1888 and a deed of 1907 were also given to the 1st defendant. It was admitted that the hypothecation deed referred to in this passage was Ex. A, on which the suit was brought in that case. It was held by the learned Judges that the plaint did not imply an acknowledgment of subsisting liability. It was pointed out that "the question of whether Ex. A had or had not been discharged was entirely immaterial in O. S. No. 1011 of 1912, which was a suit

(5) 16 M. 366; 3 M. L. J. 191; 5 Ind. Dec. (N. S.) 962.

(6) 3 Ind. Cas. 19; 19 M. L. J. 650; 6 M. L. T. 155.

(7) 10 Bom. L. R. 385.

(8) 26 M. 34; 12 M. L. J. 101.

(9) 64 Ind. Cas. 988; 33 C. L. J. 433; 26 C. W. N. 213; 48 C. 1046.

(10) 70 Ind. Cas. 576; 45 M. 443; 15 L. W. 325; 42 M. L. J. 268; (1922) M. W. N. 168; (1922) A. I. R. (M.) 104; 32 M. L. T. 166.

(11) 73 Ind. Cas. 952; 17 L. W. 674; (1923) M. W. N. 634.

to enforce a specific performance of a contract to sell. The execution of Ex. A appears to have been mentioned simply for the purpose of explaining how the *othi* deeds came to be in the hands of the defendants in that case; and where the discharge of a document is entirely irrelevant to the purpose for which the statement is made, no adverse inference can be drawn from the failure to allege discharge."

I have already pointed out, why the reference to the decree in O. S. No. 733 of 1915 was made by the second defendant in the plaint in O. S. No. 348 of 1921. Applying the line of reasoning, adopted in *Kandaswami Reddi* v. *Suppammal* (10) it follows that the plaint in O. S. No. 348 of 1921 does not contain an acknowledgment of a subsisting liability. Following this decision in *Muthukumara Mudaliar* v. *Chokalinga Mudaliar* (11) it was held that "a statement by a person that he on some prior date executed a mortgage-bond cannot amount to an acknowledgment express or implied of an existing liability, under the bond on the date of the statement."

Two later rulings, *Official Assignee of Madras* v. *Subramania Aiyar* (12) and *Tallapragada Satyanarayana Murthy* v. *Maddu Ramireddi* (13) were brought to my notice by Mr. Viswanatha Iyer after the arguments were closed. In *Official Assignee of Madras* v. *Subramania Aiyar* (12) which accepts the statement of law, as laid down in *Kandaswami Reddi* v. *Suppammal* (10) as correct, the learned Chief Justice, no doubt, at page 3* states that "an admission to prevent the running of time, under the Limitation Act need not be, in the full sense of the word, an admission of the existence of liability at the date of the admission," but this is subject to the condition, stated in the rest of the sentence, *viz.*, "if the proper inference to be drawn from the admission which is made is that it was intended to represent the debt as then subsisting."

In *Tallapragada Satyanarayana Murthy* v. *Madu Ramireddi* (13), the deposition relied on, as the acknowledgment, contained "a clear admission that the appellant was in debt to the plaintiff" and in that respect, the case was distinguished from the decisions in *Kandaswami Reddi* v. *Suppammal* (10) and *Muthukumara Mudaliar* v. *Chockalinga Mudaliar* (11) in both of which there were no such admissions of indebtedness. These two decisions do not lend any additional support to the appellant's arguments. In *Hingan Lal* v. *Mansa Ram* (14) it was laid down, by Sir John Edge, C. J., and Blenner Hassett, J., that "that the mere statement of a fact that a decree was passed against a party, on a certain date for a certain amount is not an acknowledgment that that decree is capable of execution so as to come within s. 19 of Act XV of 1877. It is merely a statement of a fact that a decree was passed, and not an acknowledgment that there is a present liability under the decree."

This case, as pointed out by the learned District Judge, is very much like the present one and has been cited with approval in *Kandasuami Reddi* v. *Suppammal* (10).

The learned Vakil for the appellant has drawn my attention to two decisions; *Madhusudan Chowdhry* v. *Brajanath Chunder* (15) and *Anant Ram* v. *Inayat Ali Khan* (16) for the position that s. 19 of the Limitation Act should be liberally construed and that I should not put a narrow interpretation on what constitutes an acknowledgment, under that section; I agree that it is but just and reasonable that the section should be construed, so as to afford every possible support to a just and lawful claim against an unjust and unconscionable assistance to that claim, see *Madhusundan Chowdhry* v. *Brajanath Chunder* (15). But in spite of the utmost liberality in construing s. 19, "nothing can operate as an acknowledgment of liability unless it can be brought, within its terms;" (*vide* Darby and Bosanquet's Statutes of Limitation, page 293, 2nd Edition).

For the above reasons I am of opinion that Ex. A in the present case, does not contain any acknowledgment, within the meaning of s. 19 of the Limitation Act.

The next question for consideration is whether the petitioner is entitled to exclude the time, during which the suit, O. S. No. 348 of 1921 was pending, on the strength of s. 14 of the Limitation Act.

(12) 77 Ind. Cas. 740; 46 M. L. J. 1; 33 M. L. T. 235; 19 L. W. 331; (1924) A. I. R. (M.) 286; (1924) M. W. N. 19.

(13) 82 Ind. Cas. 933; 20 L. W. 562; (1924) M. W. N. 877; (1924) A. I. R. (M.) 856.

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(14) 18 A. 384; A. W. N. (1896) 101; 8 Ind. Dec. (*N. S.*) 963.

(15) 6 B. L. R. 299.

(16) 68 Ind. Cas. 185; 2 L. L. J. 549.

Both the lower Courts have found against the petitioner and in favour of the respondents. In support of his argument, that the appellant is entitled to claim exemption, the learned Vakil has relied upon the decision of the Calcutta High Court in *Lakhan Chunder Sen* v. *Madhusudan Sen* (17) and of the Privy Council in appeal from the judgment in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (18) andalso on the decision of our own Court in *Kunhi Kuttiali* v. *Kunhammad* (19). In these cases, the plaintiff was allowed to exclude the period of time, spent by him in the prior suit, in which he was a defendant. It is not quite clear, as to how far these decisions are based on s. 14 of the Limitation Act. No doubt in *Kunnhi Kuttiali* v. *Kunhammad* (19) the learned Judges state that s. 14 of the Limitation Act should be construed liberally, the principle being the suspension of the right of suit, during the pendency of previous litigation. For finding out whether the plaintiff-petitioner is entitled to claim exemption, relying on general principles, or on s. 14, the question to be considered is whether the right which is now sought to be enforced, namely, the right, to execute the decree in A. S. No. 273 of 1918, that is to say, to recover possession, on deposit of a certaim amount under the decree, was being litigated in O. S. No. 348 of 1921. It is clear that no one in that suit, sought to set aside the decree, in A. S. No. 273 of 1918, and the right of the present petitioner to execute the decree was not in question in that suit. The plaintiff's prayer, in that suit was to recover the amount, which he said was charged on the property in the prior suit, *viz.*, Rs. 266-14-1 together with the profits, which he was entitled to under the *marupet*. The main point, emphasised in the written statement filed by the plaintiff petitioner, is that the suit is not maintainable. The relief claimed by him in that case was that the suit should be dismissed. The petitioner's right to execute the decree is the right, which is now alleged to be barred by limitation. That right was not urged by the petitioner in the prior suit. He did not "though defendant in the former suit urge the claim which he has now preferred as plaintiff" [See *Maharajah Jugutendur Bunwaree* v. *Din Dyal Chatterjee* (20)] It is argued by Mr. Viswanatha Iyer, that, even if the petitioner did not in O. S. No. 748 of 1921, directly claim the relief, which he now asks for, namely, to execute the decree in A. S. 273 of 1918, if the decree to be passed in the suit would lead to his claim being recognised indirectly, then the petitioner is entitled to claim the exemption under s. 14 of the limitation Act Assuming that it is so, it has not been made clear to me, how the petitioner would eventually have got the relief, which he now asks for, by a decree passed in that suit. It is obvious that as the result of the prior suit whichever way it ended possession in any event could not have been given to the petitioner, whether money was deposited by him or not. In my opinion in calculating the period of limitation prescribed for the present application for execution, the petitioner is not entitled under s. 14 of the Indian Limitation Act, to exclude the time spent by him, in defending the prior suit.

It, therefore, follows that this appeal fails and must be dismissed with costs.

V. N. V.

Z. K. *Appeal dismissed.*

(17) 35 C. 209; 7 C. L. J. 59; 3 M. L. T. 90; 12 C. W. N. 326.

(18) 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.).

(19) 73 Ind. Cas. 139; 44 M. L. J. 179; (1923) A. I. R. (M.) 347.

(20) 1 W. R 310.

CALCUTTA HIGH COURT.

CIVIL RULE No. 851 OF 1925.

August 12, 1925.

Present :—Mr. Justice Cuming and Mr. Justice Mukerji.

JOGESH CHANDRA MISRA—PETITIONER

versus

RAMANI KANTA MAHINTA—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115 (c)—Appeal—Judgment of Trial Court reversed without assigning reasons—Illegal exercise of jurisdiction—Revision.

Clause (c) of s. 115 of the C. P. C. has been advisedly framed in indefinite language in order to empower the High Court to interfere and correct gross and palpable errors of the subordinate Courts. [p. 840, col. 2.]

Where an Appellate Court reverses the decision of the Court of first instance on a certain point without assigning any reason for such reversal it acts

illegally in the exercise of its jurisdiction and its judgment is liable to be set aside in revision. [p. 840, col. 2; p. 841, col. 1.]

Rule against an order of the Court of the Additional District Judge, Silchar, (Cachar), in Miscellaneous Appeal No. 46 of 1923 dated the 31st March 1925.

Mr. *Girija Prasanna Sanyal* (with him Babu *Indu Prokash Chatterji*), for the Petitioner.

Babu *Satyendra Krishna Ghose*, for the Opposite Party.

JUDGMENT.

Mukerji, J.—This Rule has been issued to show cause why the decree passed by the Additional District Judge of Sylhet should not be set aside and such other order made by this Court as to this Court may seem fit and proper. The petitioner in this Rule was the plaintiff in a suit which had been instituted against the defendant opposite party for recovery of four sums of money and amount of Rs. 50 due on account of a loan, a sum of Rs. 72 due for boarding charges and a sum of Rs. 40 due on account of lodging charges and a sum of Rs. 38 due on account of compensation. The Court of first instance decreed the plaintiff's suit in full. On an appeal being preferred by the defendant the learned Additional District Judge upheld the decree of the Court of first instance only in respect of the sum of Rs. 50 alleged to have been due on account of loan. With regard to the other three items of money the amounts were disallowed by the learned Judge, the boarding and lodging charges on the ground that the claim thereto was governed by the provisions of Arts. 8 and 9 of the Indian Limitation Act and 4th item, namely, that relating to compensation without any reason being given by the learned Judge so far as that item is concerned.

The principal contention urged on behalf of the petitioner as relating to the boarding and lodging charges is that the learned Judge was wrong in holding that Arts. 8 and 9 of the Limitation Act have any application to the case. The petitioner contends that this error in the decision on the question of limitation affected the jurisdiction of the learned Judge in dealing with the appeal and was so gross and palpable as would bring the case within the purview of s. 115, C. P. C. So far as this section is concerned I had the occasion to express my view of it or at least the meaning which I think cl. (*c*) of that section bears in the case of *Jogunnessa Bibi* v. *Satish Chandra* (1). I adhere to the view which I then expressed as to the meaning of cl. (*c*) of this section. In my opinion this part of the section has been advisedly framed in indefinite language in order to empower this Court to interfere and correct gross and palpable errors of subordinate Courts. It is unnecessary to state what my own view is with regard to the applicability of Arts. 8 and 9 of the Limitation Act. It is enough to say that after hearing the learned Advocate for the petitioner for a considerable length of time we are not agreed as to the question of applicability or otherwise of these articles. Under the circumstances it cannot be said with propriety that the error, if any, that was committed by the learned Judge was so gross and palpable as would bring the case within cl. (*c*) of s. 115, C. P. C.

An ingenious attempt has been made by the learned Advocate for the petitioner to show that the learned Judge exercised his jurisdiction illegally in applying the provisions of Arts. 8 and 9 of the Limitation Act, because the pleadings in the case do not admit of the application of these Articles. I am unable to accede to this contention of the petitioner, for I find that the applicability of these Articles was contended for on behalf of the defendant in the Court of first instance, although that Court held that these Articles did not apply to the case. So far as these two items are concerned, therefore, the decision of the learned Judge does not appear to attract the operation of any of the clauses of s. 115 of the C. P. C.

The matter, however, is different with regard to the claim relating to the compensation. It appears that a sum of Rs. 38 was claimed as compensation for non-payment of the other items, namely, Rs. 50, Rs. 72 and Rs. 40 in all Rs. 162 which was claimed as due from the defendant. The Court of first instance decreed the plaintiff's suit, as I have stated, so far as this item of compensation is concerned. The learned Judge does not allude to this compensation at all in his judgment and he reversed the decision of the Court of first instance with regard to this claim for compensation without assigning any reason whatsoever for such reversal. This, in my opinion, amounts to acting illegally in the exercise of jurisdic-

(1) 83 Ind. Cas. 438; 51 C. 690; 28 C. W. N. 559; 39 C. L. J. 434; (1924) A. I. R. (C.) 633.

tion. I am of opinion that so far as this item is concerned the learned Judge's decision is open to revision by this Court under the provisions of s. 115 of the C. P. C. It appears that this compensation of Rs. 38 was claimed for non payment of the total sum of Rs. 162. The plaintiff has succeeded in recovering a decree for Rs. 50 out of this amount of Rs. 162. He is, therefore, entitled to a proportionate compensation, namely, Rs. 12 for the sum of Rs. 50 which had been decreed to him.

The result, therefore, is that the learned Judge's decision is varied to the extent indicated above and the Rule is made absolute to that extent. Having regard to the proportion of success and defeat of the parties in this Court we make no order as to costs of this Rule.

Cuming, J.—I agree.

M. B. *Rule made absolute.*

Z. K.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 194 OF 1922.

November 3, 1925.

Present:—Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

DARBARI LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat PARBATI—DEFENDANT AND NAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Presumption of jointness—Separation of some members, effect of—Definition of shares in revenue papers—Separate dealings with property.

A Hindu family is presumed to be joint until the contrary is established, but the presumption grows weaker as the relationship becomes more distant and the branches multiply. But no such presumption arises where it is established that before the institution of the suit one or more members of the family had already separated. [p. 842, col. 1; p. 844, col. 2.]

A member of a joint Hindu family may separate himself from the other members of the joint family, and would on such separation be entitled to have a share in the property of the joint family ascertained and partitioned off for him, but the remaining co-parceners without any special agreement between themselves may continue to be co-parceners and to enjoy as members of a joint family what may remain after such a partition of the joint family property is made, or live separately from each other. [p. 842, col. 2.]

The definition of shares in revenue papers by itself affords very slight indication of a separation in a Hindu family, such entries are usually made in the Revenue Records by those responsible for their preparation to make the record definite and precise. The acquisition of some property in the name of one member of the family, and of other property in the name of another member would similarly be inconclusive, but where there is a long series of dealings by the different members of the family independently of each other, the same considerations would not be applicable. [p. 843, col. 1.]

First appeal from a decree of the Subordinate Judge, Shahjahanpur, dated the 31st March 1922.

Dr. *S. N. Sen* (for whom Mr. *B. Malik*), for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.

Kanhaiya Lal, J.—The defendants-appellants Darbari Lal and Shankar Lal held certain mortgages from Raghunath Singh. On foot of those mortgages they obtained decrees against *Musammat* Parbati, the widow of Raghunath Singh. Raghunath Singh had two brothers Hulas Singh and Srikishun Singh. The plaintiffs-respondents are the descendants of Hulas Singh and Srikishun Singh. Their allegation was that Raghunath Singh, Hulas Singh and Srikishun Singh formed members of a joint Hindu family, that the property mortgaged by Raghunath Singh was the joint family property of the entire family, and that Raghunath Singh had no right to mortgage any portion of the same without any lawful necessity. It was further alleged that the decrees obtained on the basis of those mortgages were not binding on the plaintiffs because they were not made parties to the decrees or to the suits in which those decrees were passed. In fact they asserted that the name of *Musammat* Parbati, the widow of Raghunath Singh, was entered in the revenue papers for her consolation after the death of Raghunath Singh, and that she was only entitled to maintenance and was not in possession of any portion of the property mortgaged by her husband.

The defendants, Darbari Lal and Shankar Lal, denied that Raghunath Singh was living jointly with Hulas Singh and Srikishun Singh or their descendants. They did not suggest that the mortgages in question had been made by Raghunath Singh for legal necessity, but they contended that *Musammat* Parbati was in possession of the property of Raghunath Singh as his widow, and that the decrees obtained against her were valid and enforceable.

The Court below, relying on the general presumption that a Hindu family is joint, and also on certain oral and other evidence adduced in the case, came to the conclusion that Raghunath Singh was living jointly with Hulas Singh and Srikishun Singh and their descendants on the dates of the mortgages in question, and that the decrees obtained by the defendants-appellants against *Musammat* Parbati were not binding on the plaintiffs. It further held that the defendants could not have been ignorant of the real position of the family when they took the mortgages from Raghunath Singh in respect of what was, according to its finding, joint family property, and that they were similarly aware of the real position when they chose to file suits and obtain decree against *Musammat* Parbati alone, which could not be treated as binding on the plaintiffs.

The main question for consideration is whether Raghunath Singh was living jointly with his brothers Hulas Singh and Srikishun Singh and with their descendants on the dates of the mortgages in suit. A subsidiary question also arises whether the decrees obtained against *Musammat* Parbati alone were binding on the plaintiffs. We have carefully examined the evidence adduced in the case and are not satisfied that the learned Subordinate Judge has arrived at a right conclusion on the main fact in issue. It is well established that a family is presumed to be joint until the contrary is established, but no such presumption arises where it is established that before the suit one or more members of the family had separated. In this case there is evidence to show that the names of Raghunath Singh, Hulas Singh and Srikishun Singh were separately entered in the revenue papers in respect of equal shares, and that after the death of Raghunath Singh the name of *Musammat* Parbati, his widow, was entered in respect of the share which stood in his name. The family resided in the village Khajuri and the *lambardar* of the village was Hulas Singh who was appointed *lambardar* in 1911. Raghunath Singh and Srikishun Singh had died earlier. In 1919 Sanwal Singh, the son of Hulas Singh, applied for the entry of his name in respect of a half share out of the property entered in the name of Hulas Singh, and he succeeded in getting his name entered on the allegation that he was living separately from his father from four or five years. Both Sanwal Singh and Hulas Singh admitted at the time that they had been separate from each other from four or five years back. On the date of the present suit there can be no doubt, therefore, that at least one branch of the family, namely, that of Sanwal Singh and his father Hulas Singh, had separated, and the presumption that the whole family was joint can no longer arise. As observed by their Lordships of the Privy Council in the case of *Palani Ammal* v. *Muthuvenkatachala Moniagar* (1) a member of a joint family can separate himself from the other members of the joint family, and would on such separation be entitled to have a share in the property of the joint family ascertained and partitioned off for him, but the remaining co-parceners without any special agreement between themselves may continue to be co-parceners and to enjoy as members of a joint family what may remain after such a partition of the joint family property is made or live separately from each other. If the statements of Hulas Singh and Srikishun Singh that they had separated four or five years earlier be taken to be correct, it would appear that at all events in the year 1914 or 1915 one branch of the family was separate, and that the ordinary presumption that the remaining branches of the family had continued jointness ceased to apply. The suits filed by the defendants-appellants on the mortgages executed by Raghunath Singh were filed in 1915 and 1916, and on those dates no jointness of the family could have been presumed.

We have, however, to ascertain what was the state of things when the mortgage of the 15th of January 1904 executed by Raghunath Singh in favour of Darbari Lal, and that of the 9th of May 1907 executed by him in favour of Shankar Lal were executed. Much stress is laid on behalf of the defendants-appellants on the entries in the *khewats* in which the different members of the family were recorded as holding separate and distinct shares, and on certain dealings by the different members of the family with the ancestral

(1) 87 Ind. Cas. 333; 52 I. A. 83; (1925) A. I. R. (P. C.) 49; 48 M. L. J. 83; 6 P. L. T. 133; 21 L. W. 432; (1925) M. W. N. 330; 3 Pat. L. R. 126; 27 Bom. L. R. 735; 29 C. W. N. 816; 23 A. L. J. 746; L. R. 6 A. (P. C.) 143; 48 M. 254; 52 I. A. 83 (P. C.).

property from as far back as 1891. The entries made in the revenue papers are by themselves inconclusive, for as pointed out in the case of *Bhagwani Kunwar* v. *Mohan Singh* (2) the definition of shares in revenue papers by itself afforded very slight indication of a separation in a Hindu family. Such entries are usually made in the Revenue Records by those responsible for their preparation to make the record definite and precise. The acquisition of some property in the name of one member of the family, and of other property in the name of another member, would similarly be inconclusive, but where there is a long series of dealings by different members of the family independently of each other, the same considerations would not be applicable. There is evidence in this case to show that since 1891 different members had been dealing with different parcels of the ancestral property to the extent of the shares entered in their names. On the 7th of October 1891 a mortgage was effected by Raghunath Singh and Hulas Singh in favour of Mathura Prasad in which they described the property mortgaged as the property owned and possessed by them and recorded in their names (Ex. 21). Srikishun Singh did not join in that mortgage. The making of such a mortgage jointly by two of the brothers was consistent with those two brothers having been joint at the time, as also the fact that a joint decree was subsequently obtained on foot of that mortgage by Mathura Prasad in 1897 (Ex. 19). But the fact that Srikishun Singh was not a party to the mortgage or to the decree obtained on the foot of it may be taken as some indication that the entire family was probably not at that time joint. It is significant that on the 28th of February 1898 certain property was purchased by Ram Narain Singh and Raghunath Singh from *Musammat* Ram Dei in respect of which mutation of names was effected solely in the name of the purchasers, and the subsequent dealings with that property showed that Raghunath Singh treated himself as owner of that property to the extent of the half share purchased by him and dealt with it as his own. In fact after the death of Raghunath Singh the name of *Musammat* Parbati was entered in the revenue papers in respect of that half share. On the 15th of January 1904 Raghunath Singh mortgaged his half share of the property so purchased alone with other properties, and particulars of that mortgage are given in the plaint subsequently filed by the mortgagee against *Musammat* Parbati, the widow of Raghunath Singh. On the 23rd of July 1906 some other property was purchased by Hulas Singh from Bhupal Singh in respect of which the name of Hulas Singh alone was entered in the revenue papers. Raghunath Singh was admittedly alive at the time (Ex. 1). He subsequently mortgaged the share so purchased to Jwala Prasad on the 21st of August 1911 along with other property without reference to the other members of the family (Ex. B.). On the 31st of August 1911 two separate mortgages were executed by two different members of the family in favour of two different persons, and what is striking is that each purported to mortgage his own share as entered in the *khewts*. One of these mortgages was executed by Durga Singh in favour of Tota Ram, and the description of the mortgaged properties given tallied with the description of the properties entered in the name of the mortgagor in the *khewats* relating thereto. The other mortgage was made by Hulas Singh jointly with Tota Ram, a stranger, in favour of Jwala Prasad, and the properties mortgaged similarly corresponded with the properties entered in the name of Hulas Singh so far as the portion mortgaged by him was concerned. If the family had been joint, there is no reason why Durga Singh and Hulas Singh should have taken separate loans from different persons and would not have joined in executing those mortgages on the same date. On the 2nd of November 1907 there was another mortgage executad by Hulas Singh in favour of Ajudhia Prasad, on the basis of which a decree was obtained by the latter against Hulas Singh and two other persons on the 15th of December 1913 (Ex. G). That mortgage comprised property which stood entered in the name of Hulas Singh.

On behalf of the plaintiffs reliance is placed in an application for partition made by Srikishun Singh, Durga Singh, Hulas Singh and Raghunath Singh jointly in 1907, but that application was made in

(2) 88 Ind. Cas. 385; 23 A. L. J. 589; (1925) A. I. R. (P. C.) 132; 49 M. L. J. 55; (1925) M. W. N. 421; 41 C. L. J. 591; 22 L. W. 211; 29 C. W. N. 1037 (P. C.).

a proceeding instituted by another co-sharer for the partition of a village in which those persons were also co-sharers, and all that those persons prayed for in their application was that their shares should be formed into separate or compact *mahals*. That position is consistent with the existence of separation and does not necessarily indicate that the persons who made that application formed members of a joint Hindu family. In fact one of the persons who was a party to the application was a stranger to the family, and considering that the application was made by persons who were recorded co-sharers, it is not difficult to understand why they were anxious to have a compact *mahal* for themselves. A reference has also been made to a decree obtained by Hulas Singh and certain other members of the family for their shares of the profits against a *lambardar* in 1910. That decree had necessarily to be obtained by the persons who were recorded as co-sharers, and the fact that such a decree was obtained was inconclusive on the question now at issue. The learned Counsel for the plaintiffs-respondents has also relied on an application made by Hulas Singh for his appointment as a *lambardar* in 1911. In that application Hulas Singh had stated that he was a co-sharer in *Mahal* Srikishun Singh, that the other co-sharers were satisfied with his *lambardar*-ship, and that he was a well-to-do man and would be punctual in payments. He had also mentioned in that petition that his family (*khandan*) was joint, but he had an obvious motive in suggesting at the time that it was so, for many of the co-sharers recorded in the *khewat* belonged to his family, and he must naturally have thought that if he stated that the family was joint, it would support his statement that the other co-sharers were satisfied with his *lambardar*ship. In execution of the decree for arrears of profits obtained by Hulas Singh and his co-sharers certain property was sold by auction, and it is noticeable that the purchase was made by Hulas Singh alone (Ex. 18). The steps taken by Sanwal Singh to get his name entered in the revenue papers along with that of Hulas Singh in respect of his share have already been referred to. In the statements then made by Hulas Singh and Sanwal Singh it was clearly admitted that they had been living separately from four or five years (Exs. D and E). But even before these statements were made, Sanwal Singh had similarly stated in a suit filed by Darbari Lal and Shankar Lal, the present defendants-appellants against Hulas Singh, Sanwal Singh and others on a mortgage said to have been executed by Hulas Singh, that he was separate from his father and that he had separated several years earlier (Ex. K). It may be argued that the object of Sanwal Singh in making that statement was to save himself from liability for the payment of the *ex parte* decree which Darbari Lal and Shankar Lal had obtained against him and his father. But the compromise filed in that case shows that Sanwal Singh eventually accepted a joint liability with his father for a large portion of the claim.

The family to which Raghunath Singh, Hulas Singh and Srikishun Singh belonged was a fairly large family comprising several members, and the ordinary presumption that a family is joint grows weaker as the relationship becomes more distant, or the branches multiply. In the present case Srikishun Singh had three sons, Jit Singh, Durga Singh and Nar Singh, each of whom had sons of his own. Hulas Singh had a son Sanwal Singh, and he and his son Bachchu Singh are also plaintiffs in the suit. The account books of the family have not been produced, though Nar Singh, one of the plaintiffs, stated in his deposition that such account books existed. At one place in his statement he denied that any account was kept of the expenses incurred in connection with the marriages of his sons or of the sons of any of the brothers, but at another place he admitted that when Durga Singh took a loan of Rs. 100 from Tota Ram and executed a document mortgaging the profits of his share, the money so taken was entered in the joint account. Later on he further admitted that the amount of money received and paid and the income received were all reduced to writing, and the account books showing the income and expenditure were with him. The production of these account books would have proved beyond the possibility of doubt the exact position of the family and the manner in which the income derived from the joint family property was credited or expenses incurred therefrom. The oral evidence is of little value. Taking into consideration the circum-

stances above set forth with the evidence adduced as to the separate purchases made by the different members of the family; and the separate dealings by them with different parcels of the ancestral property held by them and entered in their names in the revenue papers, we have no reason to doubt that the family was separate at the time when the mortgages in question were made and when Raghunath Singh died, or when the suits, which resulted in the decrees sought to be impugned, were passed.

We are unable, therefore, to support the finding at which the learned Subordinate Judge has arrived, and we allow this appeal and dismiss the suit of the plaintiffs with costs here and hitherto including fees in this Court on the higher scale.

Walsh, J.—I entirely agree and merely propose to add one or two fundamental reasons why I think the learned Judge has taken an erroneous view of this case. He starts off from the presumption which ordinarily arises in favour of jointness. He adds to that what he describes as a large number of witnesses who proved that the brothers were joint, and he pays less attention than they deserve to the entries in the Revenue Records of the separate transactions entered into by members of this alleged joint family. Reviewing that aspect of the case I can only say that, in my opinion, the presumption, strong as it always is and ought to be, must in this case give way to the very weighty and admitted circumstances which seem to destroy it. Secondly, the verbal evidence on either side is of very little weight and on the plaintiffs' side is tainted by the attitude of Nar Singh, who, in dealing with the admission of separation which had been made by Hulas Singh and his son obviously lacked the courage to deny it and attempted to gloss it over by a faint admission that there had been some temporary sort of separation arising from a personal quarrel an explanation which cannot be accepted by anybody. He further attempted to vouch in favour of his view of jointness the existence of certain accounts in books which he carefully refrained from producing. Taken as a whole, the parole evidence on both sides amounts to little or nothing with the exception of these incidents in Nar Singh's evidence, which certainly militate against his case.

The case has been very ably and carefully argued by Mr. Malik, who has dwelt with great emphasis, not merely upon the entries in the *khatas*, which are suggestive enough, but upon the acts and deeds into which the separate members of this alleged joint family actually entered. No satisfactory explanation of this view of the case is to be found in the evidence, and it is not adequately dealt with by the learned Judge. When you add to it the admission of separation made by Sanwal Singh and his father Hulas Singh, it largely depreciates, if it does not destroy, the value of the ordinary presumption, and if you add further the unsatisfactory explanation of this and the absence of any satisfactory one for the non-production of the books, if there are any, and the fact in itself, which is not to my mind immaterial, that the creditor eventually thought that he had strong reason to believe that he was dealing with a separated Hindu and his widow, otherwise the attempt to enforce his rights by an *ex parte* decree against the widow of one member of a joint Hindu family reads more like the act of a man out of his mind, it is no more than just one of those circumstances taken with all the others which lend weight to one side or other in the scale. I do dot believe as a rule in consulting other cases except for the purpose of extracting some general principle, as to which no question arises in this case, and on a question of fact one reported case is seldom of the slightest assistance in India; but it does happen in this case that Mr. Malik to my mind has been rightly able to draw our attention to the Privy Council case of *Net Ram Singh* v. *Tursa Kunwar* (3) where the Privy Council upheld a Bench of this High Court in which they had overruled the Subordinate Judge on very much similar grounds upon which Mr. Malik asks us to overrule the Subordinate Judge in this case. The facts of that case and of this case, if not absolutely similar, closely resemble one another, and the cases are in principle analogous. The absence from this case of the actual partition among the five brothers in one village mentioned in the judgment of the Privy Council is supplemented in the appeal before us by the admission made by Hulas Singh and Sanwal Singh

(3) 20 Ind. Cas. 967; 17 C. W. N. 1085; (1913) M. W. N. 658; 14 M. L. T. 173; 18 C. L. J. 234; 15 Bom. L. R. 863; 25 M. L. J. 489; 11 A. L. J. 861 (P. C.).

of which there was nothing of a similar kind in the case cited. I can only say that that case has influenced my mind in coming to the conclusion in this case that the documentary evidence is so strong as to be irresistible in the absence of anything really satisfactory which one can take hold of on the other side adequate on this question. I agree with the order passed.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES
NOS. 237 AND 238 OF 1923.
July 8, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice Graham.

IN No. 237 OF 1923.

PECHA MANDAL—DEFENDANT—APPELLANT

IN No. 238 OF 1923.

BATU RAJBANSHI, MINOR BY HIS MOTHER AND NEXT FRIEND DUBIA BEWA—DEFENDANT—APPELLANT

versus

BHAIRABENDRA NARAYAN ROY AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS IN BOTH.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8—Landlord and tenant—Suit for rent coupled with claim for damages for use and occupation of excess lands, nature of—Jurisdiction of Small Cause Court—Bengal Tenancy Act (VIII of 1885), s. 30—Undivided estate—Excess land in occupation of tenant, whether can be treated as separate holding.

Where in a suit for rent compensation is claimed for the use and occupation of excess land, and the latter claim is treated as a claim for assessment and realization of rent for the excess lands, the suit is not triable by the Court of Small Causes. [p. 846, col. 2.]

In a suit for rent the owners of an undivided share of an estate can treat the excess land in the occupation of the tenants as a separate holding. [p. 847, col. 1.]

Appeals against the decrees of the Subordinate Judge, Malda, dated the 8th September 1922, affirming that of the Munsif, Second Court, Malda, dated the 14th September 1921.

Babus *Debendra Narain Bhattacharjee* and *Biseswar Bagchi*, for the Appellants.

Babu *Krishna Kamal Moitra*, for the Respondents.

JUDGMENT.—These two appeals arise out of suits which were heard together in both the lower Courts. The lower Appellate Court in describing the suits states that they are suits for the rent of different areas of land and also that in both suits the plaintiffs claim compensation for the use and occupation of excess land.

It is contended on behalf of the appellant that suits for compensation for use and occupation of land are of the nature of suits for damages which are triable in a Court of Small Causes and that the Munsif had not jurisdiction to deal with this part of the claim. Though it would seem that the plaint has not been well drafted the suits were in effect and were treated not as suits for damages for occupation of the excess land but as suits for assessment and realization of rent for the excess land. The decree granted by the Munsif and confirmed by the lower Appellate Court is clearly a decree in which the total rent has been assessed on the total areas of excess land in each suit and for rent for the land which was originally settled and also for the excess land. We, therefore, overrule the first contention raised on behalf of the appellant.

The next contention taken is that the lower Courts were wrong in treating this excess land as a separate holding. The plaintiffs sued as proprietors of an estate bearing *Touzi* No. 123. The lands in suit are in *Mouza* Muraripore and that *mouza* appertains to two *Touzis* Nos. 123 and 124 in equal shares. The owners of *Touzi* No. 124 succeeded in dispossessing the plaintiff and their co-sharers from their possession of that *touzi* and the plaintiffs were compelled to establish their rights by a civil suit. While the plaintiffs were out of possession the owners of *Touzi* No. 124, the *pro forma* defendants Nos. 3 to 10 in the present suit, settled the land which is the subject of these suits with the principal defendants. It is contended that the plaintiffs cannot ignore that settlement, and while recognizing the previous settlement of a part of the land treat the excess land outside the area originally settled as a new holding. In our opinion the lower Courts were right in holding that the decision of this Court in the case of *Abdul Hakim Saha* v. *Rajendra Narayan Roy* (1), enables the plaintiffs to succeed on their suit as framed. On behalf of the appellant reliance is placed on the decision of another Bench of this Court in *Parbatty Debya* v. *Mathura Nath Banerjee* (2), in which it was pointed

(1) 1 Ind. Cas. 312; 13 C. W. N. 635.
(2) 15 Ind. Cas. 453; 40 C. 29; 16 C. W. N. 877; 16 C. L. J. 9.

out that an undivided share could not be a holding within the meaning of s. 30 of the Bengal Tenancy Act. In that case the question for decision was whether the plaintiff who was the owner of an undivided share of a *howla* could bring a suit for enhancement of rent under s. 30 of the Bengal Tenancy Act, and it was decided that he could not. In the present case the question is whether the plaintiffs as owners of an undivided share of an estate can treat the excess land in the occupation of the tenant of the estate as a separate holding. On that point the ruling we have cited is decidedly in favour of the plaintiffs, and we are not prepared to dissent from it.

That being so we must upheld the judgment and decrees of the lower Court and dismiss these appeals with costs.

Z. K. *Appeals dismissed.*

BOMBAY HIGH COURT.
FULL BENCH.

ORIGINAL CIVIL JURISDICTION APPEAL No. 16 OF 1925.
CIVIL SUIT No. 3301 OF 1922.
August 21, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, Mr. Justice Crump and Mr. Justice Coyajee.

THE INDIA SPINNING & WEAVING COMPANY, LTD.—DEFENDANTS—APPELLANTS

versus

THE CLIMAX INDUSTRIAL SYNDICATE—PLAINTIFFS—RESPONDENTS.

Letters Patent (Bom.), cl. 12—Mortgage suit, whether suit for land—Mortgage land and residence of defendants outside limits of original jurisdiction—Suit, whether can be instituted on Original Side of High Court.

A suit based on a mortgage of land outside the local limits of the ordinary original jurisdiction of the High Court, claiming the usual mortgage-decree for sale of the property in default of payment, is a suit for land within the meaning of cl. 12 of the Letters Patent of the Bombay High Court. If the defendants to such a suit reside outside the local limits of such jurisdiction, the suit cannot be instituted on the Original Side of the High Court. [p. 849, col. 1.]

Sir *Chimanlal Setalvad*, (with him Messrs. *G. N. Thakur* and *B. K. Desai*), for the Appellants.

Mr. *Kanga*, Advocate-General, (with him Messrs. *Jinnah* and *Munshi*), for Respondent No. 1.

Mr. *Bahadurji*, (with him Mr. *Binning*), for Respondent No. 2.

JUDGMENT.

Macleod, C. J.—The contest in this appeal lies between the 2nd defendants (appellants) and the plaintiffs (respondents) and the facts material to this purpose may be shortly stated :—

In the month of December 1919, the plaintiffs, a syndicate, sold to the 1st defendants (the Sipra Cotton Spinning and Weaving Mills, Ltd.,) the machinery and buildings of the Adamjee Peerbhoy Mills at Bombay for Rs. 23,00,000. By an agreement dated October 14, 1920, the 1st defendants agreed to sell a moiety of the said machinery and buildings to the 2nd defendants, (the Indian Spinning and Weaving Co., Ltd.) for the sum of Rs. 12,50,000 (Ex. A). On July 10, 1921, the 2nd defendants mortgaged the whole of their Mills situated at Ahmedabad and also the moiety of the machinery etc., purchased from the 1st defendants, to the 1st defendants to secure payment of Rs. 6,25,000, being part of the purchase money of the said machinery and materials. The due date for payment of this mortgage-debt was April 2, 1922, (Ex. B). On January 19, 1921, the 1st defendants transferred this mortgage to the plaintiffs, who on the same day gave notice of the transfer to the 2nd defendants. On April 4, 1922, plaintiffs as such transferees called upon the 2nd defendants to pay the amount due on the said mortgage. The reply was that the mortgage was not binding on the 2nd defendants; this contention, however, was disallowed by the Trial Court. On May 2, 1922, the 2nd defendants mortgaged their Mills at Ahmedabad and also the moiety of the said machinery to the 4th defendants (Ex. 42). The 5th defendants (Girdhardas & Sons) are the agents of the 4th defendants (the Industrial Bank of Western India, Ltd.), and they were appointed agents of the 2nd defendants on or about March 4, 1922. The 3rd defendants were the previous agents of the 2nd defendants.

On July 24, 1922, the plaintiffs brought this suit against the 1st, 2nd and 3rd defendants. They claimed that the amount due to them from the 1st defendants for balance of the purchase-money and interest up to April 2, 1922, was Rs. 9,41,103-0-4; and that the amount due from the 2nd defendants under the said mortgage (Ex. B) and transfer was Rs. 6,80,172-12-6. They

prayed, *inter alia*, that the 1st defendants and the 2nd defendants might be ordered to pay the said sums of money, respectively, and that the amounts which might be recovered by them from the 2nd defendants might be applied towards payment of the amount due from the 1st defendants, that in default of payment by the 2nd defendants the mortgaged properties might be sold by and under the directions of the Court. Leave to sue was granted under cl. 12 of the Letters Patent.

It is important to note that both the said mortgages, namely, Ex. B and Ex. 42, were duly registered under the provisions of the Indian Registration Act, 1908. But as regards neither of them were the requirements of s. 109 of the Indian Companies Act, 1913, fulfilled. That section requires such mortgages to be filed with the Registrar of Joint Stock Companies for registration in the manner required by that Act, within twenty-one days after the date of their creation. On August 4, 1922, the 4th and 5th defendants applied to the District Court of Ahmedabad that the time for registration might be extended (s. 120, Indian Companies Act, 1913), alleging that "the delay in registration was not of a nature to prejudice the position of creditors or share-holders of the India Spinning & Weaving Co, Ltd." (*i. e.*, the 2nd defendant Company) "and in fact had not prejudiced it" (Ex. H). The Court extended time, but "without prejudice to the rights of parties acquired prior to the time when the mortgage should be actually registered." The mortgage was accordingly registered by the Registrar of Companies on August 9, 1922. On September 22, 1922, the plaint was amended by bringing the 4th and 5th defendants on record. But no leave was obtained to sue these added defendants.

The plaintiffs themselves obtained a like extension of time for the registration of their mortgage from the said Court on December 2, 1922, (Ex. J.), and the defect was cured.

Various defences to the suit were raised by the different defendants and many issues were framed. But the only issues which need be referred to at present were:—

(1) Whether the mortgage dated January 10, 1921, (Ex. B), by the 2nd defendants to the 1st defendants was binding on the 2nd defendants?

(2) Whether the Court had jurisdiction to entertain the plaintiffs' claim for sale of the mortgaged property so far as the same was land or attached to land situate outside the jurisdiction.

(3) Whether the mortgage in favour of the 4th defendants was valid in law?

(4) Whether the mortgage of May 2, 1922, was not entitled to priority over the mortgage in favour of the 1st defendants.

(5) Whether the Court had jurisdiction to try the suit as against the 4th and 5th defendants or either of them?

The learned Trial Judge held that:—

(1) He had jurisdiction to try the suit;

(2) The mortgage dated January 10, 1921, was binding on the 2nd defendant Company;

(3) The mortgage in favour of the 4th defendants was valid in law.

As regards the question of priority he held that "the mortgage of May 2, 1922, had priority over the mortgage of January 10, 1921, so far as it related to immoveable property or any interest therein, but as under the latter mortgage machinery was also mortgaged, it would be necessary to order an inquiry as to which of the machinery was fixed to the land and went with the land, and what would be considered as moveables, unless the parties came to some arrangement." He then passed a decree from which the plaintiffs filed Appeal No. 2 of 1925; the 4th and 5th defendants filed cross-objections. The plaintiffs did not make the 2nd defendants a party to that appeal and when it came on for hearing, the Court was not informed that the 2nd defendants had filed the present Appeal No. 16 of 1925. Appeal No. 2 of 1925 was decided in favour of the plaintiffs, the Court holding that the mortgage on which the 4th and 5th defendants relied was not effective against the plaintiffs' mortgage, so that it was not necessary to deal with the question of jurisdiction.

When the present appeal came on for hearing it was apparent that the first issue to be decided was the issue relating to jurisdiction, and as the appellants contested the correctness of the decision of this Court in *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1) the Court directed that the appeal should be heard by a Full Bench. The issue relating to jurisdiction has now been fully argued before us, and it is neces-

(1) 14 B. 353; 7 Ind. Dec. (N. S.) 695.

sary that we should give our decision upon it, since if the Court has no jurisdiction to entertain the plaintiffs' claim for the sale of the mortgaged property, the argument on the other points mentioned in the memorandum of appeal will be directly affected.

Clause 12 of the Letters Patent is as follows:—

"And We do further ordain that the said High Court of Judicature at Bombay in the exercise of its Ordinary Original Civil Jurisdiction shall be empowered to receive, try, and determine suits of every description if in the case of suits for land or other immoveable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the Ordinary Original Jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits, except that the said High Court shall not have such Orginal Jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, in which the debt or damage or value of property sued for does not exceed one hundred rupees."

The question then is whether a suit based on a mortgage of land outside the local limits of the Ordinary Original Jurisdiction of the High Court, claiming the usual mortgage-decree for sale of the property in default of payment, is a suit for land within the meaning of that clause. Incidentally it may be mentioned that the whole of the property was outside the jurisdiction and the defendants resided outside the jurisdiction. If the question had to be decided without reference to previous decisions of this Court, I do not think, speaking for myself, that there could be any doubt that the suit was a suit for land, but we are faced with the fact that ever since the decision in *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1) this Court has assumed jurisdiction to entertain suits on mortgages on land outside its jurisdiction. The High Courts of Calcutta and Madras have consistently refused to exercise jurisdiction in such suits. It will be necessary, therefore, to analyse the cases on the question decided by this Court and compare them with the cases decided by the High Courts of Calcutta and Madras. Then, even if we think that on a strict interpretation of cl. 12 a suit on a mortgage is a suit for land, we must determine whether we are entitled to place a different construction on that clause to the one which for the last thirty-five years has been placed upon it by this Court. In *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1) the facts were as follows:—

At a sale held by the Commissioner for taking accounts under an order of the Court, the defendant became the purchaser of the Bhandup Estate in Salsette outside the Ordinary Original Jurisdiction, for the sum of Rs. 2,03,000. He paid Rs. 30,000 and asked the plaintiff to lend him Rs. 1,60,000 which the plaintiff agreed to do on certain terms. The defendants was to get the sale confirmed to him and a proper conveyance executed; the defendant was then to mortgage the property to the plaintiffs as a security for the loan; the plaintiffs' agent was to reside on the estate and the net income was to be paid to him. If the net income was not sufficient to satisfy the interest the defendant should make good the deficiency and in default the plaintiff might enter with power to sell. The plaintiff prayed, *inter alia*, that the defendant might be ordered to pay Rs. 1,60,000 by a short date and that in default the Bandhup Estate might be sold by and under directions of the Court. The defendant pleaded that the Court had no jurisdiction. The Trial Court held that there was jurisdiction and passed a decree. The defendant appealed. In giving judgment Sargent, C. J., said (page 358*):—

"The expression 'suits for land' was considered as far back as 1872 with reference to the application of s. 5 of Act VIII of 1859 by a Division Bench of this Court...in *Yenkoba Balshet Kasar* v. *Rambhaji Valad Arjun* (2), where the suit was on a bond, and asked for sale of the mortgaged land."

That was a decision in an appeal on the Appellate Side of the High Court from the decision of the Judge of Khandesh. The Court said (page 13†):—

"We think that this is not a suit for land within the meaning of s. 5 of Act VIII of 1859. Comparing that section with ss. 223 and 224 of the Code, we think that a suit for land is a suit which asks for delivery of the land to the plaintiff. We may observe that

(2) 9 B. H. C. R. 12.

*Page of 14 B.—[*Ed.*]

†Page of 9 B.—[*Ed.*].

the Court of Chancery, though it has no power directly to affect property situate out of the bounds of its jurisdiction, and will not therefore, try the validity of a Will of land in the Colonies though made in England,... nor entertain a bill of partition...yet will order the sale of an estate in the Colonies, in order to realise a sum of money charged upon it. *Gascoigne* v. *Douglas* (3) and *Noel* v. *Robinson* (4)."

The terms of cl. 12 of the Letters Patent were in the main similar to those employed in s. 5 of Act VIII of 1859 and were intended to include every description of case over which the *Mofussil* Courts had jurisdiction, but it may well be doubted whether the *Mofussil* Courts had the powers of the Court of Chancery, and in any event the reference to such powers was unnecessary if the term "suits for land" was to be confined to a suit for the delivery of possession of land to the plaintiff. A suit on a mortgage would then come within the category of "all other cases." Sargent, C. J, adopted this limitation imposed on the term "suits for land" by the Court in *Yenkoba Balshet Kasar* v. *Rambhaji Valad Arjun* (2). He referred to the decision in *Delhi and London Bank* v. *Wordie* (5), in which the Court appeared inclined to construe "suits for land" in the Letters Patent as meaning suits "substantially for land," that is, for the purpose of acquiring title to or control over land, though they decided the case on another ground, and to the decision in *Sreenath Roy* v. *Cally Doss Ghose* (6), that the High Court had no jurisdiction to decree specific performance of an agreement to execute a mortgage of land beyond the jurisdiction of the High Court, which his Lordship considered would exclude the jurisdiction of the High Court in the large class of cases in which English Courts of Equity exercised jurisdiction although the lands were in the Colonies or even in foreign States. Reference was made to the principle on which they proceed, as stated by the Earl of Selborne, L. C., in *Ewing* v. *Orr-Ewing* (7).

"The Courts of Equity in England are, and always have been, Courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction."

His Lordship accordingly held that the suit, whether it could be regarded as a suit for specific performance or to enforce an equitable mortgage by deposit of title-deeds, was clearly one which a Court of Equity in England would entertain [*Paget* v. *Ede* (8)], and in which they would, if the lands were in the Colonies where it was the practice in mortgage suits to enforce the security by sale, make an order for sale instead of one for foreclosure, and concluded that if it had been intended to exclude suits *in personam* as well as suits *in rem* from the jurisdiction of the High Court, the framers of the Letters Patent, who were presumably English lawyers, would have employed different language.

A decree for the sale of the land by the officer of the High Court was, therefore, confirmed. With all due respect it appears to me that the learned Chief Justice omitted to notice that the essential conditions on which the jurisdiction of the Courts in Equity in England rests in these cases, is that they have a person within their jurisdiction against whom they can exercise their authority. He must either reside within the limits of the jurisdiction or carry on business within those limits. His obedience to the order of the Court can then be secured either by the arrest of his person or the attachment of his goods: *Penn* v. *Lord Baltimore* (9). The Advocate-General argued that a "person within the jurisdiction" means a person brought within the jurisdiction, but he did not find any case in which the Court of Chancery has allowed a suit *in personam* to be prosecuted against a person beyond the jurisdiction. If, however, a suit has been rightly instituted against persons within the jurisdiction and it is found that a person outside the jurisdiction is a necessary party leave will be given to serve that party outside the jurisdiction: *Bawtree* v. *Great North-West Central Ry. Co.* (10). The defendant in *Yeshvantrao Holkar* v. *Dadabbai Cursetji* (1), neither resided nor carried on business within the

(3) (1770) Dick 431; 21 E. R. 337.
(4) (1687) 1 Ver. 453; 23 E. R. 580.
(5) 1 C. 249; 25 W. R. 272; 1 Ind. Dec. (N. S.) 158.
(6) 5 C. 82; 2 Ind. Dec. (N. S.) 663.
(7) (1884) 9 App. Cas. 34; 53 L. J. Ch. 435; 50 L. T. 401; 32 W. R. 573.
(8) (1874) 18 Eq. 118; 43 L. J. Ch. 571; 30 L. T. 228; 22 W. R. 625.
(9) (1750) 1 Ves. Sen. 444; 1 Wh. & T. L. C. 17th Ed. 755; 27 E. R. 1132.
(10) (1898) 14 T. L. R. 448.

jurisdiction, so it is difficult to see how the Court could have enforced its decree either by arresting his person or by attaching his goods. On that ground alone, in my opinion, the decision in *Yeshvantrao Holkar* v. *Dadabbai Cursetji* (1) was wrong.

In *Sorabji Cursetji Sett* v. *Rottonji Dossabboy Karani* (11) the plaintiff brought a suit for foreclosure in default of payment of the amount due on two mortgages executed in Bombay by the defendant of certain properties situated outside the jurisdiction. The defendant also resided outside the jurisdiction. Leave was granted under cl. 12 of the Letters Patent. The defendent contended that the Court had no jurisdiction to try a suit for land outside the jurisdiction. Strachey, J., felt great difficulty in holding that the expression "suits for land," did not include a suit for foreclosure and doubted whether the decision in *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1), was binding on him, but, on examination of the *ratio decidendi* in that case he held that it was, since it decided that (page 705*) "in using the expression 'suits for land,' the framers of cl. 12 of the Letters Patent had in view the doctrines of the Court of Chancery in reference to suits relating to land situate out of England, and intended to exclude from the Court's jurisdiction only such suits relating to land as, if brought in England, the Courts would have refused to entertain on the ground that the land was situate abroad." The learned Judge then referred to the rule in England as stated in Dicey's Conflict of Laws and to the exception to the rule that the Courts have "jurisdiction to entertain an action against a person *who is in England* respecting land situate out of England on the ground of a contract or an equity between the parties with reference to such land." The italics are mine, for although the learned Judge noted that the person against whom the equitable jurisdiction would be exercised had to be in England, he appears to have thought it made no difference that the defendant before him was outside his jurisdiction, provided that leave was obtained under cl. 12.

In *Vaghoji* v. *Camaji* (12) the plaintiffs filed their suit in Bombay against the defendant who resided in Bombay, for a declaration that they were entitled to the exclusive possession and enjoyment of a certain *talao* beyond the local limits of the Court's original jurisdiction. On a summons for the rescission of the leave given under cl. 12, Russell, J., was of opinion that the plaintiffs were really seeking a remedy *in personam* and held that leave had been properly granted. The defendant appealed. Jenkins, C. J., first pointed out that the granting of leave made no difference as if the suit was one for land, leave would be of no avail. It was sometimes overlooked that under cl. 12 leave was only required when the cause of action had arisen in part within the local limits of the ordinary original civil jurisdiction. It may be noted in passing that by the decision of this Court in *Bachoo Harkisondas* v. *Nagindas Bhagwandas* (13) a different construction has been placed on cl. 12 and it was held that if the land was partly within the jurisdiction the suit would lie for the land outside the jurisdiction if leave was obtained. In *Harendra Lal Roy* v. *Hari Dasi Debi* (14) which was a suit on a mortgage bond, it appears to have been admitted that if part of the land mortgaged was within the jurisdiction of the High Court, that would suffice to prevent jurisdiction in the High Court to try the case.

To return to *Vaghoji* v. *Camaji* (12) it was next contended that the suit was not a suit for land as it did not ask for delivery of the land and the question was settled by authority. The learned Chief Justice, therefore, dealt with the authorities to which I have already referred. With reference to *Venkoba Balshet Kasar* v. *Rambhaji Valad Arjun* (2), he said (page 254*):

"This view [that a suit for land was a suit in which delivery of land was asked for] was based on a comparison of s. 5 [of Act VIII of 1859] with ss. 223 and 224 of the Act, which speak of a 'decree for a house, land or other immoveable property.'

"We have no such guide in the Letters Patent...and the decision, standing alone, is not a decision by which we are bound in construing cl. 12 of the Letters Patent."

Then referring to *Yeshvantrao Holkar* v. *Dadabbai Cursetji* (1) his Lordship said that the *ratio decidendi* by which they were

(11) 22 B. 701; 11 Ind. Dec. (N. S.) 1050.
(12) 29 B. 249; 6 Bom. L. R. 958.
*Page of 22 B—[*Ed.*]

(13) 23 Ind. Cas. 912; 16 Bom. L. R. 263.
(14) 23 Ind. Cas. 637; 41 I. A. 110; 16 Bom. L. R. 400; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 12 A. L. J. 774; 1 L. W. 1050; 41 C. 972 (P. C.).
*Page of 29 B.—*Ed.*]

bound was to be found in the concluding paragraph, and the test was whether the suit was one which would have been entertained by the Courts of Equity in England in relation to land abroad and for that purpose it was necessary to see what the plaintiffs prayed for by their plaint. They asked for a declaration that they were entitled to exclusive possession and enjoyment of the *talao* and for an injunction to give effect to that declaration. An examination of the authorities established the proposition that a Court of Equity in England only assumed jurisdiction in relation to land abroad where as between the litigants or their predecessors some priority or relation was established on the ground of contract, trust or fraud, and not where the purpose was to obtain a declaration of title to foreign land. His Lordship concluded that the expression "suits for land" could not be intended to be read with a technical limitation which had never been associated with it, and taking the words in their fair natural meaning there would be no doubt that the suit before the Court was a suit for land.

In *Zulekabai* v. *Ebrahim* (15), Davar, J., after a review of the authorities, held that a suit *inter alia* to enforce the delivery to the plaintiff of the title deeds of certain immoveable property outside the jurisdiction, where it appeared on the pleadings that the substantial point to be decided was the title of the plaintiff to the property was a suit for land and the High Court had no jurisdiction to try the case. In *Juggernauth Doss* v. *Brijnath Doss* (16) the contrary was held, and I think rightly, as it is difficult to see how a suit to recover title deeds can be beyond the jurisdiction of the Court if the defendant is within the jurisdiction.

In *Yeshvadabai* v. *Janardhan Raghunath Warik* (17) the plaintiff sued to recover maintenance charged on specific immoveable property in Bombay. At the date of the institution of the suit the defendant was not residing in Bombay, and it was held that no part of the cause of action arose within the jurisdiction. The question then arose whether the suit was a suit for land, Fawcett, J., said (page 1175*):

"Referring to *Vaghoji* v. *Camaji* (12) he (Davar, J.,) says that Sir Lawrence Jenkins there lays down in clear and explicit language that the words 'suit for land' do not mean only suits for the recovery of land. It is true that it has been held by this Court that a suit for foreclosure of a mortgage on land is not a suit for land: *Sorabji Cursetji Sett* v. *Rattonji Dossabboy Karani* (11), although, according to the Calcutta and Madras decisions, such a suit would be a suit for land. But its authority is much weakened by *Vaghoji* v. *Camaji* (12) and the substantial criticism of *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1), contained in Mulla's Civil Procedure Code, 7th Edition., p. 1036. I can see no sufficient reason for refraining from following the decision of the Madras High Court in *Sundara Bai Saheb* v. *Thirumal Rao* (18)."

Fawcett, J., then referred to *Sitabai Raghunath Vaidya* v. *Lakmibai Vyankatesh Vaidya* (19), a case under s. 16 of the C. P. C. That section which does not apply to Chartered High Courts in exercise of their ordinary original civil jurisdiction now makes it perfectly clear what suits shall be filed in the subordinate Courts in the Court within the local limits of whose jurisdiction the property is situated. There is some justification for thinking that the suits under headings (*a*) to (*c*) were the suits which were covered by the expression "suits for land" in s. 5 of Act VIII of 1859 and the proviso gives a partial effect to the maxim "Equity acts *in personam*."

The conditions, as pointed out by Mr. Mulla, are (1) that the relief sought can be entirely obtained through the personal obedience of the defendant and (2) the property must be situated in and not beyond British India.

Returning to *Yeshvadabai* v. *Janardhan Raghunath Warik* (17), Fawcett, J., considered that the words "suits for land" in cl. 12 were very wide words and ordinarily covered suits in which there was to be a determination of a right such as that claimed in the case, *viz.*, to have the property charged with the maintenance awarded to the plaintiff. It would follow in effect that the learned Judge was really of opinion that the words "suits for land" covered all the suits mentioned in s. 16 under headings (*a*) to (*e*).

(15) 17 Ind. Cas. 198; 37 B 494; 14 Bom. L. R. 846.
(16) 4 C. 322; 3 C. L. R. 375; 2 Ind. Dec. (N. S.) 204.
(17) 81 Ind. Cas. 776; 25 Bom. L. R. 1172; (1924) A. I. R. (B.) 141.
(18) 3 Ind. Cas. 930; 33 M. 131 at p. 133; 6 M. L. T. 263; 20 M. L. J. 103.
(19) 32 Ind. Cas. 985; 18 Bom. L. R. 67; 40 B. 337.

*Page of 25 Bom. L. R.—[*Ed.*]

In *Venkatrao Sathupathy* v. *Khimji Assur Virji*, (20), it was held that a suit by a mortgagee to enforce his rights under a mortgage was not a suit for land within the meaning of cl. 12. Scott, C. J., said (page 536--38*):—

"Speaking for myself, it appears to me difficult to understand how a suit in which the mortgagee seeks to have the land vested in him under his mortgage sold to somebody else by the agency of the Court is a suit for land. It is a suit to realise and dispose of his and his debtor's interest in the land. The object of the suit is not to obtain land or to obtain a declaration of title to land or to obtain damages for interference with land, but to obtain re-payment of debt owing to the plaintiff and for that purpose to realise the security which has been vested in him...It has been suggested for the defendants, however, that the Court here cannot act *in personam*, inasmuch as, although the cause of action arose wholly or in part within the jurisdiction and leave has been obtained to sue, he and the other defendants reside not in Bombay but in Bellary. But the personal jurisdiction of the Court is exercised under cl. 12 of the Letters Patent not only in cases where the defendants or some of them reside permanently within the jurisdiction but in cases where, according to the provisions of the Letters Patent, they have been lawfully caused to appear upon summons where the cause of action or part of it has arisen in Bombay:.....Lastly, I may refer to the judgment of Byrne, J. in *Duder* v. *Amsterdamsch Trustees Kantoor* (21) as showing that where a defendant is lawfully brought before the court, the Court would not be deterred from making an order *in personam* with respect to land situate outside the jurisdition merely by the fact that the person so brought before it has his residence in another country."

But it must be noted that in *Duder* v. *Amsterdamsch Trustees Kantoor* (21) the other defendants were within the jurisdiction, and leave was given to serve the fresh defendants outside the jurisdiction following the decision in *Bawtree* v. *Great North West Central Ry. Co.* (10). A certificate was granted for leave to appeal to the Privy Council in *Venkatrao Sathupathy* v. *Khimji Assur Virji* (20) but the appeal was not prosecuted.

In *Jasraj Foorji* v. *Akubai* (22) it was held by Shah, J., that the High Court had jurisdiction to entertain a suit by a mortgagee to enforce the mortgage against property outside the local limits of the ordinary original civil jurisdiction, against a mortgagor living outside the jurisdiction. His Lordship referred to the decision of the Privy Council in *Harendra Lal Roy* v. *Hari Dasi Debi* (14), which it was contended overruled *Holkar's case* (1) and said (page 540*) :—

"Speaking for myself I find it difficult to reconcile the view taken by their Lordships .....in *Harendra Lal Roy* v. *Hari Dassi Debi* (14) with the decision in *Yeshvantrao Holkar* v. *Dadabhai Cursetji* (1)."

But as the decision in *Venkatrao Sethupathy* v. *Khimji Assur Virji* (20) was subsequent to the decision of the Privy Council, though it made no reference to it, the learned Judge considered that the later decision of the Appeal Court was binding upon him.

In *Rajah Kotakal* v. *Malabar Timber Co.* (23), Fawcett, J., held that a suit to declare a charge upon lands outside the jurisdiction was not a suit for land, though if the land was within the jurisdiction it would be a suit for land so as to give the High Court a jurisdiction which it would not otherwise have had. I find it difficult myself to reconcile this decision with the decision of the same learned Judge in *Yeshvadabai* v. *Janardhan Raghunath Warik* (17) but Fawcett, J., satisfied himself that this could be done. He thought that when the land was outside the jurisdiction the words "suits for land" in cl. 12 should be read subject to the qualification that the Bombay High Court had a jurisdiction *in personam* similar to that exercised by a Court of Equity in England and by a *Mofussil* Court under the proviso to s. 16 of the C. P. C., 1908.

There may be some justification for saying that the Court has jurisdiction to declare in favour of *A* that he shall have a charge on the property of *B* outside the jurisdiction and to restrain *B* from dealing with the property if *B* resides within or has property within the jurisdiction, so that obedience to the decree can be en-

(20) 80 Ind. Cas. 442; 26 Bom. L. R. 535.
(21) (1902) 2 Ch. 132; 71 L. J. Ch. 618; 87 L. T. 22; 50 W. R. 551.
(22) 80 Ind. Cas. 1007; 26 Bom. L. R. 539; (1924) A. I. R. (B.) 419.
(23) 80 Ind. Cas. 1049; 26 Bom. L. R. 541; (1924) A. I. R. (B.) 412; 48 B. 625.

*Page of 26 Bom. L. R.—[*Ed.*]

forced by arresting *B* or attaching his property, but the plaintiff asked for an order for sale in default of payment on the trial of the preliminary issue regarding jurisdiction. The learned Judge declined to deal with the question whether a suit to enforce the charge by sale of land could be said to be within the personal jurisdiction

In *Pranlal Tribhuwandas* v. *Goculdas Damodar* (24) Pratt, J., held that the High Court had no jurisdiction to grant a declaration as to who out of two or more competing mortgagees was a prior mortgagee, when the property mortgaged was ouside the jurisdiction of the Court. His own opinion was that *Holkar's case* (1) had been overruled by the Privy Council in *Harendra Lal Roy* v *Hari Dassi Debi* (14) but by virtue of the decision of the Appeal Court in *Venktrao Sathupathy* v. *Khimji Assur Virji* (20) he was constrained to hold that *Holkar's case* (1) was still good law. However he considered that the declaration the plaintiff asked for was not within the equitable jurisdiction assumed by the English Courts in such cases on the authority of *Vaghoji* v. *Camaji* (12) since no privity on the ground of contract, trust or fraud was established between the plaintiff and the 2nd defendant.

Whether a suit for specific performance of a contract for sale of land outside the jurisdiction can lie in this High Court at the instance of the purchaser has not been expressly decided.

In *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (25) the plaintiff sued for specific performance of a contract by him for the purchase of land outside the limits of its ordinary original civil jurisdiction. No issue was raised on the question of jurisdiction and a decree was eventually passed in favour of the plaintiff, though it might be considered that such a decree would involve the conveyance and delivery of land.

I now come to the cases cited which have been decided by the High Court of Calcutta. In *Delhi and London Bank* v. *Wardie* (5), the plaintiff filed a suit against the trustees of a certain deed executed by two of the defendants conveying *inter alia* property outside the jurisdiction of the High Court upon certain trusts, praying that the trusts of the deed might be carried into effect that the trustees might be relieved and a Receiver appointed to carry out the trusts under the orders of the Court. After referring to *Penn* v. *Lord Baltimore* (9), *Bugrm* v. *Moses* (26) and *Paget* v. *Ede* (8) their Lordships said (page 263*):—

"But those cases are all more or less distinguishable from the present, which depends not so much upon the jurisdiction generally exercised by Courts of Equity, as upon whether this suit is brought substantially 'for land'; that is, for the purpose of acquiring title to, or control over, land within the meaning of a particular clause in the Charter; and we think, having regard to what is the real object of the suit, and to what are the rights and contentions of the respective parties, it is impossible to say that this is not substantially a suit for land. The express purpose of the suit is to compel the sale of the whole of the land conveyed by the trust deed."

In *Juggernauth Doss* v. *Brijnath Doss* (16) it was held that a suit to recover title-deeds, although it might involve a question of title, was not a suit to obtain possession of land or to deal in any way with the land itself within the meaning of the Charter. In *Srcenath Roy* v. *Cally Doss Ghose* (6) the defendant borrowed Rs. 4,000 from the plaintiff and agreed to execute a mortgage of land beyond the jurisdiction of the Court. It was held that so far as the suit was a suit for specific performance of the agreement with respect to land the Court had no jurisdiction, but that in the circumstances of the case a money decree would be passed for the return of the Rs. 4,000.

In *Land Mortgage Bank* v. *Sudurudeen Ahmed* (27) a vendor sued in the High Court to enforce *inter alia* the specific performance of a contract entered into by the defendant for the purchase of land outside the jurisdiction and in the alternative for damages. On settlement of issues an issue was raised whether the Court had jurisdiction to try the suit. Trevelyan, J., said (page 366 †):—

"It seems to me that, having regard to the expressions used in *Kellie* v. *Fraser* (28)

(24) 88 Ind. Cas. 92; 27 Bom. L. R. 570; (1925) A. I. R. (B.) 333.

(25) 32 Ind. Cas. 246; 18 Bom. L. R. 163; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 23 C. L. J. 358; 20 C. W. N. 744; 40 B. 289; 43 I. A. 26 (P. C.).

(26) 1 Hyde 284.

(27) 19 C. 358; 9 Ind. Dec. (N. S.) 683.

(28) 2 C. 445; 2 Ind. Jur. 101; 1 Ind. Dec. (N. S.) 57.

*Page of 1 C.—[*Ed.*]

†Page of 9 C.—[*Ed.*]

and *Delhi and London Bank* v. *Wordie* (5) as to the meaning of a 'suit for land,' that there is a distinction between a vendor's suit and a purchaser's suit for specific performance. The question as to whether a purchaser's suit would lie is one which I need not decide here."

Then after considering *Holkar's case* (1) and the English cases cited before him, his Lordship said (p. 367*):—

"I do not think, myself, that this case depends...entirely on what is a "suit for land' within the meaning of the Letters Patent...I do not think that this a suit for land. It is not a suit to sell or acquire possession of or title to land in any sense .....I decline to hold that wherever land has anything to do with a suit it is, therefore, a 'suit for land'...I hold that, having regard to everything except para. (*b*) of the prayer of the plaint [a prayer for sale and application of the sale-proceeds in compensating the plaintiff], this is not a suit for land. I am inclined to hold that, so far as that paragraph is concerned, this is a suit for land, but it is not necessary to determine that question now, as the right to relief under that prayer cannot be determined until the facts are found."

In *Hara Lall Banerjee* v. *Nitambini Debi* (29) the plaintiff asked for an account and administration of his grandfather's estate, the whole of the immoveable property of which was outside the jurisdiction, and the construction of the Will of his grandfather. Harington, J., said (page 322†):—

"The question is, having regard to the reliefs asked for in this Court, does it come within the description which I have just read? (that is to say, a suit brought for the purpose of acquiring the possession of, or establishing title to or an interest in the property—the subject of the dispute)? I confess. I think it does. It appears to me, where the plaintiff says under a Will I am entitled to immediate possession of immoveable property, construe that Will and declare my rights, it is impossible to say that he is not seeking to establish a title to, or a right in, the immoveable property, and, if that is so, his suit falls within the terms of cl. 12 of the Charter, and there is no jurisdiction to entertain it, if the immoveable property is outside the jurisdiction of this Court. The jurisdiction of this Court...is limited by the express terms of the Charter. The question, therefore, has to be decided by reference to the words of the Charter and not by a consideration of the jurisdiction exercised by Courts of Equity in England."

But in *Srinivasa Moorthy* v. *Venkatavarada Iyengar* (30) it was held that a suit by three executors against a fourth for the administration of the estate including immoveable property of a deceased person which was outside the jurisdiction was not a suit for land.

In *Lodna Colliery Co., Ltd.* v. *Bipin Bihari Bose* (31) the plaintiff sued for damages owing to the defendant having carried away coal from their land. Fletcher, J., said (page 751*):—

"It seems to me that so far as the same is a suit to recover damages arising out of an action for trespass to land, that is a suit for land...In England it has always been considered as a suit for land."

The reason being, as the learned Judge points out, that it would become necessary that the title in respect of the coal would have to be gone into to ascertain whether the defendant had a right to break through or not. In *Sudamdih Coal Co., Ltd.* v. *Empire Coal Co., Ltd.* (32) it was held that the expression "suits for land or other immoveable property" in cl. 12 of the Charter of 1865 could not be construed as limited to suits for the recovery of land in its strict sense, but must be extended to a suit for compensation for wrong to land, where the substantial question is a right to land. Fletcher, J., following the decision in the last cited case, dismissed the suit. The plaintiff appealed. In the course of the arguments Jenkins, C. J., remarked (p. 945†):—

"At the time the Charter was passed the C. P. C. of 1859 was in force. The section in that Code referring to 'suits for land' was subsequently replaced by similar sections in successive Codes. Section 16 of the present Code describes what was meant by 'suits for land.' "

And again (p. 950†):—

"It appears to me that the test proposed

(29) 29 C. 315.

(30) 11 Ind. Cas. 447; 38 I. A. 129; 13 Bom. L. R. 520; 15 C. W. N. 741; 8 A. L. J. 774; (1911) 2 M. W. N. 375; 14 C. L. J. 64; 21 M. L. J. 669; 34 M. 257; 10 M. L. T. 263 (P. C.).

(31) 17 Ind Cas. 500, 39 C. 739.

(32) 31 Ind. Cas. 581; 42 C. 942.

*Page of 19 C.—*Ed.*]

†Page of 29 C.—[*Ed.*]

*Page of 39 C.—[*Ed.*]

†Pages of 42 C.—[*Ed.*]

by cl. 12 is not one of form but one of substance. A suit brought in trespass for the purpose of having title to land tried is a suit for land."

And in giving judgment his Lordship said (page 951*):—

"The question is what was intended by that expression ['suits for land or other immoveable property']. It appears to me that it was not a mere formal test that was proposed—a test to be determined by the precise form in which a suit might be framed; but that regard was to be had to the substance of the suit, and I cannot help thinking that the particular expression was used, because there was its equivalent in the C. P. C. of 1859, s. 6. Indeed, it is a matter of common knowledge that the Secretary of State's despatch forwarding the Letters Patent to this Court makes special reference to that circumstance. The course of decisions on the Charter shows that the description cannot be limited to suits for the recovery of land in its strict sense, and as to that there can be no dispute; and, running on parallel lines with that, we find the C. P. C. of 1859 developed in 1877, so as to embrace a number of topics which perhaps would not in strictness be regarded as *suits for land*, and it is instructive to observe what they are."

In *Nalum Lakshimikantham* v. *Krishnaswamy Mudaliar* (33) Moore, J., preferred to follow the decision in *In the matter of the petition of S. J. Leslie* (34) rather than the decision in *Yenkoba Balshet Kasar* v. *Rambhaji Valad Arjun* (2) and held that a suit to enforce a mortgage by deposit of title deeds of property outside the jurisdiction by sale of the lands was a suit for land within the meaning of cl. 12 of the Letters Patent. His Lordship considered that a suit for land included any suit in which a decree was asked for operating directly upon the land and, therefore, included any suit brought to enforce a security upon the land and that the phrase "suits for land or other immoveable property," as used in cl. 12 of the Letters Patent, included all suits mentioned in clauses (*a*) to (*f*) in s. 16 of the C. P. C. In *Sundra Bai Sahib* v. *Tirumal Rao* (18) the plaintiff prayed that maintenance might be charged on certain specific land. It was held that the plaintiff asked for a decree which would operate directly on the land, if the decree were passed it would be a decree against that land, and the decree might be framed so as to provide for a sale if the defendant failed to pay. The suit then was a suit for land. It is curious to note that the learned Judge appears to have been of oninion that *Holkar's case* (1) and *Sorabji Cursetji Sett* v. *Rattonji Dassahhoy Karani* (11) were considerably shaken if they had not been overruled by the later decision in *Vaghoji* v. *Camaji* (12).

Lastly, there is the Privy Council decision already referred to, *Harendra Lal Roy* v. *Hari Dasi Debi* (14). The main question there was whether there had been a fraud committed in registering the deed in Calcutta on the ground that part of the property conveyed was in Calcutta, which was contrary to the fact. It does not seem to have been seriously contended that if none of the property was situate within the jurisdiction, the Court would have had jurisdiction to deal with the suit which was on a mortgage-bond. I doubt very much whether the case was cited in *Venkatrao Sathupathy* v. *Khimji Assur Virji* (20) as it was really decided on the question of registration. I have not the slightest hesitation in holding that a suit on a mortgage, as this is, is a suit for land within the meaning of that expression in cl. 12 of the Charter. I entirely agree with the long series of Calcutta decisions to the effect, as summed up in the words of Jenkins, C. J., that regard had to be had to the substance of the suit. The Judges of the Calcutta and Madras High Courts have declined to follow the specious argument that because in certain classes of suits, though they are suits for land, a Court of Equity in England will grant relief *in personam*, therefore, such suits cease to be suits for land so as to exclude them from the meaning of that expression in cl. 12 of the Charter. I think the difference between the two views may be expressed thus. Calcutta and Madras look to the relief actually claimed in the suit. Bombay considers the possibility of a decree being passed *in personam*. I do not for a moment dispute the powers of this Court to pass a decree *in personam* in spite of the fact that the suit relates to land outside the jurisdiction. Such a power is expressly granted to the subordinate Courts by s. 16 of the C. P. C. If the plaintiff asks for relief against the defendant only, the Court has jurisdiction though the suit re-

(33) 27 M. 157.
(34) 9 B. L. R. 171; 18 W. R. 269.

*Page of 42 C.—[*Ed.*]

lates to property outside the jurisdiction. But he cannot, when asking for relief against the property, claim that the suit is not a suit for land, because he is also asking or may be entitled to ask for an order which can be enforced personally against the defendant. Mr. Mulla in his notes to s. 16 of the C. P. C. in the 5th Edition analysed very carefully the different classes of suits *in personam*. He divided them into two main divisions :

(1) Those in which the relief can be entirely obtined by the personal obedience of the defendant.

(2) Those in which the relief sought can be obtined only partially by the personal obedience of the defendant.

The second division is again divided into two sub-divisions :—

(*a*) Cases of contract, fraud and trust.

(*b*) Other cases.

Premising that the person or the personal property of the defendant must be within the jurisdiction he pointed out that Courts of Equity in England will exercise jurisdiction in cases coming within the headings above (1) and (2) (*a*) whereas only suits falling within the division (1) fall under the proviso to s. 16. It is this difference which I think, with all due respect, Fawcett, J., failed to notice in *Raja Kotakal* v. *Malabar Timber Co.* (23) when he appeared to think that the jurisdiction given to the subordinate Courts by the proviso to s. 16 of the Code was the same as the jurisdiction *in personam* exercised by the Courts of Equity in England. So that, in my opinion, we cannot read into cl. 12 of the Letters Patent anything more than the proviso to s. 16. It must follow that if my view of the proper construction to be placed on cl. 12 of the Letters Patent is correct, the present suit filed by the plaintiff against the second defendant who resides outside the jurisdiction asking for a sale of the mortgaged properties also outside the jurisdiction in default of payment of the amount due on the mortgage is not competent. We have, however, to consider whether in spite of that opinion we should not give effect to the doctrine of *stare decisis*. We have been told by the Advocate-General that a decree passed without jurisdiction is a nullity and that if we decide in this case that the Court has no jurisdiction to hear the case, all the previous decrees of this Court passed in mortgage-decrees where the mortgaged properties were outside the local limits would become nullities and the titles of persons who had brought properties in pursuance of such decrees would become clouded. The authority cited for that proposition was *Rajlakshmi Dassee* v. *Katyayani Dasee* (35). In that case a suit was intentionally undervalued. The defendant raised no objection and the suit was tried. The appeal was filed before the District Judge instead of before the High Court and the District Judge decided the appeal by a consent-decree. The plaintiff then filed the suit before the Court praying for a declaration that the consent decree to which she was not a party was in no way binding upon her. The first ground on which the plaintiff relied was that the District Judge had no jurisdiction on the subject-matter of the litigation. The plaintiff was not successful in the Trial Court. In appeal to the High Court the learned Judges considered that as the subject-matter of the suit was over Rs. 1, 37,000 the consent-decree made by the District Judge was made wholly without jurisdiction. They did not feel themselves called upon to consider what the effect of such lack of jurisdiction would be upon the decree in so far as the parties thereto were concerned, but it was manifest that a stranger who was interested in the property affected by the decree could obviously ask for a declaration that the decree was a nullity. It was an elementary principle of law that if a Court had no jurisdiction over the subject-matter its judgments and orders were mere nullities and might not only be set aside at any time by the Court in which they were rendered but be declared void in every Court in which they were presented. The authorities cited for this proposition were: *Ferguson* v. *Mohon* (36), *Briscoe* v. *Stephens* (37), *Buchanan* v. *Rucker* (38), *Attorney-General* v. *Hotham* (39), *Perkin* v. *Proctor* (40), *Ex parte Kinning* (41) and *Brown* v. *Compton* (42).

(35) 12 Ind. Cas. 461; 38 C. 639.

(36) (1839) 11 A. & E. 179; 52 R. R. 301; 3 P. & D. 143; 9 L. J. Q. B. 146; 113 E. R. 382.

(37) (1824) 2 Bing. 213; 27 R. R. 597; 9 Moore. 413; 3 L. J. (o. s.) C. P. 257; 130 E. R. 288.

(38) (1808) 9 East. 192; 9 R. R. 531; 1 Camp. 63; 103 E. R. 546.

(39) (1823) T. & R 209; 24 R. R. 21; 3 Russ. 415; 37 E. R. 1077.

(40) (1768) 2 Wils. K. B. 382; 95 E. R. 874.

(41) (1847) 4 C. B. 507; 136 E. R. 605.

(42) (1800) 8 T. R. 424; 101 E. R. 1469.

In *Briscoe* v. *Stephens* (37) the plaintiff had sued in an inferior Court in which judgment had been given against him. It was held that he could bring another action in a Court having jurisdiction.

In *Buchanan* v. *Rucker* (38) it was held that the law will not raise an assumpsit upon a judgment obtained by default in one of the Colonies against a party who upon the face of the proceedings appeared only to have been served by nailing a copy of the declaration at the Court House Door.

In *Attorney-General* v. *Hotham* (39) upon an information to set aside a lease for ninety-nine years of charity lands the defendant set up a title adverse to the lease. Apart from the merits it was held that the defendant could not dispute the title while in possession, when a limited Tribunal took upon itself to exercise a jurisdiction which did not belong to it and decided upon matters with respect to which it had no authority. Its decision amounted to nothing and no party could in the least be bound by it.

In *Ex parte Kinning* (41) it was held that when under 8 & 9 Vic. c. 127, s. 31, a Judge of an inferior Court of record had upon proof of a debtor's ability to pay made an order for payment of instalments, he could not after default grant a warrant of imprisonment without giving the debtor an opportunity of being heard.

In *Brown* v. *Compton* (42) there was an action of debt against the Sheriff for the escape of a prisoner. In justification the order of a Court not having jurisdiction was pleaded, but judgment was given for the plaintiff.

In *Ferguson* v. *Mohon* (36) the plaintiff brought an action of debt on a foreign judgment. It was held that though the defendant could not contest the merits of the action or the propriety of the decision, he could show that the Court had not properly jurisdiction over him.

It will be seen that none of these cases directly assist the proposition the Advocate-General wished to advance. If we hold that this is a suit for land so that the Court has no jurisdiction we do not say that this Court had no jurisdiction in the various cases which have been cited in which it has held that it had jurisdiction. That would be beyond our power. We only decide that those cases are not binding upon us for the purpose of our present decision. If it was open to anyone interested to dispute the validity of those decisions as having been passed without jurisdiction, it is still open to them to make the attempt whether we decide in this case that we have or have not jurisdiction. Put in another way the question whether the Courts in those cases had jurisdiction or not does not depend upon our decision in this case. It was also suggested that any purchaser of property outside the jurisdiction under a decree of this Court might now seek to get rid of his purchase on the ground that the decree was a nullity. I doubt whether there is the remotest possibility of anyone being so rash as to make such an attempt. It has not been the case of an inferior Tribunal arrogating to itself the jurisdiction of a superior Tribunal or of the Courts of one country being asked to pass a decree on a judgment of the Courts of another country. This Court construed its Charter in order to decide whether it had jurisdiction, and on that question it had jurisdiction to decide right or wrong. However that may be, I do not see how the prospect placed before us by the Advocate-General of such suits being filed can deter us from holding that we have no jurisdiction to try this suit when we think the words of our Charter provide an absolute bar.

Reference may usefully be made in this respect to the case of *Naro Hari* v. *Anpurnabai* (43) where West, J., said at page 171*:

"The order of the one Court (the District Court) as of the other (the High Court) binds a person generally subject to the jurisdiction until it is reversed or set aside, and can be questioned only in the ways provided by the law. In a recent case, the Master of the Rolls thought it a good answer to an application founded on the Court's having sold property without jurisdiction that there was a decree standing unreversed, and directing the sale, *Steed* v. *Preece* (44). The order, which if beyond the jurisdiction might have been got rid of by proceedings directed to that object, was not allowed to be canvassed in a collateral inquiry."

The Advocate-General also told us that mortgagees had advanced money on properties outside the jurisdiction on the faith of the decision that suits on mort-

(43) 11 B. 169*n*; 11 Ind. Jur. 261*n*; unrep. P. J. B. H. C. (1874-75) 235; 6 Ind. Dec. (*N. S.*) 105.

(44) (1874) 18 Eq. 192 at p. 196; 43 L. J. Ch. 687; 22 W. R. 432.

*Page of 11 B.—[*Ed.*]

gages would lie in the High Court. That again could not, in my opinion, provide an excuse for our assuming a jurisdiction which was not given to us by law.

Still it may be considered whether the construction put upon cl. 12 of the Letters Patent by the Court in *Holkar's case* (1) should not be allowed to stand even though we think it wrong, because thirty-five years have passed since it was decided and it would really be a matter of convenience to the public that we should accept it as correct and assume a jurisdiction which we do not believe we possess, a course of action which I must confess would cause injury to none. The objection in this case to adhering to so easy a road out of the difficulty lies in the fact that we cannot find the slightest foundation for the exercise of our equitable powers. We cannot by any process of argument claim the right to make orders against the person of a party outside the limits of our jurisdiction.

The constitution of the Courts in this Presidency is entirely different to the constitution of the Courts in England, where the High Court of Judicature exercises jurisdiction over the whole of England. Here each District Court is a Court of general civil jurisdiction, and there is no warrant for the High Court to exert its equitable powers against persons residing within the jurisdiction of the District Courts. I am aware that we are bound to attach the greatest importance to the doctrine of *stare decisis*, but, in my opinion, that doctrine can be no authority for our establishing so novel a proposition. In my opinion we should hold that the Court has no jurisdiction to try this suit.

Z. K. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 626 OF 1923.

November 12, 1925.

Present:—Mr. Justice Sulaiman and Mr. Justice Mukerji.

NARAIN DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHEO DIN AND ANOTHER—PLAINTIFFS RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Suit for possession by several plaintiffs—Decree—Appeal—Death of one respondent—Legal representatives not brought on record—Abatement, extent of.

In a suit for joint possession of property brought by a number of plaintiffs it is possible in appeal to dismiss the claim of some plaintiffs and to uphold the decree in favour of the others. The decree passed in such a suit is a joint decree, but the rights of the claimants are distinct and can be considered individually and disposed of separately. Where, therefore, during the pendency of an appeal against such a decree, one of the plaintiffs-respondents dies and his legal representatives are not brought on the record within the prescribed period, the appeal abates only as against the deceased respondent and not as against all of them. [p. 860, col. 2.]

Second appeal from a decree of the District Judge, Jhansi, dated the 25th January 1923.

Dr. *N. C. Vaish*, for the Appellants.

Mr. *A. Sanyal*, for the Respondents.

JUDGMENT.

Sulaiman, J.—A preliminary objection has been taken on behalf of the respondents that this appeal has abated as a whole. This appeal arises out of a suit brought by two plaintiffs Sheo Din and Debi framed as a redemption suit. The Court of first instance decreed the claim holding that the mortgage had been established. An appeal was preferred by the defendants and there was a cross appeal by the plaintiffs. Both these appeals have been dismissed. The learned Judge has come to the conclusion that the mortgage has not been satisfactorily proved by the plaintiffs, but he has repelled the contention of the defendants that they have been in adverse possession of this property. He has come to the conclusion that the defendants' possession has been permissive and that they are licensees. He was inclined to allow the plaintiffs a decree for possession without any consideration as to the payment of the sum offered by them. But as in their appeal they had not challenged that part of the decree he did not try to disturb it. The result was that he dismissed both the appeals.

The defendants preferred an appeal to this Court impleading both the plaintiffs. During the pendency of the appeal Sheo Din respondent died and no application to bring his legal representatives on the record was made within the time allowed by law. It is admitted before us that Sheo Din and Debi did not form members of a joint Hindu family with rights of survivorship *inter se*.

There can be no doubt that the appeal must abate as against Sheo Din deceased and his legal heirs. The question is whether the appeal must be deemed to have

abated as regards the respondent Debi also or not.

Under the old C. P. C. no doubt in a number of cases it was held that where a joint decree has been passed and the defendant appeals against the plaintiffs but fails to implead one of them or to bring his heirs on the record within the time allowed by law the whole appeal abated. The words of the old s. 368 were wide enough to cover this position. Under the new Code some amendments have been introduced which require consideration. In the first place in O. I, r. 9 it is specifically provided that no suit shall be defeated by reason of misjoinder or *non-joinder* of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties before it. Then in O. XXII, r. 4, sub-cl. 3 it is provided that if no application to bring the heir of the deceased defendant has been made in time the suit shall abate *as against the deceased defendant*. We have a similar provision in r. 3, sub-cl. 2 when a plaintiff dies. These rules have been made applicable to appeals. On the face of these rules it is clear that when a respondent dies and his heir is not brought on the record within the time then the appeal abates as against the deceased.

Of course, there may sometimes be cases where in the absence of one party to the case the Appellate Court finds itself helpless to decide the matter in controversy. Cases of this kind may arise in partition suits and suits for dissolution of partnerships where it may be said that in the absence of one of the parties jointly interested a partition or dissolution cannot be made. The same principle has been extended to pre-emption in the case of *Imamud din* v. *Sadara* (1) which was followed with some difference of opinion in the case of *Wajid Ali Khan* v. *Puran Singh* (2), but the circumstances of a pre-emption suit are peculiar and do not necessarily apply to a suit for recovery of possession either on payment of money or without any such condition.

When a suit for joint possession of property is brought by more than one plaintiffs and a decree is obtained in the first Court it is open to the defendant to challenge the right of any one of the plaintiffs although he may not be in a position to challenge the rights of the other co-plaintiffs It is, therefore, conceivable that he may choose to appeal only as against one of such claimants and not substantially as against the others. He may have good reason not to appeal against some as he may have compromised the dispute with them or it may be his interest to get rid of some of the claimants if he cannot get rid of all. In any case very often an Appellate Court may uphold the decree in favour of some of the plaintiffs and may dismiss the claim of the other plaintiffs. It, therefore, seems to me that in a case for joint possession of property brought by a number of plaintiffs it is possible to dismiss the claim of some and uphold the decree in favour of the others. The decree is certainly a joint decree, but the rights of claimants are distinct and can be considered individually and disposed of separately. In this view of the matter, there being no express provision directing that the whole appeal should abate, it seems difficult now to hold that the present appellant cannot ask this Court to dismiss the claim of Debi even though he may not be in a position to challenge the decree in favour of the deceased Sheo Din. The only case under the present Code where in a suit for joint possession the principle of the integrity of a joint decree has been applied which has been brought to our notice is the case of *Tej Narain Sahu* v. *Dal Ram Sahu* (3). The learned Judges of the Patna High Court did not consider the effect of the amendments in the new Code but merely followed a previous ruling of the Calcutta High Court reported in *Basir Sheikh* v. *Fazle Karim* (4). In this latter case also the amendments were not considered but two previous cases under the old Code were simply followed. It is unnecessary to consider the case where a joint money-decree has been passed in favour of several plaintiffs. A case like that arose before the Lahore High Court in *Sardari Lal* v. *Ram Lal* (5).

Even if this appeal were allowed the result would simply be that Debi would be disentitled from executing his decree and

(1) 5 Ind. Cas. 837; 32 A. 301; 7 A. L. J. 228.
(2) 85 Ind. Cas. 66; 47 A. 100; 22 A. L. J. 994; L. R. 6 A. 39 Civ.; (1925) A. I. R. (A.) 108.
(3) 69 Ind. Cas. 624; 1 Pat. 609; (1922) A. I. R. (Pat.) 605; 4 P. L. T. 170; (1923) Pat. 207; 1 Pat. L. R. 103.
(4) 28 Ind. Cas. 703; 19 C. W. N. 290.
(5) 57 Ind. Cas. 199; 1 L. 225; 1 L. L. J. 225; 143 P. L. R. 1920.

his right thereunder would be extinguished. This may not necessarily affect Sheo Din and his heirs who may be allowed to execute the whole decree or at any rate a part of the decree.

I would, therefore, overrule the preliminary objection.

Coming to the merits of the appeal the main point urged before us is that the lower Appellate Court has made out a new case for the plaintiffs in holding that the defendants are holding possession as mere licensees. The plaintiffs alleged themselves to be the original proprietors. The defendants never disputed the original title of the plaintiffs. The plaintiffs alleged that the defendants were put in possession by their predecessors as mortgagees. The defendants denied the very existence of the mortgage and set up adverse possession. The Court of first instance had found the existence of title in favour of the plaintiffs and had not accepted the plea of adverse possession inasmuch as it found them to be holding possession as mortgagees.

On appeal the learned Judge has found that the mortgage is not proved. He has found that the defendants have not proved their adverse possession. He has further found that the defendants' predecessor was put in possession with the leave of the owner and that there are written admissions available which destroy the plea of adverse possession. It is obvious that the decree has been upheld on the main ground that the title rests with the plaintiffs and that the defendants have not established their adverse possession. It was not really a new case set up for the first time. The appeal accordingly has no force and I would dismiss it with costs.

Mukerji, J.—There were two respondents in this appeal Sheo Din and Debi. They brought the suit out of which this appeal has arisen for redemption on the allegation that an ancestor of their vendor mortgaged the property in suit to an ancestor of the defendants, who are the appellants before us. They alleged that the mortgage money was a sum of Rs. 199 and they offered to pay the same.

The suit succeeded in its entirety in the Court of first instance which found that there subsisted a mortgage. There were two appeals, one by the plaintiffs, on the question of costs and the other by the defendants, who dispute the right of redemption, on the ground that there was no mortgage at all. The defendants had also set up a title in themselves by adverse possession. The learned District Judge found that the evidence that was adduced to prove the mortgage was not admissible, because, if a mortgage subsisted, it must have been created by a registered document. No registered document was produced. A certain statement made in the year 1904 by an ancestor of the defendants was put into evidence. There, he had stated that he was holding as a martgagee and he had also stated the terms on which he held. The learned Judge was of opinion that the admission of Ganga Prasad, for such was the name of the man, was not good enough for establishing a mortgage, though it was good enough to show that the ancestor of the defendants came upon the land with the permission and leave of the plaintiffs' predecessor-in-title. The learned Judge remarked that in the circumstances the plaintiffs were entitled to succeed on their title and it was fortunate for the defendants that they had got an offer of Rs. 199.

In this Court the defendants appealed and the main contention of the learned Counsel for the appellants is that the learned Judge has changed the case set up by the plaintiffs and this he was not entitled to do.

A preliminary objection has been taken that the whole of the appeal has abated. It appears that the respondent Sheo Din died more than 90 days ago and no heir of his was brought on the record. It is urged on behalf of the respondent Debi that the whole appeal abates because it abates against Sheo Din.

Before I come to consider the appeal on the merits, it is necessary to dispose of the preliminary objection. My view on the question of abatement is set forth in the case of *Wajid Ali Khan* v. *Puran Singh* (2). In that case my opinion was not accepted by the majority of the Judges who heard the case. The decision of the case, however, was influenced by the fact that the case involved a pre-emption decree and the question now before us is whether the principle therein enunciated by the majority of the Judges who heard the appeal should be followed in this case. The majority of Judges did not say anything by which they may have meant to lay down anything like an universal rule. I, therefore, agree with my learned brother that the principle there laid down cannot be and should not be extended to the case like the present one,

Here two persons who are independent of each other purchased a mortgagor's interest and instituted a suit for redemption. It would not affect Sheo Din if the suit of Debi be dismissed at the instance of the present appellants. A very similar case arose before the Bombay High Court in the case of *Shankarbhai Manorbhai Patel* v. *Motilal Ramdas Shah* (6). The Acting Chief Justice Shah remarked:—

"It is enough for our present purposes to point out that if the defendants succeed, it would place them in a more advantageous position in so far as they would have then to satisfy the plaintiff No. 2 only with reference to the decree and not the plaintiff No. 1."

In the case before the Bombay High Court there were two plaintiffs who were tenants-in-common and they had succeeded in their suit for ejectment. On an appeal by the defendants one of the plaintiffs died but his legal representative was not brought on the record. Then the question arose whether the whole appeal should abate or a part. Both the Acting Chief Justice and Mr. Justice Fawcett held that the appeal ought to be heard so far as the surviving respondent was concerned I am, therefore, of opinion that the law laid down by the majority of the Judges in the case of *Wajid Ali Khan* v. *Puran Singh* (2), is not of universal application and should not apply to this case. The appeal should be declared to have abated as against Sheo Din only.

Coming to the merits of the case, it appears to me that the appeal has no force. The case is just like those that frequently arise when an occupancy tenant mortgages his tenancy and then claims to redeem it. The mortgage is illegal. He is allowed to recover his property, but on payment. In this case there was a mortgage but there being no registered mortgage-deed, it was not operative. The title was with the plaintiffs and the defendants came upon the property with the permission of the plaintiffs' predecessor-in-title. That being the case, the learned Judge was right in holding that the plaintiffs were entitled to succeed. The learned Judge thought that the defendants were fortunate enough to get a sum of money. But this is hardly correct. The defendants were entitled, in equity, to have the money back which they had advanced in consideration of the property. The appeal, therefore, must fail.

By the Court.—We declare that the appeal, as against Sheo Din, has abated and we dismiss the rest of the appeal. The appellants must pay the costs of the respondent Debi in this Court including Counsel's fees on the higher scale.

M. A. A. *Appeal dismissed.*

Z. K.

(6) 85 Ind. Cas. 197; 49 B. 118; 26 Bom. L. R. 1217; (1925) A. I. R. (B.) 122.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 639 OF 1925.

June 19, 1925.

Present:—Mr. Justice Babington Newbould KT., and Mr. Justice Graham.

BIMALA PROSAD MUKERJI—PETITIONER

versus

LAL MONI DEVI AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. VII, r. 10—Plaint presented in wrong Court—Return of plaint—Presentation in proper Court—Court-fees enhanced during interval—Deficit Court-fees, whether payable.

Where a plaint which is presented in a wrong Court is returned for presentation to the proper Court and is subsequently presented in a Court of competent jurisdiction, the suit must, for purposes of the computation of Court-fees payable on the plaint, be deemed to have been instituted on the date on which the plaint is presented in the proper Court. If between the date of the presentation of the plaint in the wrong Court and its presentation in the proper Court the Court-fees payable on the plaint have been enhanced, the plaintiff must pay the Court-fees payable on the plaint on the date on which the plaint is presented to the proper Court, after deducting the amount already paid by him as Court-fees on the plaint. [p. 863, col. 1.]

Rule against an order of the Subordinate Judge, Burdwan.

Babus *Probodh Kumar Das* and *Apurba Charan Mukerji*, for the Petitioner.

Mr. *Charu Chandra Biswas* and Babu *Manindra Kumar Bose*, for the Opposite Party.

JUDGMENT.—The plaintiff filed a plaint in the Court of the Subordinate Judge of Alipur on the 2nd October 1920. After litigation up to the High Court it was decided that that Court had no jurisdiction to try the suit and the plaint was returned for presentation to the proper Court on the 31st October 1922. The plaintiff then filed it before the Subordinate Judge of Burdwan on the 14th November 1922. The question that arises in this Rule is: "Wha

Court-fee should be paid by the plaintiff." The lower Appellate Court has held that he should pay Court-fees in accordance with the amended Court Fees Act which came into force on the 1st April 1922, after deducting the Court-fees already paid.

For the plaintiff, the petitioner before us, it is contended that the Court-fee originally paid is sufficient. On behalf of the opposite party, the defendant, who appeared in this Rule it is contended that the plaintiff should pay the Court-fee under the amended Act without any deduction for the cancelled Court-fee stamp on the plaint that was originally filed. We think that the learned Subordinate Judge is right in holding that the Court-fee payable is that payable under the new Act after crediting the plaintiff with the Court-fee originally paid. The question as to the plaintiff being entitled to be credited with the Court-fee paid has been decided by Full Benches of the Madras and Bombay High Courts. No case of this Court clearly in point has been pointed out to us but our experience is that the practice in this Province is the same as in the other Provinces and we think that the rule laid down in those cases should be followed.

As to the Court-fee payable it is undisputed that the Court-fee should be leviable under the law which was in force at the time when the suit was instituted.

The whole question in this Rule is "Was the suit instituted when the plaint was filed in the Court which had no jurisdiction or when it was filed in the Court having jurisdiction." On this point the decision of a Division Bench of this Court in *Hedlot Khasia* v. *Karan Khasiani* (1) is an authority for holding that when the plaint which has been returned is presented in a Court of competent jurisdiction the suit must be taken to be instituted on the date of such presentation. On behalf of the petitioner reliance is placed on certain decisions of this Court reported in the Weekly Reporter which are discussed in the judgment of the Subordinate Judge. We agree with him in thinking that those cases turn on the question of limitation and merely apply the rule which has since been made in the law by the passing of s. 14 of the Limitation Act of 1877.

The result is that the Rule is discharged. The opposite party's application for a Rule directing an order to pay further Court-fees is rejected.

The parties will bear their own costs.

The petitioner will be allowed one month from this date to pay the deficit Court-fees.

Z. K. *Rule discharged.*

(1) 13 Ind. Cas. 377; 15 C. L. J. 241 at p. 245.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEALS NOS. 64 AND 65 OF 1924.

October 23, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Lindsay.

DARIYAI SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHOB SINGH—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 58 (b) –Landlord and tenant—Suit for ejectment of thekadar—*Ejectment grounds for—Plaint, averments in.*

A plaintiff seeking to eject a defendant on the allegation that the latter is a *thekadar* must set out definitely in his plaint the grounds on which he alleges that the defendant is liable to ejectment. The ground on which a *thekadar* or a person holding under a lease can be ejected under the provisions of cl. (*b*) of s. 58 of the Agra Tenancy Act, is that the term of his lease has expired or will expire at or before the end of the current agricultural year. A statement in the plaint that the defendant is a *thekadar* of the land in dispute, paying a yearly rent and that he has no right to remain in possession does not satisfy the requirements of the law, and a decree for ejectment cannot be granted on the basis of such a plaint. [p. 865, cols. 1 & 2.]

Letters Patent Appeals against the judgment of Mr. Justice Mukerji, in S. A. Nos. 1524 and 1525 of 1922, dated the 14th March 1924, printed as 82 Ind. Cas. 594.

Dr. *N. C. Vaish*, for the Appellants.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—These two appeals are connected and have been heard together and may be disposed of by a single judgment.

The appellants before us were the defendants in two suits brought by different plaintiffs in a Revenue Court for ejectment.

In both these cases in the Revenue Court it was alleged on behalf of the plaintiffs that they (the plaintiffs) were the *zemindars* of the lands in suit, that the defendants were lessees (*thekadars*) of the lands in dispute, paying a yearly rent to the plaintiffs. In para 3 of both plaints it was

alleged that the plaintiffs desire to eject the defendants as the defendants had no right to remain in possession. It was stated that the defendants had been asked to vacate the lands, had refused to do so, and hence suits for ejectment lay under the provisions of s. 63 and s. 58 of the Agra Tenancy Act. In both cases the cause of action for the suit was described as having arisen on the 1st of July 1918, that is to say, after the expiry of the agricultural year.

In both cases the defendants-appellants, who are before us, denied the allegations set out in the plaints. They pleaded that for several generations they had been in proprietary possession of the plots of land on a fixed sum and had rights as inferior proprietors.

The Assistant Collector dismissed both suits, holding that the defendants were not liable to be ejected by proceedings under s. 63. We understand that an appeal against the order of the Assistant Collector was taken to the Commissioner, and thereafter further appeal to the Board. The result of all these proceedings was that the Revenue Courts were of opinion that appeals ought to have been preferred to the Court of the District Judge. Both appeals eventually came before the District Judge of Mainpuri who affirmed the order of the Assistant Collector in each case. Before the District Judge a plea of limitation was raised on behalf of the defendants-respondents. The plea was to the effect that the appeals had been lodged before the learned District Judge beyond time. The learned District Judge decided in favour of this plea and was of opinion that the appeals were time-barred.

The plaintiffs then came up in second appeal to this Court and here they have succeeded. The learned Judge of this Court, who decided the appeals, differed from the lower Appellate Court on the question of limitation for various reasons, which he sets out in his judgment. He was of opinion that the delay in the presentation of the appeals in the Court of the District Judge should be condoned and that the appeals should be treated as having been filed within time.

The learned Judge here also differed from the judgment of the first Appellate Court, he has in fact decided that these defendants-appellants are tenants-at-will who were liable to ejectment under the provisions of s. 58 of the Agra Tenancy Act.

We have now before us these appeals under the Letters Patent, in which the correctness of the judgment of this Court is challenged on two grounds. It is said in the first place that the learned Judge ought to have held that the appeals presented before the District Judge were barred by time and secondly it is urged that the learned Judge of this Court was in error in coming to the conclusion that these defendants were liable to ejectment.

As regards the question of limitation we do not propose to deal with it. On the other question our judgment is in favour of the defendants-appellants.

It has been argued before us that there was before the learned Judge of this Court a definite finding of fact which ought to have led him to dismiss both appeals. The learned Judge of the first Appellate Court was of opinion that the plaintiffs had failed to prove that a cause of action had arisen in their favour. They had alleged, as has been set out in their plaint, that the defendants were *thekadars*, holding under a *theka*. The Judge of the first Appellate Court was of opinion that being *thekadars* they could be ejected only on the ground set out in s. 58 cl. (*b*), in other words on the ground that they were holding under a lease, or *theka*, the term of which had expired, or was about to expire, at the end of the current agricultural year. He found that there was nothing to show that the period of the *theka*, under which these appellants were holding the plots, had come to an end so as to justify the plaintiffs in asking for ejectment on the ground set out in cl. (*b*) of s. 58.

The learned Judge of this Court appears to have taken the view that it was for the defendants to prove that they were enjoying holdings of a permanent nature and that they had failed to show how they came into possession, and under what terms they were holding and they were liable to be treated by the plaintiffs as tenants-at-will from year to year and consequently liable to be evicted on the ground set out in cl. (*a*) of s. 58 of the Agra Tenancy Act.

A great deal of documentary evidence was produced in the course of the trial of these cases and it is clear that it is a matter of great difficulty to ascertain what the status of these defendants is. There can

be no doubt whatever that they have for a period of at least 90 years been in continuous occupation of this land. It is true that during that period they have been paying rent to the plaintiffs; but it is further found that although they have been in this position of paying rent nevertheless the tenants to whom they sublet have acquired occupancy rights.

The nature of the occupation of these defendants has been litigated before and we have before us on the record two judgments that were passed in the years 1904 and 1905 by the Assistant Settlement Officer. It is quite clear from a perusal of these judgments that there was very strenuous dispute between the parties at the settlement which took place in or about the year 1904 as to the status of these defendants-appellants.

The Assistant Settlement Officer had great difficulty in assigning to these defendants any position known to the law. We may say at once, however, that he refused absolutely to treat them as being ordinary tenants or tenants-at-will. Eventually he came to the conclusion that they had been admitted to possession many years before, probably as *mustajars* (or farmers) of the plots of land.

The matter is by no means clear, for it is difficult to understand how these people, even if they were admitted, were able to hold on during successive settlements as *thekadars*. The fact, however, remains that in 1904 the Assistant Settlement Officer decided definitely that these people were no ordinary tenants and that the only class in which they could be placed was that of *thekadars*. He was competent to decide this question, and that his classification of these defendants as *thekadars* must be taken as having settled their status under the Tenancy Act.

If that is so, and if these defendants are *thekadars*, we think it was the duty of the plaintiffs in these two suits to set out definitely in their plaints the grounds on which they were liable to be ejected. So far as we can see, and we are speaking with reference to the provisions of s. 58, the section which was invoked by the plaintiffs in their plaint, the ground on which a *thekadar* or a person holding under a lease, can be ejected is that the term of his lease has expired or will expire at or before the end of the current agricultural year.

On this language it appears to us that the plaintiff who has come into Court and is asking for the ejectment of *thekadars* is bound to show that the *theka*, or lease, under which the land is held, has expired or is about to expire. We have the plaints before us, in which there are no allegations of this kind. As we have pointed out all that is said is that the defendants are *thekadars* of the land in dispute, paying a yearly rent, and that they have no right to remain in possession. It is not asserted in the plaint why these defendants have no right to remain in possession.

We do not agree with the view which was taken by the learned Judge of this Court, that it was for the defendants to prove that they have some permanent right of occupancy which protected them from ejectment. On the facts as set out, and particularly in view of the entries made in the papers, and the decision of the Settlement Officer we think it lay upon the plaintiffs to show that these defendants-appellants were liable to ejectment on the ground that the period of their *theka* had come to an end. Having failed to do so, we think both suits ought to have been dismissed.

We, therefore, allow the appeals, set aside the decrees of this Court and restore the decrees of the lower Appellate Court. The appellants are entitled to all costs in this Court including fees on the higher scale,

Z. K. *Appeals allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1110 OF 1925.

November 9, 1925.

Present:—Mr. Justice Sulaiman.

RAM RUP AGRAHRI AND OTHERS—DEFENDANTS—APPELLANTS

versus

NAIK RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Appeal filed by Vakil—Vakalatnama *signed by appellant and Vakil—Omission to state name of appellant and Vakil in body of* Vakalatnama, *effect of—Limitation Act (IX of 1908), ss. 5, 14—Appeal, delay in filing—Extension of time—Delay, explanation of—Discretion of Court—Appeal, second, interference in.*

An appeal presented by a Vakil acting under a *vakalatnama* signed by the appellant and by the

Vakil but which omits to state the name of the appellant and the name of the Vakil in the body, is not properly presented and is not a good appeal. [p. 866, cols. 1 & 2.]

Where a party is entitled to the exclusion of a certain period under the provisions of s. 14 of the Limitation Act, it is not incumbent on him to explain any subsequent delay in instituting the proceeding provided that the proceeding is instituted within limitation after the exclusion of such period. Where, however, extension of limitation is prayed for under s. 5 of the Act on a ground analogous to that laid down in s. 14 of the Act, it is incumbent upon the party asking for the indulgence of the Court to explain the delay which has taken place between the termination of the period which is sought to be excluded and the presentation of the appeal or application. [p. 866, col. 2.]

Where discretion has been exercised one way or the other by an Appellate Court under s. 5 of the Limitation Act, the High Court will not interfere with the exercise of such discretion in second appeal. [p. 867, cols. 1 & 2.]

Second appeal against a decree of the Additional Subordinate Judge, Azamgarh, dated the 31st of March 1925.

Dr. *M. Waliullah*, for the Appellants.

Mr. *Janaki Prasad*, for the Respondent.

JUDGMENT.—This is a defendants' appeal from an order dismissing an appeal as being barred by time.

The claim was decreed by the first Court on the 17th of December 1924 and the defendants applied for the copies of the decree and judgment on the 23rd of December. These copies were ready on the 5th of January. An appeal was preferred by the defendants on the 17th of January 1925, through a Vakil whose *vakalatnama* was filed along with the memorandum of appeal. Later on it was discovered that the names of the appellants and the name of the Vakil were omitted from the body of the *vakalatnama* which was, however, signed by the appellants and the Vakil. On the 12th of February 1925 one of the appellants who was present filed a fresh *vakalatnama* duly signed by him with an application praying that the omission might be deemed to have been cured. The learned Judge, however, held against the defendants and dismissed the appeal on the ground that it had not been properly presented.

On the 18th of February 1925 an application for fresh copies was made and copies were granted on the 19th of February on which date a fresh appeal was filed. In an application accompanying the appeal it was prayed that time should be extended under s. 5 of the Limitation Act. Another Judge before whom this appeal came up for hearing has declined to extend the time and has dismissed the appeal as being time-barred.

The learned Counsel for the appellants has argued before me that even if s. 14 of the Limitation Act does not in terms apply to an appeal, as it obviously applies only to suits, its principle ought to be applied and that the time from the 17th of January 1925 till the 12th of February 1925 during which the infructuous appeal was pending should be altogether excluded. His contention is that if this period is excluded and the time requisite for obtaining copies is also excluded, the appeal filed on the 19th of February 1925 would be well within time. He has placed a very strong reliance on the case of *Narain Singh* v. *Bikram Singh* (1). He has further argued that even if the principle underlying s. 14 cannot be made applicable in its entirety, the period spent in prosecuting the previous appeal should be taken into account when considering the extension of time under s. 5.

In view of the pronouncement of the Letters Patent Bench in the case of *Mohammad Ali Khan* v. *Jasram* (2) affirming a judgment of a Single Judge reported in the same volume at page 458 [*Muhammad Ali Khan* v. *Sukhu* (3),] it is clear that the appeal with the defective *vakalatnama* had not been properly presented and was not a good appeal.

As to the applicability of s. 14 of the Limitation Act, it seems to me that there is a clear distinction between exclusion of the time during which another civil proceeding has been duly prosecuted within the meaning of that section and an extension of time for good cause shown under s. 5. If it were a question of exclusion then the appellant would be entitled to exclude from all calculation the period during which the previous appeal was pending, but if it is merely a matter of extension then he would be entitled to have time extended up to the last date when the previous proceeding terminated. If time were to be excluded then it is not incumbent on him to explain the delay for the subsequent period provided that the appeal comes within time. On the other hand if it is only a question of extension then it is necessary for him to explain the delay between the 12th of February 1925 when the appeal was

(1) 11 Ind. Cas. 814; 8 A. L. J. 793.
(2) 23 Ind. Cas. 464; 11 A. L. J. 1015; 36 A. 46.
(3) 19 Ind. Cas. 674; 11 A. L. J. 451.

dismissed and the 19th of February 1925 when it was filed afresh. All that was decided in the case of *Balwant Singh* v. *Gumani Ram* (4) was that the circumstances contemplated in s. 14 might and ordinarily would constitute a sufficient cause in the sense of s. 5 of the Limitation Act. I am, therefore, prepared to concede that in view of the obvious fact that the previous appeal had been filed through an oversight the time during which it was pending should be taken into account while exercising the discretion under s. 5 of the Limitation Act. But that does not absolve the appellants from their obligation to show that there was sufficient cause for not filing the appeal earlier than the 19th of February 1925.

It has been suggested on behalf of the appellants that only one of the appellants was present on the 12th or 13th February and that some delay was due to the fact that intimation had been given to the other appellants and that they had to come to Azamgarh to apply for fresh copies. It is further said that the application was made on the 18th and as soon as the copies were obtained on the 19th the appeal was filed.

Unfortunately for the appellants no affidavit was filed on their behalf before the lower Appellate Court explaining these facts and stating that it was owing to the absence of the appellants that the application for fresh copies was not made earlier than the 18th of February 1925. It is possible that this delay might have been explained easily, but the appellants failed to file any affidavit or produce any evidence explaining this delay. The lower Appellate Court has accordingly held that the appellants have not acted with due diligence in presenting the appeal after a week from the dismissal of the first appeal and have been guilty of gross delay and carelessness and that no sufficient cause is shown for the delay. In view of the absence of an affidavit explaining the delay the lower Appellate Court declined to exercise the discretion vested in it under s. 5 of the Limitation Act. Although it is obviously a hard case I find it difficult to say that the order passed by the lower Appellate Court is either perverse or does not amount to an exercise of discretion. It has been held in several cases by this Court that where discretion has been exercised one way or the other by an Appellate Court under s. 5, the High Court will not interfere in second appeal. I may refer to the case of *Ahmad Husain* v. *Muhammad Fasihullah* (5) and the cases referred to therein.

The appeal is accordingly dismissed; but having regard to the unfortunate circumstances of this case I direct that parties should bear their own costs of this appeal.

Z. K. *Appeal dismissed.*

(4) 5 A. 591; A. W. N. (1883) 142; 3 Ind. Dec. (N. S.) 515.

(5) 74 Ind. Cas. 1039; 21 A. L. J. 319; (1923) A. I. R (A.) 455; 42 A. 432.

OUDH CHIEF COURT.

EXECUTION OF DECREE APPEALS NOS. 49 AND 50 OF 1925.

November 9, 1925.

Present:—Mr. Justice Hasan and Mr. Justice Raza.

Musammat HASIB-UN-NISA—OBJECTOR—APPELLANT

versus

Pandit BISHNATH—DECREE-HOLDER AND *Syed* ALI HAIDER—JUDGMENT-DEBTOR—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal filed beyond time—Misconstruction of order by appellant—Extension of time—Sufficient cause.

Where an appeal is filed after the expiry of the period of limitation owing to the deliberate misconstruction of the lower Court's order by the appellant, the appellant is not entitled to the indulgence of the Court under s. 5 of the Limitation Act.

Appeal from an order of the Subordinate Judge, Bahraich, dated the 28th November 1924.

Mr. *Zahur Ahmad* for Mr. *Mohammad Hafiz*, for the Appellant.

Mr. *Ishri Prasad*, for Respondent No. 1.

JUDGMENT.—These two appeals arise from the decision of the Subordinate Judge of Bahraich, dated the 28th November 1924. This decision was followed by the preparation of a prescribed formal order embodying the result of the decision and this formal order was signed by the Subordinate Judge on the 3rd December 1924. An application for obtaining a copy of the judgment of the Subordinate Judge was made on the 11th December 1924 and the notice that the copy was ready for delivery was pasted on the Board of the Court on 13th December 1924. The appellant actually obtained delivery of the copy on the 16th of the same month. She ap-

plied for the copy of the formal order. The notice for the same was posted on the 13th December 1924. The copy of the formal order was also delivered to her on the 16th of the same month. The present appeals were filed in this Court on the 27th July 1925. The appeals are, therefore, clearly barred by limitation.

The appeals were accompanied with applications under s. 5 of the Indian Limitation Act, 1908, for extension of time in the circumstances stated in those applications. We have to see whether those circumstances constitute "sufficient cause" within the meaning of s. 5 of the Indian Limitation Act, 1908. The decision of the Subordinate Judge in both cases was given under cl. (4), sub-cl. (3) of the Third Schedule of the C. P. C., and under cl. (6) of the same Schedule such decision had the force of and was appealable as a decree. On obtaining a certified copy of the formal order, to which reference has already been made, it is alleged that the agent of the appellant thought that the Court had wrongly framed the said order and that it should have framed a decree instead. Persuaded by that thought the agent made an application on the 20th December 1924 to the Subordinate Judge asking him to frame a decree. The Subordinate Judge, however, held that his decision fell under O. XXI, r. 58 of the C. P. C. and consequently it was not necessary to frame any formal decree. This opinion of the Subordinate Judge was delivered on the 16th May 1925. Having failed in getting the Subordinate Judge do what the appellant desired him to, it is alleged that advice was taken from a Counsel in Lucknow as to whether an application in revision was maintainable against the order of the 16th May 1925 and it was then that she first obtained the right advice that the order of the 28th November 1924 had the force of a decree and was appealable as such. On this statement of facts we are asked to hold that there was a *bona fide* mistake as to a point of law and that that constitutes "sufficient cause" within the meaning of s. 5 of the Indian Limitation Act.

We are of opinion that these circumstances do not constitute "sufficient cause" within the meaning of that section. The law as enacted in cl. (6) of the Third Schedule of the C. P. C. is perfectly clear and it was no concern of the appellant to see whether the decision of the Subordinate Judge was followed by preparation of a formal order or a formal decree in the office. It seems to us that the misfortune, if any, which the appellant has brought on her head is due to her own stupidity against which we are unable to give her any relief. We, therefore, hold that these two appeals are barred by time and we consequently dismiss them with costs.

Z. K. *Appeals dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1704 OF 1923.

July 24, 1925.

Present:—Mr. Justice Phillips and Mr. Justice Ramesam.

SOWRIMUTHU AND OTHERS—PLAINTIFFS NOS. 1 TO 3—DEFENDANTS NOS. 3 AND 4—APPELLANTS

versus

PAVADAI PACHIA PILLAI AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

*Hindu Law—Joint family—Alienation by father—Suit by son for partition and to set aside alienation—Alienee, rights of—Subsequent suit for general partition by alienee, maintainability of—Procedure—*Res judicata.

A purchaser from a Hindu co-parcener of his share in specific family properties is entitled to file a suit for general partition, and to work out his rights and equities either by having the properties sold to him allotted to the share of the alienor, or by getting other properties in substitution. [p. 869, col. 2.]

Where in a suit by a Hindu son to set aside alienations by his father of family properties and for partition of his share therein it is found that the alienations are not binding upon the plaintiff, it is open to the alienees to insist upon the plaintiff's assenting to the results of a suit for a general partition of the family properties and ask, if the undisposed of properties are sufficient for the son's share, that the alienated properties may be allotted to the father's share and through him to themselves. If the purchasers do not defend the suit on this ground of equity or if their plea is disallowed, the decree must be regarded as final and the son gets his share in the alienated properties unconditionally as his separate property. [p. 869, col. 2; p. 870, col. 1.]

So far as the properties allotted to the son are concerned the decree operates as *res judicata* against the alienees and the latter cannot in a subsequent suit claim any relief with regard to such properties in order to work out their own rights and equities. With regard to the balance of the properties, however, the alienees are still entitled to claim in a suit for general partition that other properties belonging to the alienor should be allotted to them in substitution of the properties which had been alienated in their favour and which have since been allotted to the son. [p. 870, col. 1.]

Ramkishore Kedarnath v. *Jainarayan Ramrachpal*, 20 Ind. Cas. 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.), *Hanmandas Ramdayal* v. *Valabhdas Shankardas*, 46 Ind. Cas. 133; 43 B. 17; 20 Bom. L. R. 472, *Subbe Goundan* v. *Krishnamachari*, 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112 and *Davud Beevi Ammal* v. *Ramakrishna Aiyar*, 72 Ind. Cas. 81; 44 M. L. J. 309; 17 L. W. 332; (1923) M. W. N. 202; 32 M. L. T. 263; (1923) A. I. R. (M.) 467, distinguished.

Second appeal against a decree of the District Court, North Arcot at Vellore, in A. S. No. 316 of 1921, preferred against that of the Court of the District Munsif, Tiruvannamalai, in O. S. No. 388 of 1920.

Mr. *K. Sankara Sastry*, for the Appellants.

Mr. *N. Chandra Sekhara Iyer*, for the Respondents.

JUDGMENT.—The facts out of which this second appeal arises are not in dispute. One Subbaraya Pillai father of the first defendant died in 1918. He sold the properties mentioned in the plaint Sch. I to the plaintiff's father Roger on the 27th February 1905, the properties mentioned in Sch. II to the 4th defendant on 22nd May 1902 and the properties in Sch III to the predecessor in-title of the present 3rd defendant on 21st May 1901. The properties mentioned in Sch. IV were not disposed of by him. The present first defendant alleging that the sales mentioned above, made by his father were not binding on him sued for partition, and recovery of his share in O. S. No. 416 of 1916. He obtained a decree. That suit came up to the High Court in second appeal, and the decree in favour of the plaintiff was confirmed with some variations which are not now material. After the termination of the said litigation the present plaintiffs, the sons of the alienee of the properties in Sch. I, have now sued for a general partition of the properties of Subbaraya. They allege that the properties left undisposed of by him were enough to be allotted to the share, which the present first defendant is entitled to. They pray in the first instance that the whole of the properties sold to them may be allotted to the father's share and through the father to themselves, and in the alternative they pray for the allotment of other properties as substitute, if the Court holds that the properties sold to them and mentioned in Sch I cannot be allotted to them. The District Munsif agreeing with the plaintiff's contention gave a decree for the properties sold to them. On appeal the District Judge reversed the decree and dismissed the plaintiffs' suit, on the ground that the suit as framed is not maintainable. He was of opinion that a suit for general partition by a stranger purchasing specific items of property from one of the members of a joint family should be filed before a suit by a non-alienating co-parcener for partition of the alienated item, is filed, and decreed, and would not be maintainable after the partial partition was decreed. In the result, he dismissed the plaintiffs' suit. The plaintiffs appeal.

In second appeal the plaintiffs have urged their right to both the alternative prayers. The right of a purchaser to file a suit for general partition, and to work out his rights and equities either by having the properties sold to him allotted to the share of the alienor, or by getting other properties in substitution is not in dispute before us, and has been conceded on both sides [*vide Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (1).] The right of a non-alienating co-parcener to file a suit for partial partition and get a decree for his share is equally settled, and must now be taken as established law [*vide Venkatachella Pillay* v. *Chinnaiya Mudaliar* (2), *Subramanya Chettyar* v. *Padmanabha Chettyar* (3) and *Iburamsa Rowthan* v. *Thirumalai Muthuveera Thiruvenkatasami Naick* (4).] We must start from the basis that these decisions were correctly decided. If in a suit for partial partition, the purchaser does not defend the suit on the ground of his equity, or if his plea is disallowed, the decree must be regarded as final. It is true as pointed out in *Ramkishore Kedarnath* v *Jainarayan Ramrachpal* (5), that it is competent for the Court to make the whole or any part of the relief granted in such a suit to the non-alienating co-parcener conditional on his assenting to the results of a suit for general partition. In the present case no such equities were urged in the former second appeal What was urged was that the purchaser was

(1) 25 M. 690.
(2) 5 M. H. C. R. 166.
(3) 19 M. 267; 6 Ind. Dec. (N. S.) 891.
(4) 7 Ind. Cas. 559; 34 M. 269; (1910) M. W. N. 380; 8 M. L. T. 269; 20 M. L. J. 743.
(5) 20 Ind. Cas. 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.).

entitled to insist on the son suing for a general partition, not that he himself was entitled to sue for a general partition, and get the property allotted, to his share, and that the decree in that suit should be made conditional on the result of such a suit. Thus we have got the fact in this case that in the former suit no condition was added to the decree. In *Hanmandas Ramdayal* v. *Valabhdas Shankardas* (6) Batchelor and Kemp, JJ., added a reservation staying execution of the decree and giving three months to the defendant to file a suit for general partition. It practically amounted to making the decree conditional. The question that now arises is, what is the effect of the unconditional decree in the former suit? We think that so far as the particular property is concerned the former suit is final and makes the matter *res judicata* and the plaintiffs are not entitled to their first prayer. The result of the decree in the former suit is that the plaintiff in that suit gets his share as his separate property, and does not hold it as joint family property. The learned Vakil for the appellants relies on two decisions. The first of them he relies on is *Subbe Goundan* v. *Krishnamachari* (7). In that case a non-alienating co-parcener sued not for partial partition but for possession of the property alienated, on the ground that the sale was void. His suit was decreed. It was held that a suit for general partition by the purchaser was afterwards maintainable. It was pointed out by the learned Judges that it was not in the power of the defendant in the prior suit to convert the suit for possession into a suit for general partition. In so far as the suit for general partition beyond the specific properties sold is concerned, these observations are undoubtedly in favour of the appellants. But this case cannot be regarded as authority in their favour so far as the first prayer is concerned. The first suit in that case was a suit for possession and when the non-alienating co-parcener got a decree for the properties, it must be taken that he obtained possession of the properties on behalf of the joint family, it cannot be said that he obtained it as his separate property. In the appeal before us the first suit was a suit for partial partition and as we already observed the first defendant obtained the property as his separate property. The second case relied on by the learned Vakil for the appellants is *Davud Beevi Ammal* v. *Ramakrishna Aiyar* (8). The observations of Wallace, J., particularly are in their favour. These observations seem to be *obiter dicta*; for on the facts of that case, the observations were not necessary. The suit for partial partition by the son was pending at the time when the suit for general partition was taken for consideration and decreed. Wallace, J. seems to have been of opinion that, when a non-alienating co-parcener obtains a decree in a suit for partial partition, he obtains the property as joint family property. This is indirectly to say that the decision in *Venkatachella Pillay* v. *Chinnaiya Mudaliar* (2) and other cases allowing a suit for partial partition are erroneously decided. There is no purpose in a decree for partition if the only object of it is merely to get rid of the sale and not to divide the property by metes and bounds. So long as such a suit is permissible and the decree directs division of the property by metes and bounds, the result of the decree must be that the co-parcener gets his share as separate property. And as there is no condition or reservation attached to the former decree as was pointed out in *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (5) or as was done in *Hanmandas Ramdayal* v. *Valabhdas Shankardas* (6) that decree is final and cannot be re-opened in another suit. It seems to us, therefore, the matter is *res judicata* so far as the property sold is concerned and the first part of the appellants' contention must, therefore, be disallowed.

Coming to the second prayer, it is obvious that all the authorities and the trend of the previous discussion go to show that the suit is maintainable. It was not in the plaintiffs' power to ask for a general partition in the former suit as was pointed out in *Subbe Goundan* v. *Krishnamachari* (7). The learned Vakil for the respondents does not support the District Judge's judgment on this point. The result is that the second appeal must be allowed, and the case remanded for disposal according to law in the light of the above observations. Appellants will have refund of the Court-fee on the appeal memorandum. We may say that we agree with the

(6) 46 Ind. Cas. 133; 43 B. 17; 20 Bom. L. R. 472.

(7) 68 Ind. Cas. 869; 45 M. 449; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112.

(8) 72 Ind. Cas. 81; 44 M. L. J. 309; 17 L. W. 332; (1923) M. W. N. 202; 32 M. L. T. 263; (1923) A. I. R. (M.) 467.

District Judge in thinking that the position of 3rd and 4th defendants is the same as that of the plaintiffs and they will be given a similar decree in this case. In the second appeal each party will bear his own costs.

V. N. V.
Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 132 OF 1922 AND SECOND CIVIL APPEAL No. 20 OF 1924.

June 12, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

MAHADEO SAHU—PLAINTIFF—APPELLANT

versus

SARJU PRASAD TIWARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Religious Endowments Act (XX of 1863), s. 14—Religious endowment—Mutwalli, *alienation by—Suit by worshipper—Alienation, whether can be cancelled—Possession, whether can be decreed—Dedication, proof of—Assertion of dedication given effect to in judicial proceedings, effect of.*

In a suit brought under s. 14 of the Religious Endowments Act the Court cannot give any relief in the shape of the cancellation of any transfer effected by the *mutwalli*, nor can it grant possession to the plaintiff of property which the *mutwalli* is alleged to have alienated. [p. 872, col. 1.]

The question whether certain property has been dedicated to religious uses must, so far as possible, be decided upon the basis of such documentary evidence as is available. Oral evidence is apt to be unreliable in such cases. [p. 872, cols. 1 & 2.]

The fact that an assertion that certain premises were used as a place of public worship was given effect to in the course of judicial proceedings several years prior to the institution of a suit in which the question of the nature of such premises arises, is a strong indication of the fact that the premises have been dedicated as a place of public worship, as also is the fact that a portion of the property in dispute was used as a sort of *dharmshala* or *musafirkhana* for the accommodation of persons who came to worship there. [p. 873, cols. 1 & 2.]

First appeal from a decree of the District Judge, Gorakhpur, dated the 24th January 1922.

Mr. *Shiva Prasad Sinha*, for the Appellant.

Dr. *M. Waliullah* and Mr. *Mushtaq Ahmad*, for the Respondents.

JUDGMENT.—These two cases relate to the same property which, as far as we are able to judge, consisted at one time of a series of three houses or enclosures. It is said that at one time before the present litigation began these premises were used as a *thakurdwara* and temple. The premises were sold in the month of July 1919 by one Sarju to Aziz Hasan for the sum of Rs. 599-15 and the case which Aziz Hasan has put forward in both the suits out of which this appeal has arisen was that the property was not temple property but was mere private property which he was entitled to purchase and which his vendor was entitled to sell.

First Appeal No. 132 of 1922 arises out of a Suit No. 2 of 1921 brought in the Court of the District Judge of Gorakhpur. This suit purports to be a suit under s. 14 of the Religious Endowments Act, XX of 1863. Under this section of the Act in question any person who is interested in any mosque, temple or religious establishment is entitled to bring a suit against a trustee, manager or superintendent of the endowed property and he is entitled to ask the Court for relief by directing the trustee, manager or superintendent to perform any specific act. He is also entitled to ask for a decree for damages against the trustee, manager or superintendent and the Court may, in the exercise of its powers, direct the removal of the trustee, manager or superintendent.

This suit then, was brought by a plaintiff named Mahadeo Sahu on the allegation that the property in dispute was a *thakurdwara* which had originally been erected by one Girdhari Lal *Khattri* for the worship and the benefit of the general public of the Hindu community. It was said that no less than four idols were installed in this temple or *thakurdwara*. In the second paragraph of the plaint it was alleged that the plaintiff and other people of Gorakhpur city used to do worship in this *thakurdwara* and reference was also made to worship on special occasions such as the *Ram Naumi* or other festivals.

In the third paragraph of the plaint it was alleged that Girdhari continued to be the manager and *mutwalli* of the *thakurdwara* during his lifetime; he was succeeded by his son Mul Narain and Mul Narain was succeeded in turn by his son Gorakh Prasad *alias* Babban. It was alleged that Babban had made over the management of this *thakurdwara* to one Ram Kishen Tewari, the father of the first defendant Sarju Prasad Tewari. It was this man Sarju Prasad who sold the property to Aziz Hasan on the 8th July 1919.

It was pleaded in the plaint that this sale was a void transaction inasmuch as the property conveyed was endowed property which Sarju Prasad had no authority to alienate, and it was prayed, therefore that the sale-deed of the 8th July 1919 might be set aside and that the first defendant, that is to say Sarju Prasad, might be ordered to restore the idols and other paraphernalia of the temple and directed to perform the worship and that should he refuse to do so another *mutwalli* might be appointed in his place who might be directed to carry on the worship in the temple. There was also a prayer for possession by demolition of the buildings erected by the defendant Aziz Hasan since the time of its purchase.

Pausing here we may remark that some of the reliefs which were asked for in this plaint could not be granted in a suit brought under s. 14 of the Religious Endowments Act. The Court could not under that Act have given any relief in the shape of cancellation of the sale ; nor again could it have given any decree to the plaintiff for possession of the premises.

The question of possession, however, arises in the other case (S. A. No. 20 of 1924) and we shall deal with that presently.

We have already mentioned that the case which Aziz Hasan set up to the suit was that the property was not a public endowment of a religious nature. He maintained that it was private property such as his vendor was entitled to dispose of.

A number of witnesses were examined in support of the plaintiff's case and certain documentary evidence was also put in. The defendant Aziz Hasan did not enter the witness-box nor were any witnesses cited on his behalf.

The learned Judge of the Court below came to the conclusion that although there had been a temple on the site of these premises at one time nevertheless it seemed to him that it had not been a public temple but merely, what he called, "a private kind of chapel" with a moveable idol or moveable idols. In this view of the case he dismissed the plaintiff's suit and so we have this appeal before us. The question which we have to decide here is whether the evidence establishes that these premises were at one time a public place of worship.

In cases of this kind the oral evidence is apt to be unreliable and where it is possible the Courts prefer to found their judgment upon such documentary evidence as is available.

We have no document showing when these premises were devoted in the first instance to public worship as alleged in the plaint. No document is available, executed by Girdhari Lal *Khattri*, the man whose name is mentioned in the first paragraph of the plaint. There is, however, some documentary evidence which takes us back as far as the year 1866. At page 17 of the record in F. A No. 132 of 1922 we find a *rubkar* of the *Sudder Amin* of Gorakhpur dated 22nd January 1866. From this document it is apparent that certain decree-holders had obtained a decree against Mul Narain who by that time had died. Mul Narain apparently was the son of Girdhari Lal *Khattri* whose name has just been mentioned.

The proceedings in the Court of the *Sudder Amin* show that the decree-holders had attached and were seeking to bring to sale certain house property and that Babban the son of the deceased judgment-debtor was opposing the application for execution and maintaining that the property which had been attached in execution was *wakf* property. In the petition of objections it is stated that the property consisted of a *shivala* and *thakurdwara*. It is stated that this property is *wakf* property and that the *thakurdwara* and *shivala* had been constructed by the objector's grandfather. The Court, after an inspection of the premises, gave effect to the objection. The *Sudder Amin* remarked in his order that the premises which had been attached consisted of a house divided up into three parts. In one of these parts there was kept a *thakurdwara*. In the other two parts there were a well and other things connected with worship. The result of these proceedings was that the property was released from attachment and declared not to be liable for sale.

Then again in the year 1902 we find that there were some other proceedings in execution in the Court of the Subordinate Judge of Gorakhpur. The Collector, the manager of the Bettiah State, had got a decree against Sarju Prasad for a sum of Rs. 1,352 odd. Attachment of property had taken place and Sarju Prasad put in a petition saying that the property was *wakf* property and had been made a *wakf* for purposes of defraying his expenses of the *thakurdwara*. He pleaded, therefore, that

the property could not be attached and demanded that it should be released. This petition of his is to be found at page 18 of the record in the first appeal. On the 23rd of May 1903 the Subordinate Judge of Gorakhpur accepted the objection made by Sarju Prasad. He stated in his order at page 19 of the record that the oral evidence produced by the objector and an old judgment dated the 22nd January 1866 proved that the house was a temple and not liable to be sold.

Although, therefore, there is no direct evidence of dedication and no documentary evidence directly showing that this property was dedicated to public religious use nevertheless these documents are of considerable value special regard being had to the fact that in the year 1866 an assertion, that these premises were used as a place of public worship, was given effect to in the course of judicial proceedings. The learned District Judge who has tried this case was impressed with this evidence and held that the document certainly constituted *prima facie* proof that the property in suit was a religions endowment in which case, he said, the defendant Sarju Prasad would have had no right to sell to Aziz Hasan, but as we have already mentioned the learned Judge went on to find that the property was not a public property but a sort of private trust. We do not think that deduction can be drawn from the documents upon which the learned Judge has placed reliance for it seems to us that the plea which was being put forward in the year 1866 and again by Sarju himself in the year 1902 was that the property was property devoted to public religious worship and not property which might be described as private property of any kind.

As regards the oral evidence produced in the case we do not wish to lay undue stress upon it but the fact remains that a number of witnesses deposed that people used to resort to these premises for purposes of worship, more specially on festival occasions. It is quite true that these witnesses do admit that for a number of years before the suit was brought the premises had fallen into decay and had not been used as a place of worship. The preponderance of the evidence is to the effect that for some 8 or 10 years before the suit was brought no worship had been carried on there because the property had fallen into disrepair.

But on the whole we can see no reason to reject the evidence of these witnesses which if accepted goes to show that members of the Hindu public used to resort to these premises on occasions and perform worship there. In this connection we notice in particular that there is some evidence to show that one of the divisions of the house to which we have referred above was used as a sort of *dharamsala* or *musafirkhana*, that is, for the accommodation of persons who came to worship there. That fact is strong evidence that there was a dedication of the property to public use. We might cite in this connection a recent judgment of their Lordships of the Privy Council reported as *Lakshmana* v. *Subramania Ayyar* (1).

We are satisfied, therefore, that there was good evidence before the Court below which the plaintiff can claim to have established his case that these premises had been dedicated to purposes of public worship.

We have decided, therefore, on this review of the evidence to reverse the judgment of the Court below and to allow this appeal. The only relief which we can award to the plaintiff appellant is that the defendant No. 1, Sarju Prasad, be directed to restore the idols to these premises within the period of six months from the date of this Court's decree and that he be further directed to carry on the duties of *mutwalli*. In case he fails to do so within the time so limited we direct that he be removed from the office of *mutwalli*. The appeal is, therefore, allowed and a decree in this sense will be prepared in the office. We leave the parties in the first appeal to pay their own costs in this Court.

The other appeal, S. A. No. 20 of 1924, is really concluded by the findings of fact arrived at by the learned District Judge. More evidence was produced in this case than in the case we have just disposed of, but it is sufficient for us to say that on the evidence which was led in the suit which has given rise to this second appeal it was competent for the Judge to find that the premises in question were used for public worship. There is no merit at all in this second appeal and the defendant-appellant cannot possibly succeed. We, therefore, dismiss S. A. No. 20 of 1924

(1) 81 Ind. Cas. 518; 22 A. L. J. 169; (1924) A. I. R. (P. C.) 44 19 L. W. 253; (1921) M. W. N 278; 10 O. & A. L. R. 605; 29 C. W. N. 112; L. R. 5 A. (P. C.) 125 (P. C.).

with costs including in this Court fees on the higher scale. We allow the appellant three months from the date of this Court's decree to remove his materials and to clear the site; if he fails to carry out this order he will forfeit all rights to the materials.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 70 OF 1924.

August 24, 1925.

Present:—Sir Victor Murray Coutts-Trotter, Kt., Chief Justice, and Mr. Justice Viswanatha Sastri.

V. GOPAL NAIDU—APPELLANT

versus

MOHANLAL KANYALAL AND OTHERS—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), s. 9 (d) (iii)—Partnership—Act of insolvency committed by managing partner—Partner, other, whether can be adjudicated insolvent.

In order that a man may be made a bankrupt, the act of bankruptcy relied upon must be some act which can be definitely brought home to him. [p. 875, col. 1.]

It is impossible to state that there can be no case in which the act of an agent in closing down the business of principal and absconding from the creditors could be treated as an act of the principal. There might be cases in which a Court would be justified in certain circumstances in holding that the act of the agent in violation of s. 9 *(d) (iii)* of the Presidency Towns Insolvency Act might and should be treated as the act of the principal, and constitute the foundation for a petition in insolvency against the principal. [p. 876, col. 1.]

The question is, however, one for decision in each case whether on the facts of a particular case the agent occupies such a position that his principal must stand or fall by his acts for the purpose of bringing the case within the Statute of Insolvency. [p. 876, col. 2.]

Two persons traded together in partnership at Madras. One of them resided in Madras and managed the business. The other although ordinarily residing outside Madras used to come there to look into the accounts and see how the business was progressing. The business got into difficulties and the managing partner closed the business down and absconded in order to get out of the clutches of the creditors. On an application by the creditors to adjudicate both the partners as insolvents:

Held, that the circumstances were insufficient to hold that the act of the managing partner was necessarily in law the act also of the other partner, and that the latter could not, therefore, be adjudicated an insolvent. [p. 877, col. 2; p. 878, col. 1.]

Kastur Chand Rai v. *Dhanpat Singh*, 23 C. 26; 22 I. A. 162; 6 Sar. P. C. J. 617; 5 M. L. J. 269; 12 Ind. Dec. (N. S.) 18 (P. C.), followed.

In re Hurruck Chund Golicha, 5 C. 605; 6 C. L. R. 382; 2 Ind. Dec. (N. S.) 993, *In re Dhunput Singh*, 20 C. 771; 10 Ind. Dec. (N. S.) 520 and *In the matter of Brijmohun Dobay*, 2 C. W. N. 306, explained.

Ex parte Blain, In re Sawers, (1879) 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334 and *Cooke* v. *Charles A. Vogeler Company*, (1901) A. C. 102; 70 L. J. Q. B. 181; 84 L. T. 10; 17 T. L. R. 153; 8 Manson 113, referred to.

Appeal from the judgment and order of Mr. Justice Ramesam, dated the 23rd September 1924, and passed in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court, in I. P. No. 7 of 1923.

Mr. *K. S. Krishnaswami Iyengar*, for the Appellant.

Mr. *O. Thanikachalam Chettiar*, for the Respondents.

JUDGMENT.—This case raises a point of some interest. Two persons traded together in partnership. A man called Anantha Mudali, about whom no question arises in these proceedings, and the appellant Gopal Naidu had carried on a produce business in Madras and the facts seem to be that Anantha Mudali was managing the business in Madras, whereas Gopal Naidu resided ordinarily at Wallajabad, but the evidence which is given in the case—and that is the evidence that was relied upon by the adjudicating creditors themselves—establishes two things. The first is that when anybody, after the difficulties arose and in this concern they did arise—wanted to see Gopal Naidu when he went to Wallajabad, he found Gopal Naidu without difficulty and was able to put whatever he wanted to put before him. The other fact that emerges is that, although Gopal Naidu ordinarily resided at Wallajabad, he did from time to time come to Madras and look into the accounts and see how the business was progressing. What is before us is an appeal by Gopal Naidu against his adjudication. The circumstances which led to it are these. The business got into difficulties when the debts due to the petitioning creditors amounted to something over Rs. 10,000 and the difficulties came to a head—we will take it as proved, for it is not disputed—when Anantha Mudali closed the business and went away in order to get out of the clutches of his his creditors, thereby committing an act of insolvency, so far as he is concerned under s. 9 *(d) (iii)* of the Presidency Towns Insolvency Act. That is a perfectly good foundation for the insolvency petition and the adjudication consequent upon it as against Anantha Mudali but it has been sought in this case to use that act of Anantha Mudali in order to lay the foundation not merely of the petition against Anantha Mudali him-

self, but of the petition against the lant Gopal Naidu.

We had a very interesting argument practically giving us the whole of the history of the law on this matter both in England and in India. There is no doubt that the English cases of which I may take as an instance, *Mills* v. *Bennett* (1) as one of the earlier and *Ex-parte Blain, In re Sawers* (2) and *Cooke* v. *Charles A. Vogeler Company* (3) as some of the later, clearly lay down the principle, that, in order that a man may be made a bankrupt, the act of bankruptcy relied upon in English Law must be some act which can be definitely brought home to him, and the learned Judges point out that the act of the agent cannot ordinarily found a petition in bankruptcy. The chief pronouncement which has been approved of in many subsequent cases is contained in the judgment of Brett, L. J., in *Ex parte Blain, In re Sawers* (2). He says: "It was said that a person may commit an act of bankruptcy by his agent, and that the partner in England was the agent of these foreign partners, and, therefore, they committed an act of bankruptcy by their agent in England, that is, by allowing the execution to go without satisfying the judgment, and that, this having been done by their agent in England, they ought to be adjudged bankrupts. That assumes that a man can commit an act of bankruptcy by his agent, whether he has authorized the particular act or not, and that assumption seems to me to be equally wrong. I think that a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorized, and of which act he has had no cognizance". That is what Brett, L. J., said in *Ex parte Blain, In re Sawers*, (2) and, in my opinion, that is good law to-day in England and with a certain modification is probably good law in India. Meanwhile, the matter had arisen on several occasions in Calcutta as to whether a man could be adjudicated a bankrupt, because of the act of some person whom he left in charge of his business, namely, a *munib gumastha* or a *quasi*-partner with the authority of an agent to act for his fellow partners; and, so far as the High Court of Calcutta is concerned, the matter came to a head in the case of *In re Dhunput Singh* (4) which was decided in the year 1893 by a Bench consisting of Sir Comer Petheran, Chief Justice, Mr. Justice Prinsep and Mr. Justice Pigot. In that case there was a pronouncement of Mr. Justice Trevelyan, which lends colour to the suggestion that the act of an agent in departing with intent to defeat creditors was always, as a matter of course, to be treated as a departure by the principal on the ordinary principles of agency, and that view was definitely rejected by the Court very largely on the authority of the English cases. The learned Judge who deals most clearly with the matter is Mr. Justice Pigot. At page 795* of the Calcutta Reports, he says: "I think the general proposition laid down by Lord Justice Brett in *Ex parte Blain, In re Sawers* (2) only affirms, and is intended to affirm, the rule stated before by Lord Tenterden: 'I think a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorized and of which act he had no cognizance.'" "This general rule is, I apprehend, applicable in cases outside those of the class with which we are here concerned, and it seems to me absolutely to govern this case. There are, therefore, two reasons why the acts of Pannalal in this case, assuming them to amount, so far as he personally was concerned, to a departure, etc., with intent, etc., cannot be acts of insolvency committed by his master, Dhunput Singh. The first is that the nature of the acts themselves, as described in the section, is incompatible with the possibility of their being committed by any one but the debtor himself; the departure must be his departure, and the intent proved must be his intent. The second is that a man cannot commit any act of bankruptcy by an act of his agent which he has not authorized, and of which act he had no cognizance". He then goes on to say that, in accordance with the principles stated above which he accepts as correct, he thinks he must pronounce that the earlier case in the Calcutta High Court of *In re Hurruck Chund Golicha* (5) decided by Broughton, J., sitting in Insolvency was wrongly decided. This very case of *Kastur Chand Rai* v. *Dhanpat Singh* (6) came up before the Privy Council and was dealt with in *Kastur Chand Rai*

(1) (1814) 2 M. & S. 556; 105 E. R. 488; 15 R. R. 348.

(2) (1879) 12 Ch. D. 522 at p. 529; 41 L. T. 46; 28 W. R. 334.

(3) (1901) A. C. 102; 70 L. J. Q. B. 181; 84 L. T. 10; 17 T. L. R. 153; 8 Manson 113.

(4) 20 C. 771; 10 Ind. Dec. (N. S.) 520.

(5) 5 C. 605; 6 C. L. R. 382; 2 Ind. Dec. (N. S.) 993.

(6) 23 C. 26; 22 I. A. 162; 6 Sar. P. C. J. 617; 5 M. L. J. 269; 12 Ind. Dec. (N. S.) 18 (P. C.).

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v. *Dhanpat Singh* (6) in a judgment which was delivered by Lord Hobhouse. Their Lordships adopted what I may call a middle course. They thought that Mr. Justice Pigot had put the supposed rule much too broadly and they thought that it was impossible to say that there can be no case in which the act of an agent in closing down the business and absconding from the creditors could be treated as an act of the principal and they proceeded to say that there might be cases, of which by the way the one before them they clearly considered not to be one, in which a Court would be justified in certain circumstances in holding that the act of the agent in violation of the section of the bankruptcy might and should be treated as the act of the principal and in the light of that the expression of opinion by Mr. Justice Pigot required modification and a much more flexible rule should be laid down. I am reading from page 35* in which, after setting out the view taken by Mr. Justice Pigot and the High Court, their Lordships go on to observe as follows: "So understood, their Lordships cannot assent to the principle laid down by the High Court [in *Dhunpat Singh's case* (4).] The position of a *gumastha* differs in different cases. In some cases he may be little more, or no more than an ordinary manager. In others he may represent the business so entirely that the beneficial owners have no practical control over it and are quite unknown to the customers. Mr. Justice Pigot states the possible position of a *gumastha* with even more force than does Mr. Justice Broughton [I think in *Hurruck Chand's case* (5).] He says: 'It often happens that a large business is carried on for years by a *munib gumastha* or by a succession of them, in the name of principals who never are seen, or personally known, in connection with the business at all; sometimes in the name of family firms the members of which are constantly fluctuating from generation to generation, and of which firms it is or may be difficult to determine who are at any given time, actually members." Then their Lordships go on as follows: "Their Lordships think otherwise. They cannot hold that the creditors of firms exclusively managed by *gumasthas* have no remedy by way of insolvency, whatever the the *gumastha* may do; though he may make fraudulent conveyances, promote fraudulent executions, or, as in *Hurruck Chund's case* (5), 'leaving the creditors to find him or his master if they could'. And yet that consequence must follow if the principle laid down by the High Court in this case be the true one". And then they go on to say: "It is a question in each case whether the *gumastha* occupies such a position that the owner must stand or fall by his acts, so that his fraud or his flight shall by imputation be the fraud or flight of the owner or multitude of owners, for the purpose of bringing their case within the Statute of Insolvency. Their Lordships agree with the Judges who have held that the Statute admits of application to such cases, and that to exclude it may lead to injustice and confusion in many cases. They are by no means prepared to say that *Hurruck Chund's case* (5) was wrongly decided; though the position of the *gumastha* there is not stated so fully as they would think desirable, if the case were before them for decision. On the other hand they have no hesitation in agreeing with the High Court that Punna did not occupy such a position as to make the respondent liable to be declared insolvent on the ground of his personal conduct. The respondent appears to have been an active and responsible owner. His residence and head *koti* at Azimgunge were well-known. He occasionally came to Calcutta, and to the *koti* When difficulties arose, Punna applied to him to meet them; and when payment was suspended, Punna openly, by himself or by his servants, told the creditors that his principal was coming, and that they must wait for his action. Under such circumstances, even if Punna himself had committed the acts alleged by the appellant, it would, in their Lordships' opinion, be wrong to hold that his acts were those of the respondent." In that case a hint had been thrown out by Mr. Justice Pigot in the High Court and then by way of encouragement of the suggestion by Lord Hobhouse in the Judicial Committee that the case was one which might aptly be met by further legislation, and I suppose that it was that suggestion which brought about finally the Presidency Towns Insolvency Act of 1909 long after. We have the desired legislative machinery in the explanation to s. 9. That explanation runs as follows: "For the purpose of this section, the act of an agent may be the act of the principal, even though the agent may have no specific authority to commit the act."

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I take that section to be an attempt by the draftsman to carry out broadly and in spirit the effect of the observations of their Lordships of the Judicial Committee in *Dhunput Singh's case* (4) and I am content to deal with it on that footing.

Unfortunately in this country a misinterpretation, as we feel constrained to regard it, has been put upon that section, and, for this purpose, I wish to refer to two cases. One is the case reported as *In the matter of Brijmohun Dobay* (7), a decision of Mr. Justice Sale sitting alone in insolvency. What Mr. Justice Sale says on this point is very brief, and I will read his exact words. He deals first with a different point with which we are not concerned and then he goes on to say this: "If I had taken another view of this point, the question would still remain as to whether the departure of the *gumastha* under the circumstances and under the instructions of the debtor did not constitute an act of insolvency." Why indeed should it not? For, as is clearly expressed in the learned Judge's words, the departure of the *gumashta* was under the express instructions of the master. We are here concerned with a case where the departure of the agent is *ex hypothesi* an act done by himself without express authority of the principal. Then he goes on to say: "The difficulties which arose in *Dhunput Singh's case* (4) are absent from this. (We do not know what those difficulties are but one of them was clearly the absence of express instructions of the principal) and I am inclined to think that the departure of the *gumastha* did, under the circumstances, amount to an act of insolvency on the part of the debtor." This is really a decision on the facts of that case, and we entirely agree with the learned Judge that the facts of that particular case were such that certainly under the section of the Presidency Towns Insolvency Act and also previously to it under the guidance of the judgment of the Privy Council in *Kastur Chand Rao* v. *Dhanput Singh* (6) his was a perfectly correct determination of the matter before him.

The judgment of Sale, J., came before a Division Bench of this Court consisting of Spencer, J., and Phillips, J., There is no doubt, looking at the report, the one I have before me is *Kalianji Singhji Bhai* v. *Bank of Madras* (8) that those learned Judges regarded this decision of Mr. Justice Sale as laying down the sweeping principle that in all circumstances the act of an agent in closing down the principal's place of business must be treated to be the act of the principal and they treated that as being the existing law. They refer to English cases and they go on in these words: "In India it has been expressly enacted as an explanation to s. 4 of the Provincial Insolvency Act (that is the same in words as s. 9 of the Presidency Towns Insolvency Act) that for the purpose of that section, which deals with acts of insolvency committed by a debtor, the act of an agent may be the act of the principal. It was accordingly held in *In the matter of Brijmohun Dobay* (7) that the departure of an agent from the place of business did constitute an act of insolvency on the part of the principal." It did on the particular facts of that case, but unfortunately the learned Judges of the Madras High Court have taken to be a hard and fast rule of law what in truth and in fact was a decision on the particular facts of that particular case and the same fallacy undoubtedly vitiates the reasoning of Mr. Justice Ramesam when he tried this case. He took the decision of the C. W. N. case and he took the decision of the Madras High Court as laying down a hard and fast rule which he was bound to respect, and without reference to the particular circumstances of the case, he thought he was in law bound to treat the act of the agent as inevitably the act of the principal which is clearly incorrect.

In the light of these principles, Mr. Thanikachalam Chetty very wisely does not seek to uphold the decision of the learned Judge on this point. When we look at the affidavits it is clear that the facts of the case which are put by the creditors themselves before the Court constitute just the kind of facts which would enable the Court in its discretion to say in a particular case "this is not the sort of case where we will do what the Act allows us to do, namely, treat the unauthorized act of the agent in closing down the business as in law being the act of the principal." Mr. Thanikachalam Chetty does not, therefore, press us to remit the case back. On a further consideration in the light of these

(7) 2 C. W. N. 306.

(8) 31 Ind. Cas. 583; 29 M. L. J. 788; 3 L. W. 13; (1916) 1 M. W N. 12; 39 M. 693.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the District Munsif, Chingleput, in S. C. S. No. 181 of 1923.

Mr. *T. S. Anantharaman*, for the Petitioner.

Mr. *T. Pattabhirama Iyer*, for the Respondent.

JUDGMENT.—I think the decree of the Munsif is correct. The promissory note after reciting that the executant was the guardian of the minor and that Rs. 125 was due by the father of the minor proceeds as follows :—"I shall pay these Rs. 125 to you or order, on demand, with interest at 1 per cent. per mensem. I execute the promissory-note in these terms with my consent". It is signed by the defendant without any qualification or description.

It is difficult to see how I can in the face of the express personal promise to pay and the unqualified way in which the note is signed hold that the defendant is not liable on the note. It is open to the guardian to undertake to pay personally a debt due by the estate and there is no want of consideration if, creditor agrees to accept the guardian's personal responsibility instead of having recourse against the estate.

Reference has been made to *Padma Krishna Chettiar* v. *Nagamani Ammal* (1) but as pointed out by Wallis, C. J., in *Palaniappa Chettiar* v. *Shanmugam Chettiar* (2) the case does not decide that the executant who was the mother was not personally liable.

I have in *Ammalu Ammal* v. *Namagiri Ammal* (3) held that a person executing a negotiable instrument will be personally liable unless there is a clear indication in the document that he does not intend to incur personal liability but limits the recourse of the payee or holder to the person whom or the estate which he represents as trustee, executor, guardian or agent.

In the present case I see no such limitation.

The petition fails and is dismissed with costs.

V. N. V.
Z. K. *Petition dismissed.*

(1) 30 Ind. Cas. 574; 39 M. 215; 18 M. L. T. 216.
(2) 49 Ind. Cas. 23; 41 M. 815; 8 L. W. 317; 35 M. L. J. 90; 24 M. L. T. 51.
(3) 43 Ind. Cas. 760; 33 M. L. J. 631; 22 M. L. T. 391; 6 L. W. 722; (1918) M. W. N. 110.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 303 OF 1923.

September 24, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

T. R. M. S. RAMANATHAN CHETTI BY AUTHORISED AGENT MOHAMED ABDUL KADER ALIM SAHIB —DECREE-HOLDER—PETITIONER APPELLANT

versus

NALLA VEERAPPA PILLAI—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Application for execution—Duty of Court—Dismissal of application, when justified.

An Executing Court can dismiss an application for execution only if the creditor does not take proper steps or does not help the Court in executing the decree.

An order made by an Executing Court such as "Proceedings closed" or "petition lodged" or "the matter is held over," for statistical purposes is improper.

Appeal against an order of the District Court, Ramnad, at Madura, dated the 4th July 1923, in E. P. No. 46 of 1919, in O. S. No. 25 of 1917, on the file of the Court of the Subordinate Judge, Trichinopoly.

Mr. *K. S. Narayana Iyengar*, for the Appellant.

Mr. *R. Kesava Iyengar*, for the Respondent.

JUDGMENT.—The District Judge passed the following order:—"Proceedings closed. Sale held on 31st July 1922 is recognised."

We have pointed out in more cases than one that no Court which executes a decree can pass such an order as "Proceedings closed" or "petition lodged" or "the matter is held over" for statistical purposes. It is the duty of the Executing Court to execute a decree and it could dismiss the application only if the creditor does not take proper steps and does not help the Court in executing the decree.

We, therefore, set aside the order of the District Judge and direct him to restore the application to file and dispose of it according to law.

Costs will abide the result.

V. N. V.
Z. K. *Order set aside.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 38 OF 1925.

April 7, 1925.

Present:—Justice Sir Babington Newbould, KT., and Mr. Justice B. B. Ghose.

RAM PADA CHATTERJEE AND OTHERS—COMPLAINANTS

versus

BASANTA BAISHNABI AND OTHERS—ACCUSED.

Eastern Bengal and Assam Disorderly Houses Act (II of 1907), ss. 2, 3—Proceedings under Act—Procedure—Evidence not recorded—Order, legality of—Duty of Magistrate.

Proceedings under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act are not governed by the provisions of the Cr. P. C. It is not necessary for a Magistrate in such proceedings to act only on legal evidence and he need not administer an oath to the witnesses. But before passing an order under s. 3 of the Act the Magistrate must not only be satisfied that the houses in question are used as brothels or for the purpose of habitual prostitution or as disorderly houses, but he must further find an additional fact to bring them within the provisions of cl. (*a*) or (*b*) or (*c*) of s. 2 of the Act. [[p. 881, col. 2.]

A Magistrate has no power to take action against the keeper of a brothel under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act if the place is respectably conducted, unless it is in the neighbourhood either of an educational institution or of a cantonment so as to attract the operation of cl. (*a*) or cl. (*c*) of s. 2 of the Act. [p. 882, col. 2.]

It is not necessary for a Magistrate who desires to proceed against several persons under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act to draw up separate proceedings and hold separate enquiries in the case of each house, but in deciding the question whether annoyance is caused to the neighbours, the Magistrate must apply his mind to the case of each house separately. [*ibid.*]

A Magistrate summoned certain persons under the provisions of the Eastern Bengal and Assam Disorderly Houses Act and after questioning them and examining witnesses but without administering any oath to the witnesses or recording their evidence or the statement of the persons against whom the proceedings had been taken, he passed an order under s. 3 of the Act:

Held, that the proceedings taken by the Magistrate had not been conducted within the ordinary rules of fairness and his order must, therefore, be set aside. [p. 881, col. 2.]

Reference made by the Sessions Judge, Rajshahi, recommending that an order of the Deputy Magistrate, Malda, dated the 30th September 1924, be set aside.

Mr. *Gopal Chandra Das* and Babu *Satyendra Kishore Ghose*, for the Complainants.

Mr. *Narendra Kumar Bose* and Babu *Jatindra Mohan Chaudhuri*, for the Accused.

Mr. *Ashraf Ali*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is a Reference made by the learned Sessions Judge of Rajshahi recommending that the order made by the Deputy Magistrate of Malda, dated the 30th September 1924, under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act (Act II of 1907), be set aside.

On a petition submitted to the Magistrate of Malda by 25 residents in the vicinity summonses were served on 31 persons described as owners and 87 persons described as occupiers directing them to appear before the Magistrate on the 30th September 1924. After questioning the persons who appeared before him and examining witnesses, but without administering any oath to the witnesses, or recording their evidence or the statements of the persons, against whom the proceedings had been taken, the Magistrate passed the following order: "I am satisfied that the houses occupied by the women named below are used as brothels and for the purpose of habitual prostitution and they and the owners of the houses occupied by them named in the left-hand column are directed to discontinue such use by the 30th October 1924."

In the case of *Rajani Khemtawali* v. *Emperor* (1) it has been held that proceedings under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act of 1907 are not governed by the provisions of the Cr. P. C. It is not necessary for the Magistrate to act only on legal evidence and he need not and possibly he may not administer oaths. But before passing an order he must satisfy himself that the house is used as described in s. 2, cls. (*a*), (*b*) or (*c*) and he may do this in any way that does not violate the ordinary rules of fairness and propriety. In the present case we agree with the learned Sessions Judge that the proceedings taken by the Magistrate do not appear to have been conducted within the ordinary rules of fairness. In the case referred to the order of the Magistrate was upheld on the ground that the principles had not been violated. The Judges had before them a full record not only of the evidence taken but also of a local enquiry held by the Magistrate in those proceedings. In the present case we have no record except the written statement filed by the parties proceeded against and the judgment of the Magistrate. In the present case the Magis-

(1) 5 Ind. Cas. 323; 37 C. 287; 14 C. W. N. 404; 11 C. L. J. 297; 11 Cr. L. J. 112.

trate does not appear to have properly realized that before he can pass an order under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act he must not only be satisfied that the houses are used as brothels or for the purpose of habitual prostitution or as disorderly houses, but he must further find an additional fact to bring it within the provisions of cls. (*a*), (*b*) or (*c*) of s. 2 of the Act. Though in his subsequent explanation the Magistrate refers to the fact which might bring cl. (*a*) into operation, namely, that the houses are in the vicinity of educational institutions, but at the time of the enquiry the only allegation made before him was that the houses were used as brothels, etc., to the annoyance of the inhabitants of the vicinity. In his judgment he has stated that certain persons named by him have proved that all the women proceeded against with six exceptions are prostitutes and they use the houses occupied by them as brothals and for the purpose of habitual prostitution to the annoyance of the inhabitants of the vicinity including the witnesses examined by him. But in his final order he simply recorded that he is satisfied that the houses occupied by the women named below are used as brothals and for the purpose of habitual prostitution. He suggests that he has overlooked the importance of finding that each of these houses is used to the annoyance of the inhabitants of the vicinity. Under the law the Magistrate has no power to take action against the keepers of brothels provided that the place is respectably conducted unless it is in the neighbourhood either of an educational institution or of a cantonment so as to draw the operation of cl. (*a*) or (*c*).

In order to decide whether a brothel is used as such to the annoyance of the inhabitants of the vicinity, there is a great risk of confusion with findings when the cases of such a large number of houses are jointly considered. We do not mean that it is necessary to draw up separate proceedings and hold separate enquiries in the case of each of these houses. But we think in deciding the question whether annoyance was caused the Magistrate should have applied his mind to the case of each house separately. It seems obvious that when there were several brothels in a portion of the town if some of them are used in a disorderly manner to the annoyance of the neighbours the Magistrate, unless he applies his mind to each case separately, is liable to hold that all are similarly used. In fact his finding in his judgment suggests that there has been such confusion. There is no clear finding that every house has been so used as to cause annoyance.

We, therefore, accept this Reference and we set aside the order of the Deputy Magistrate of Malda, dated the 30th September 1924, directing the persons named in his order under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act to discontinue the use of the houses as brothels or for the purpose of habitual prostitution.

Z. K. *Reference accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 400 OF 1925.

October 21, 1925.

Present :—Mr. Justice Dalal.

Musammat SUMARIA *alias* BISMILLA—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 250—Complainant directed to pay compensation exceeding Rs. 50—Appeal, whether lies.

Where the total amount of compensation ordered to be paid by a complainant in one particular case exceeds Rs. 50, there is a right of appeal under cl. (3) of s. 250 of the Cr. P. C., even though the amount of compensation to be paid to each individual accused person may not exceed the sum of Rs. 50. [p. 883, col. 1.]

Criminal revision from an order of the Sessions Judge, Ghazipur, dated the 28th of March 1925.

Mr. *Saila Nath Mukerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant woman, *Musammat* Sumaria *alias* Bismilla, was ordered by the learned District Magistrate of Ghazipur to pay compensation of Rs. 50 to each one of three constables whom she accused of having committed extortion. The total sum she was required to pay was Rs. 150.

When she went up in appeal the learned Sessions Judge held that no appeal lay. I do not think that he was right in this conclusion. In cls. 1 and 2 of s. 250, where the limit of compensation is stated, it is definitely laid down that the limit

of compensation is Rs. 100 with respect to every accused person. On the other hand in cl. 3 which relates to appeal, the words are general and the right of appeal is given wherever the order relates to the payment of compensation exceeding Rs. 50. In cl. 3 the words of cls. 1 and 2 are not repeated of compensation to each individual accused person. I am, therefore, of opinion that when the total amount of compensation ordered to be paid by a complainant in one particular case exceeds Rs. 50 there is a right of appeal even though the amount of compensation to be paid to each individual accused person may not exceed the sum of Rs. 50.

I do not, however, think it worth while to send the case back to the Sessions Court. I have gone through the facts of the case and the fine of Rs. 150 appears to me to be excessive. I reduce the amount to Rs. 20 payable to each accused person and direct that the excess amount if recovered from the applicant woman shall be refunded to her.

M. A. A.
Z. K. *Order accordingly.*

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 382 AND 389 OF 1925.

August 26, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Mukerji.

PRAFULLA KUMAR ROY CHOWDHURY AND ANOTHER—ACCUSED——APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 120B—Conspiracy, charge of—Single individual, whether can be convicted—Criminal trial—Presumption against accused, whether permissible.

In a criminal case the Court cannot proceed upon an assumption that the accused must have done what he was required by the rules of his employment to do, in order to fasten liability upon the accused with regard to his knowledge of certain transactions which form the subject-matter of the charge. [p. 885, col. 1.]

Where a charge of conspiracy is based upon the fact that only three persons participated in the conspiracy, and two of those persons are acquitted of the charge, the third must necessarily be acquitted also, inasmuch as a charge of conspiracy cannot stand as against a single individual. [p. 886, col. 1.]

Appeals against an order of the Third Presidency Magistrate, Calcutta.

Babus *Probodh Chandra Chatterji*, *Debendra Narayan Bhattacharjya* and *Radhika Ranjan Guha*, for the Appellants.

Babus *Satindra Nath Mukerji* and *Bibhuti Bhusan Lahiri*, for the Complainant.

Mr. *Narendra Kumar Bose*, for the Crown.

JUDGMENT.—These two appeals arise out of an order passed by the Third Presidency Magistrate of Calcutta convicting the appellants Prafulla Kumar Roy Chowdhury and Manik Lal Sur of an offence under ss. 120B/403, Indian Penal Code and sentencing them each to undergo rigorous imprisonment for one year and to pay a fine of Rs. 500 or in default to undergo rigorous imprisonment for six months and awarding the fines, if realised, to the complainant as compensation. There was another accused person one Pramatha Nath Bose who was tried along with the appellants in respect of the same offence, but was acquitted.

The three accused persons were on the staff of the Bengali newspaper Basumati, Profulla as a despatcher, Manik as an assistant accountant and Pramatha as checker of postage stamps. The prosecution case was that they conspired with each other and were members of a conspiracy with the object of committing criminal breach of trust in respect of postage stamp or the money equivalent thereof and that they did in fact commit the offence of criminal breach of trust in respect of 67,606 half-anna prostage stamps of Rs. 2,112-11 their money value. The period was confined in the charge to that between the 3rd October 1924 and 23rd March 1925, both days inclusive. It was the prosecution case that a gigantic and well-organised swindle was being perpetrated in respect of postage stamps or their money equivalent for some considerable time, but for the sake of convenience of proof or to prevent embarrassment the charge was confined to such postage stamps as were meant to be affixed to cards which would require half-anna stamps to pass through the post as post cards. The circumstances under which the fraud was detected are fully described in the judgment of the learned Magistrate and need not be repeated here, but it is necessary to describe the procedure which obtained in the office in order to deal with the points which arise in the present appeal.

The procedure which was in vogue may

be gathered, though not without considerable difficulty, from the evidence of the proprietor P. W. No. 4 and the Manager P. W. No. 1. The difficulty arises from the divergence as to the details in the evidence of these two gentlemen due mainly to the disregard of sequence in the events that they were asked to state. The procedure appears to have been somewhat cumbrous and to state quite shortly it was as follows:—Letters issued from the different departments of the office—and there are sixteen departments of the concern manned by a very large number of employees—are entered in the issue registers of the respective departments and placed before the proprietor in his room for his signature. After they are signed the despatcher takes them from the proprietor's room. The despatcher then gets an advance from the Durwan requisite to cover the postage. This advance is made by the Durwan from out of the cash which he has in his hand on account of sale proceeds of newspapers sold through hawkers. The despatcher takes this advance from the Durwan after giving him a slip noting down therein the details of this amount. Stamp purchased with the amount so received is affixed by the despatcher to the letters and he produces them before the assistant accountant. The assistant accountant is supposed to check and count the number and value of the stamps on post cards, letters and packets enter the same separately on a slip, and while retaining the slip with himself, returns the post cards, letters and packets to the despatcher. The slip is made over by the assistant accountant to a clerk for being entered in the stamp register. This clerk ordinarily writes the stamp register, but in his temporary absence other persons as well write it including the checker of stamps. The despatcher takes the post cards, letters and packets to the checker of stamps whose duty it is to count them again and keep a note of the figures representing the stamps or their value. The articles are then despatched by the despatcher through some office peon to the post office. After the stamp register is written up the checker compares the entries with the notes kept by him and examines it with reference to the slip prepared by the assistant accountant which also passes on into his hands. The checker has also to compare the entries with the issue register of the different departments. The Durwan when he makes over the cash to the cashier, produces before him a book in which he gets written up a sort of account in respect of his collections and disbursements and he also produces before him the slip which the despatcher gives him for the advance taken. The cashier receives the balance, if any, and puts down in this book the items mentioned in the slip and makes a calculation therein showing the amounts spent on different heads and also the cash he receives from the Durwan. The cashier finds the amount taken by the despatcher to tally with what the stamp register shows and it is then inferred that the postage actually issued is the postage for which advance has been received from the Durwan. It may be conceded that if this procedure was followed to the letter, there could be no fraud but for the complicity of the despatcher, the assistant accountant and the checker, and each one of them was a *sine qua non* in the conspiracy and possibly others may also have participated in it.

Now as regards the embezzlement there can hardly be any room for doubt. A good deal of argument has been advanced before us in order to show that the examination of the books of the office by the C. I. D. officer was not comprehensive enough, that the figures arrived at by him cannot be acted upon as they do not take into account the postage that must have been used in letter and packets, that the proprietor's personal correspondence and as well as stamps which must have been used by the Collection Department, the Ayurvedic Department, the Editorial Department and the Agency Department have not been included in the calculation. Our attention has also been drawn to some of the dates on which the number of letters actually despatched are far in excess of the number for which postage was charged for, and we have been asked to hold that if an audit embracing all the departments of the concern was made and for a sufficiently long period it would appear that there is no foundation for the charge. The learned Magistrate has dealt with all these matters very fully in his judgment and I entirely agree with him in his conclusions in this respect. Making all sorts of allowance that is conceivable or that may be necessary nothing approaching a plausible explanation can be offered of the gigantic discrepancy in the figures. There is, in my opinion, not the slightest doubt whatever that a gross fraud was perpetrated in the office on a well-organised system and

for a considerable length of time, and but for the honesty of some people in the office, the fraud would have gone on without detection. The statements made by the appellants in their written statement or in their defence only betray an innate depravity of nature and only create in our minds an amount of prejudice against them which personally I find it somewhat difficult to get over. The proprietor apparently did not realise that he had to deal with a wicked world and it is this ignorance on his part that has caused him to suffer.

The substantial question for investigation in the case is as to the complicity of the two appellants. As I have already stated, if the procedure which I have described was strictly followed, in other words, if the three members of the alleged conspiracy did what it was their duty to do every day, all three must have been parties to it. In a criminal case, however, we are not permitted to proceed upon an assumption that they actually did what they were required by the rules to do. The learned Magistrate has recognised the importance of this doctrine when dealing with the case against the checker Pramatha. With regard to that accused he thus observes in his judgment:—"There is ground for suspicion that accused No. 2 Pramatha was also in the conspiracy, as there is no doubt that he had the stamp register before him daily, because almost every day his initials are to be found under both the credit and the debit side. But it is said that he checked the totals only and did not compare with the issue register at all. None of these registers do, in fact, bear any initials of the accused No. 2 or any indication that he looked over them. It cannot, therefore, be said for certain that these registers were placed before him or seen by him daily in the evening as alleged by the prosecution. This work of daily checking used formerly to be done by the proprietor himself but as he was busy with litigation in 1924 he made over this duty to accused No. 2. The checking was done at the end of the day after a strenuous day's work. It is very doubtful whether the checking was ever done as it was intended to be done." He thus acquitted Pramatha giving him the benefit of the doubt. The acquittal of this accused strikes at the root of the prosecution case and reflects upon the case as against the two appellants at least to this extent that we have got to be satisfied that the two appellants before us did actually follow the routine that was prescribed for them in respect of the items covered by the period in the charge and to see what exactly has been proved in the case in this respect.

As regards the appellant Prafulla there is not the slightest doubt upon the evidence of the Manager P. W. No. 1. the proprietor P. W. No. 4 and the Durwan P.W. No. 3, that the part ascribed to him in the routine used to be performed by him. There is other evidence corroborative of the evidence of these witnesses. To show that he was a party to the conspiracy, however, it has got to be proved that he took a larger sum of money from the Durwan than was actually necessary for the postage. On this point there is no evidence. The slips which he used to give to the Durwan are not available, the entries in the Durwan's book (Ex. 19) which purported to have been made by the cashier from those slips have been proved only by proof of the handwriting of the cashier; the cashier has not been called. It is said he has left office. This is not altogether unnatural as Prafulla is his brother; but that does not relieve the prosecution from proving that the entries so made by the cashier really represented what Prafulla had stated in the slips. The Durwan does not and indeed cannot be expected to say what amounts were taken by Prafulla. Prafulla's connection with the entries made in the stamp register or his knowledge of any other documentary evidence showing that larger amounts were being entered than were actually necessary has not at all been established. In fact it has not been shown that the canspiracy was not equally possible without Prafulla but with his brother the cashier as one of the conspirators; and so long as this contingency is within the range of possibility Prafulla's complicity cannot be held to have been established. Prafulla's extra-judicial confession has not been relied upon by the learned Magistrate and his reasons for so doing are sound and substantial. To bring home the offence to Prafulla in my judgment we have to assume the very facts which the prosecution has failed to prove against him.

Besides the evidence to which I have referred the prosecution relies upon the pieces of documentary evidence, namely, Exs. 2 and 3. These are two of the slips which used to be prepared by the assistant cashier. All the other slips are missing

from the office. One of them, Ex. 2, is said to relate to a date subsequent to the period covered by the charge and is only relevant as showing the practice and that the assistant cashier used to prepare such slips. The other slip, Ex. 3, of which the lower portion is said to have been in his handwriting shows that he made an entry indicating that postage was being charged for a number of post cards far in excess of these that were being issued on that particular day. The latter undoubtedly is a very valuable piece of evidence as against the appellant Manik, but it does not touch the appellant Prafulla.

In my opinion, therefore, there is no evidence which would justify the conviction of Prafulla upon the charge on which he has been tried, and his appeal should be allowed and he should be acquitted and released.

With the acquittal of Prafulla, the other appellant Manik stands acquitted as a matter of course, for the conspiracy alleged in the charge is one in which only three persons are alleged to have been participators, of whom one was acquitted by the learned Magistrate and the other Prafulla has just been acquitted by this Court. The appellant Manik, therefore, should also be released.

Cuming, J.— I agree.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 62 OF 1925.

September 30, 1925.

Present :—Mr. Justice Fawcett and Mr. Justice Madgavkar.

EMPEROR—PROSECUTOR

versus

KARIM RAJMAHAMAD—ACCUSED.

Bombay Public Conveyances Act (VII of 1920), ss. 12 (2), 26—Bombay General Clauses Act (I of 1904), s. 19—Superintendent of Police, powers of, whether can be delegated to Assistant Superintendent—Delegation, mode of—Proof of delegation—Driving conveyance after suspension of license—Offence.

A District Superintendent of Police has the authority to delegate powers conferred upon him under the Bombay Public Conveyances Act to the Assistant Superintendent of Police, but where in a criminal case the question arises whether there was such delegation, the delegation must be clearly proved. It is desirable that a question of such delegation of powers should not depend on a general verbal order made by the Superintendent of Police but that there should be a written order, giving references to the various sections of the Act and specifying particular powers and duties which the Superintendent delegates to the Assistant or Deputy Superintendent of Police. [p. 888, col. 1.]

The power to refuse to grant a license or to refuse to renew it or to suspend or cancel it, is one which is of some importance, and before delegating such a power, the Superintendent of Police ought to consider whether it can be properly delegated. [*ibid.*]

Where a person continues to drive a public conveyance after he has been deprived of his license he ought to be prosecuted under sub-s. (1) of s. 26 of the Bombay Public Conveyances Act for driving a public conveyance without a license for the time being in force, rather than under sub-s. 2 (*c*) of the section for failure to produce a license, which is not an offence really affected by the question of suspension of license except on the principle of *lex non cogit ad impossibilia* [p. 887, col. 2.]

Reference made by the District Magistrate, Poona.

JUDGMENT.

Fawcett, J. and Madgavkar, J. —(*August* 26*th*, 1925.)—In this case the accused was convicted of failing to produce a license on demand by a Police officer under cl. (*c*) of sub-s. 2 of s. 26 of Bombay Act VII of 1920. The District Magistrate refers the case to us on the ground that the reason for this failure was the fact that the Assistant Superintendent of Police, Poona, had suspended the accused's license, and that he had no authority to make this suspension under sub-s. (2) of the Act read with the Commissioner C. D.'s Notification of December 13, 1920, which says that the duties assigned by the Act to the Commissioner of Police shall be performed by the District Superintendent of Police. He says that he has made inquiries with the District Superintendent of Police whether the Assistant Superintendent of Police had authority to suspend a license under s. 12 (2) of the Act; and that the District Superintendent of Police reported that the Assistant Superintendent "has no lawful authority to suspend a license," but he considers the Commissioner C. D.'s Notification is a sufficient authority for that act. The District Magistrate is of opinion that, unless this power has been delegated to the Assistant Superintendent specifically, the action taken by him is illegal and the sentence of fine inflicted on the accused is consequently illegal.

It is not quite clear whether the District Superintendent of Police means that he has not in fact delegated authority to the Assistant Superintendent of Police to suspend a license under s. 12, or whether

he means that in spite of such delegation there is no lawful authority in view of the Commissioner C. D.'s Notification. If there has in fact been a delegation of authority by the District Superintendent of Police to the Assistant Superintendent, then it seems to me that the Assistant Superintendent's act would not be unlawful merely because the Commissioner's Notification refers to the District Superintendent of Police and not to any of his subordinates. Section 19 of the Bombay General Clauses Act I of 1904, lays down that "it shall be sufficient, for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully performing the duties of that office in the place of their superior, to prescribe the duty of the superior." A power to delegate may be expressor implied in an Act: thus in *Dharam Chand Lal* v. *Queen-Emprsss* (1), it was held that a *nazir* had implied authority to delegate the execution of a warrant to his peon. The rank of an assistant to an officer necessarily implies that the assistant may ordinarily exercise the powers of that officer, when and as duly delegated to him. Many instances can be cited where this power is expressly provided for. Thus under s. 6 of the Land Revenue Code, an assistant to a Commissioner shall perform such duties as the Commissioner to whom he is subordinate may from time to time direct. Again under s 10 of the same Code an Assistant Collector is to perform such particular duties as the Collector may from time to time see fit to assign to him. In the General Police Act V of 1861 it is enacted by s. 1 that the words "District Superintendent" or "District Superintendent of Police" shall include any Assistant District Superintendent or other person appointed by general or special order of the Local Government, to perform all or any of the duties of a District Superintendent of Police under that Act in any District. Paragraph 23 of the Bombay District Police Manual, Vol. I, page 8, shows that under that particular section a Deputy Superintendent of Police has been empowered to perform such of the duties of the District Superintendent as the latter may from time to time authorise him to perform on his behalf. Again sub-s. (2) of s. 6 of the Bombay City Police Act 1902, says, an Assistant Commissioner shall exercise such powers and perform such duties as may from time to time be delegated or assigned to him by the Commissioner of Police. The Bombay District Police Act, 1890, does not contain any express provision on the subject but in view of what is implied in the word "assistant" itself, it may, I think, be legitimately taken that a similar power of delegation is implied. Under s. 27 cl. (*f*) of that Act the Inspector-General of Police may make regulations in regard to the particular duties to be done by different Police Officers, and accordingly the implied power of delegation can be regulated in that manner. Subject to any rule preventing the District Superintendent of Police from delegating his power to suspend a license under s. 12 of the Bombay Public Conveyances Act VII of 1920, there is, in my opinion, no legal impediment to such a power being delegated to the Assistant Superintendent. The Commissioner's Notification is one that is framed with reference to s. 36 of the Act VII of 1920, which requires him to appoint some to perform the functions assigned by that Act to the Commissioner of Police. It, therefore, naturally refers only to the District Superintendent of Police, but in view of s. 19 of the Bombay General Clauses Act and the considerations I have mentioned, that notification in itself does not necessarily make the Assistant Superintendent's act unlawful. Accordingly, I think that, before we decide to interfere, we should have a report from the District Magistrate as to exactly how matters stand in regard to any actual delegation of authority by the District Superintendent of Police to the Assistant Superintendent. It may further be pointed out that, if the accused's license has been suspended, it would have been more appropriate to prosecute the accused under sub-s. (1) of s. 26 for driving a public conveyance without a license for the time being in force rather than for failure to produce a license, which is not offence really affected by the question of suspension of the license except on the principle of *lex non cogit ad impossibilia*.

[The case was sent back for necessary report, and when it was received, the reference was answered as follows :—]

Fawcett, J.—The District Superintendent of Police has now reported that no written orders delegating the authority vested in him by the notification of

(1) 22 C. 596; 11 Ind. Dec. (N. S.) 397.

the Commissioner, C. D., of December 1920 have been issued by him, but under verbal orders all the duties involved in the working of the Public Conveyances Act in Poona have been carried out by the Assistant Superintendent of Police or the Deputy in charge of City Sub-Division since 1915.

As already mentioned in my previous judgment the delegation of powers under the Act of 1920 can be effected, and the definition of "Commissioner of Police" in s. 2 of the Act supports this view. But in a case where there has been an exercise of a power under alleged delegated authority, it is clearly necessary for a conviction in a case like the present that the delegation should be clearly shown. No doubt, the District Superintendent of Police means not only that there was a delegation of authority to perform the duties imposed by the Act on the District Superintendent of Police in place of the Commissioner of Police, but also of authority to exercise any powers conferred by the Act on the District Superintendent of Police in the same manner; and, therefore, it is possible to say that the Assistant Superintendent of Police, who suspended the accused's license in this case, had authority to do so under sub-s. (2) of s. 12 of the Act. But, on the other hand, it is, in our opinion, desirable that the question of such authority should not depend on a general verbal order of the kind in question, and the District Superintendent of Police ought to pass written orders, giving references to the various sections of the Act, and specifying particular powers and duties which he delegates to an Assistant or Deputy Superintendent of Police. The power to refuse to grant a license or to refuse to renew it, or to suspend or cancel it, is one which is of some importance and, before delegating such a power, the District Superintendent of Police ought to consider whether it can properly be so delegated. Having regard to these considerations, we do not think that the conviction should be allowed to stand. The omission of the accused to produce his license was in consequence of the order of the Assistant Superintendent of Police suspending it; and as it is not clear that the Assistant Superintendent of Police had proper authority to deprive the accused of his license for a time, the conviction does not rest on a sufficient basis.

We, accordingly, reverse the conviction under s. 26, sub-s. (2) (*e*) of Bombay Act VII of 1920, and direct that the fine of Rs. 10, if paid, should be refunded to the accused.

Z. K. *Conviction reversed.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 615 OF 1925.

October 22, 1925.

Present:—Sir Grimwood Mears, KT., Chief Justice.

RAGHUNATH KANDU—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 227, 237 Penal Code (Act XLV of 1860), s. 290—Police Act (V of 1861), s. 34—Obstruction to public, charge of—Nuisance, conviction for, legality of—Alteration of charge—Procedure—Notice to accused—Power of Court.

Section 227 of the Cr. P. C. deals with the alteration of a charge, but the alteration must be read and explained to the accused and the latter must know what he is charged with and what offence he has to answer. Section 237 of the Code must be read with s. 227, and a Court has no power to convict an accused person of an offence of which he has not been told anything. [p. 889, col. 1.]

Section 237 of the Cr. P. C. applies only to cases mentioned in s. 236 of the Code, which deals with cases in which an act is of such a nature that it is doubtful which of several offences the facts will constitute. [p. 889, col. 2.]

Accused was tried for an offence under s. 34 of the Police Act on the allegation that he had kept logs of wood in a public place and had thereby caused obstruction to the passers-by. The Magistrate in his judgment found that the act of the accused did not come within the purview of s. 34 of the Police Act but that it amounted to an offence under s. 290 of the Penal Code and convicted the accused of the latter offence, without having at any previous stage of the case explained to the accused that he would have to meet a charge under s. 290 of the Penal Code:

Held, that the conviction was illegal and must be set aside. [*ibid.*]

Criminal reference made by the Sessions Judge, Azamgarh, dated the 21st September 1925.

REFERRING ORDER.—This is an application for revision of an appellate order of Pandit Uma Charan Misra, Magistrate, First Class dismissing an appeal against the order of conviction under s. 290 of the Indian Penal Code passed by the Tahsildar of Mohammadabad against the applicant Raghunath Kandu. The facts of the case are as follows. Applicant Raghunath Kandu was sent up by Mubarakpur Police for trial under s 34 of the Police Act V of 1861. It was complained that he

kept logs of wood in a public way, and thereby caused obstruction to the passers-by. It was proved that logs of wood were lying there and they could cause obstruction on market days. The accused admitted that he cut a tamarind tree and some pieces of timber lay on the public way. He however pleaded that he could not remove them on account of the prevalence of plague in the village. The accused produced no evidence in his defence.

The Tahsildar Magistrate found that the accused's act did not come under s. 34 of the Police Act and it was an offence under s. 290 of the Indian Penal Code. He, therefore, convicted applicant under the latter section and fined him Rs. 10. Applicant preferred an appeal which was dismissed and it was held that under s. 237 of the Cr. P. C. a person charged with one offence can be convicted of another offence. Appellant now comes in revision to this Court and I think this order cannot be upheld

The accused was charged under s. 34 of the Police Act. The accused must have known through his legal advisers that he committed no offence under the Police Act. He, therefore, made no defence. The accused was never told that there was a charge under s. 290 of the Indian Penal Code against him. He had no knowledge of the charge against him until he was convicted and sentenced. It appears from the judgment of the Tahsildar that s. 290 of the Indian Penal Code was introduced by him in his judgment at the very last moment. The accused had no opportunity to meet the charge. He did not even know of it till his conviction. This, in my opinion, is not only an irregularity but an illegality which had prejudiced the accused. It is possible the accused might have been advised to give evidence that there was no public nuisance and the keeping of the wood there caused no public inconvenience had he been informed that he was charged with committing a public nuisance.

Section 227 of the Cr. P. C. deals with alteration of a charge but it requires that the alteration shall be read and explained to the accused. The accused must know what he is charged with and what offence he has to answer. Section 237 of the Cr. P. C. must be read with s. 227 of that Code. A Court cannot convict an accused person of an offence of which he has not been told anything.

Then again s. 237 applies only to cases mentioned in s. 236, Cr. P. C. which deals with cases in which an act is of such a nature that it is doubtful which of several offences the facts will constitute. In the present case it was not doubtful whether an offence under s. 34 of the Police Act or under s. 290 of the Indian Penal Code was committed. In my opinion s. 237 can not apply to this case and even if it can be said to apply the accused must be told what he is charged with. It is not just to convict a man without telling him his offence.

I find a similar case has been recently decided by the Hon'ble High Court in which the same view has been taken. It is the case of *Dhum Singh* v. *Emperor* (1) decided by Mr. Justice Banerji on the 9th April 1925. The case has not been reported in any recognised law report.

For the above reasons I allow this application for revision and order the record of this case to be submitted to the Hon'ble High Court with a recommendation that the applicant's conviction may be set aside, and his fine may be refunded. The Magistrate's explanation will also be called for and submitted with the record.

Mr. *A. P. Dube*, for the Applicant.

JUDGMENT.—This conviction must be set aside and the fine refunded.

M. A. A.

Z. K. *Conviction set aside.*

(1) 88 Ind. Cas. 1; 23 A. L. J. 436; (1925) A. I. R. (A.) 448; L. R. 6 A. 143 Cr; 26 Cr. L. J. 1057.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 458 OF 1925.

August 26, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Mukerji.

H. W. SMITH—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 304A—Culpable rashness or negligence, what amounts to—Car driven slowly at night over road under repairs—Death caused of men sleeping on road—Offence.

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross or culpable neglect or failure to exercise that reasonable

and proper care and precaution to guard against injury either to the public generally or to the individual in particular, which, having regerd to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. [p. 891, col. 1.]

Culpable rashness is acting with the consciousness that mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening; the imputability arises from acting despite the consciousness. Culpable negligence is acting without consciousness that the illegal and mischievous act will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection. [p. 892, col. 2.]

Each case must be judged in reference to the precautions, which in respect to it, the ordinary experience of man has found to be sufficient, though the nse of special or extraordinary precautions might have prevented the particular accident which happened. [p. 893, col. 1.]

Accused was driving in an old and noisy motor car, at night, along a road which was under repairs, at a slow pace. The car ran over two coolies who happened to be sleeping on the road and caused their death:

Held, that it could not be said that the accused had been guilty of culpable rashness or negligence and that consequently he was not guilty of an offence under s. 304A of the Penal Code. [p. 892, cols. 1 & 2.]

Appeal against an order of the Chief Presidency Magistrate, Calcutta, dated the 3rd July 1925.

Mr. *Bagram* and Babu *Tarakeswar Pal Choudhuri*, for the Appellant.

Mr. *Khundkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

Cuming, J.—This is an appeal against an order of the learned Chief Presidency Magistrate, Mr. T. Y. Roxburgh, convicting the accused, one H. W. Smith, under s. 304A, Indian Penal Code, and sentencing him to one month's simple imprisonment and a fine of Rs. 500.

The facts appear to be these:—

The occurrence took place at about 10-30 or 11-30 P. M. on the night of the 12th May last.

The accused Smith lives in Howrah and had come into Calcutta driving his own car, a Mors car No. 1990, with a friend Mr. Williams. He got as far the Mayo statue and was then coming from west to east. At the Mayo statue he determined to go home *via* the Red Road and, therefore, turned to the right and went along the Dufferin Road. About half way up the road he ran over and killed two coolies who were sleeping on the road.

The case of the prosecution is that the road was under repairs and that there was a barrier right across the road to prevent people driving along the road and that the accused killed these two coolies by doing a rash and negligent act, to wit, driving his motor car rashly or negligently from north to south along the Dufferin Road which was closed to traffic and barricaded and having red light across, the road being in various stages of repair. The defence case is that there was no barrier across part of the road and that the accused entered the road by the open portion. He went over then to the proper side of the road. He did not see the coolies who were lying wrapt up in *gamchas* on the road, did not even know he had driven over them and knew nothing till he was stopped by the constable at the south end of the road by the Dufferin statue. His car is a very old and noisy one. It cannot travel at more than 10 miles an hour and he was not driving negligently or carelessly. The learned Magistrate found that at the time of the accident the barrier did not reach right up to the tram line on the west of the road. The accused, he holds, must have heard one of the warnings he got, one being from the witness Ramzan that there were coolies sleeping on the road. That he must have heard the shouts after the accident and hence known he had gone over some one. Finally the learned Magistrate holds that the accused entered a road on which there were warning lights and that he was talking to the man at his side. This was itself negligance and that accused must have known from the lights that special caution was necessary and that had he driven with reasonable care the coolies would not have been killed. He finds that excessive speed has nothing to do with the case as the car cannot do more than 10 miles an hour.

First as to the fact—

Mr. Bagram contends that even if Ramzan did shout to the accused that there were men sleeping on the road it does not necessarily follow that the accused heard him and with this I agree. The coolies in the hut close by did not hear Ramzan. The accused was driving. The car was old and noisy and there is nothing improbable in the allegation of the accused that he did not hear any one shouting that there were coolies sleeping on the road. The only person who shouted this information was Ramzan. Then there is the evidence of the constable at the north end of the road by the Mayo statue

that he shouted to the accused that the road was under repairs. The evidence when considered would show that he must have been some forty yards from the accused. Again the accused may or may not have heard him and if he did hear him may not have realized what he said or even that he was shouting to him. Even if accused heard him and realized he must not go on the road because it was under repair it does not affect the case as I shall afterwards show. The prosecution contends that accused must have known he had gone over these coolies and still drove on after doing so. It does not follow that because the accused felt a bump he must have known he had gone over anyone. The road was under repair and he may well have thought he had gone over some road material, though it is his case he noticed nothing. But the accused's conduct after the accident in no way affects his guilt or innocence so far as the present charge is concerned.

The facts which I find proved are that accused entered the road through an opening at the end of the barrier on the west side of the road and then crossed to the east side, the proper side of the road on which to drive, that he was driving at a speed not exceeding 10 miles an hour and he drove over the two deceased who were sleeping on the road killing them. I have now to consider whether the accused caused the death of these two unfortunate men by a rash and negligent act. Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury but without intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequence. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. This is the law on the point as laid down by Straight, J., in the case of *Empress of India* v. *Idu Beg* (1) and with the view of the law I am in entire agreement. Reference may also be made to the case of *In re Nidamarti Naga Bhushanam* (2). We have then to consider what is the criminal rashness or negligence which has been attributed to the accused and whether what he did comes within the mischief of criminal rashness and negligence. If I understand the case of the prosecution rightly it is that he drove along a road which was under repair and while doing so was talking to a friend alongside of him. Now there is nothing rash or negligent *per se* in driving along a road under repair or partly under repair any more than on a road not under repair except perhaps to the person driving. During the day time no doubt there would be men working on the road the avoiding of whom would require caution as the avoiding of anyone on a road does. At night normally it is not to be expected that men would be found working on a road nor is it the allegation of the prosecution that anyone was working on the road the particular night. As a matter of fact one would expect less traffic if any traffic at all at night on a road under repair. Anyone driving on a road under repair would be called on to exercise the same caution as he would on a road in its normal condition, that is to say, to look out to see what persons or vehicles were on the road making the ordinary use of the road. What further caution is called for I fail to see. A driver cannot be expected to look out for what can only be described as a very abnormal condition of things. The normal use of a road is for the purpose of passing or re-passing on it. It certainly cannot be said that one of the normal uses of a road is for the purpose of sleeping. I do not think that it can possibly be held that a driver should anticipate that he will find persons sleeping on a road, even at night, though a road under repair, and that he must look out for persons making such an abnormal use of the road and if he does not do so he is guilty of negligence or rashness.

As I have pointed out there is no special danger *per se* in driving along a road under repair except perhaps to the driver himself. The accused in this case was not driving recklessly. He was driving at 10 miles per hour. The deceased had wrapt themselves up in *gamchas* and so in the night, even though there were lamps, would be extremely difficult to distinguish. The accused

(1) 3 A. 776 at p. 779; A. W. N. (1881) 132; 6 Ind. Jur. 264; 2 Ind. Dec. (N. S.) 697.

(2) 7 M. H. C. R. 119; 1 Weir 324.

cannot reasonably be held liable to anticipate that he should find persons sleeping on a road. If, therefore, he did not look for persons sleeping on a road he cannot be held guilty of rashness or negligence for not doing so. He could not know that his act in driving on the road was dangerous because people were sleeping or might be sleeping on it and yet did the act taking the risk of running over these sleeping people. It is not suggested his speed was excessive. In fact it was very slow for a motor car. The fact that he was talking to a friend does not show he was driving rashly or negligently. Even if he had not been talking it is highly improbable he would have looked out for persons sleeping on the road. There is nothing to prevent a man talking and at the same time taking the ordinary precautions against accident. I do not think that the engaging in conversation whilst driving is necessarily a rash or negligent act. It might be in some circumstances, as for instance, in busy crowded traffic. The decision to which I must come, therefore, on a consideration of all the facts of the case is that the accused in acting as he did, did not act either rashly or negligently. That these two unfortunate men have lost their lives is to be much deplored but the accused cannot be held criminally responsible for their death. As to the accused's conduct after the accident so far as the present charge is concerned it is immaterial. But in view of the Magistrate's remarks in justice to the accused himself I should deal with this point because clearly if he drove on knowing he had run over these men his conduct would be deserving of the severest censure. It would be the act of a man entirely callous and indifferent to the injury he inflicted on his fellow creatures. I am not, however, satisfied that he must have known he had driven over someone. He may have been aware of the bump although both he and Mr. William state they felt no bumps, but bumps would probably be met with on a road under repair and being expected may not have been noticed. No doubt the other coolies there shouted. But it does not follow that the accused necessarily must have heard the shouting or, if he did, have realised they were shouting at him. The shouting would not begin at once. The car was as has been noted before an old and very noisy one. It is significant that accused when stopped by the Police constable on duty at the Dufferin statue said at once, "Why should I stop? I have committed no offence" and at once went back to the place of occurrence when requested to do so. The accused at once stopped when asked to by the constable at the end of the road and made no attempt to go away.

Taking all the facts and circumstances into consideration I do not think that the learned Magistrate was justified in drawing the inference he did that the accused must have known he had run over some one. I think on this point the accused is entitled to the benefit of the doubt. The result is, the finding and sentence must be set aside and accused should be acquitted; the fine, if paid, to be refunded.

Mukerji, J.—I agree that this appeal should be allowed and the accused acquitted and I wish to add a few words.

The difficulty in dealing with a case of this nature is to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that lives have been lost and the responsibility for the same ultimately rests with none else but the accused. This prejudice is bound more or less to reflect on the question of the culpability of the accused and give rise to false issues which tend to cloud judicial vision.

Section 304-A has been judicially interpreted in a number of decisions of which two stand out as the most valuable. In the case of *In re Nidamarti Nga Bhushanam* (2), Holloway, J., said this: "Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection." In the case of *Empress of India* v. *Idu Beg* (1), Straight, J., observed as follows:—"Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to

cause injury or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care... to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted." The learned Deputy Legal Remembrancer has cited before us a number of other decisions in which s. 304-A of the Indian Penal Code or the English Law of Manslaughter by negligence has been explained, and also referred to some cases dealing with negligent use of public way, in order to show under what circumstances special care is necessary, want of which will make one liable for the offence. The one principle of universal applicability deducible from all these cases is that which was laid down by Alderson B. in *Blyth* v. *Birmingham Waterworks Co.*, (3), and adopted by Brett, J., in *Smith* v. *London and South-Western Ry. Co.* (4): "Each case must be judged in reference to the precautions, which, in respect to it, the ordinary experience of men has found to be sufficient, though the use of special or extraordinary precautions might have prevented the particular accident which happened."

The question whether the accused's conduct amounted to culpable rashness or negligence, therefore, depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient upon all the circumstances of the case.

Now as to the circumstances I would prefer to take the findings of the learned Magistrate and rest my judgment on those findings.

The learned Magistrate has found that the barrier at the entrance did not extend right up to the tram lines; in other words that there was a space between the end of the barrier and the tram lines; over this space as also on the space on the other side of the lines there was no barrier. There were also a number of red lights and perhaps also a "road closed" notice. The accused's conduct in entering the road was unquestionably reprehensible, but the real issue is what did these circumstances indicate. In my judgment they indicated that the road was closed up, perhaps not to the extent of its entire width, certainly also that there was a possibility of men working, walking, or moving about on the road. They would also, in my opinion, suggest that there was every chance of one coming across excavations or obstructions or impassable portions of the road or such portions as were not fit for being used as a road. All these would put one on his guard and call for special care and circumspection on his part, but only to the extent of avoiding or getting round an accident such as would result from the possibilities to which I have referred. The idea, however, would hardly cross the average prudent and reasonable mind that there was chance of people sleeping on the road or rather on a side of the road with their bodies covered up except for the faces, and lying partly on the road and partly on the grass.

Then as to the various warnings and shouts alleged to have been given. As regards the warning given by the constable on duty at the Mayo statue, it conveyed nothing more than what was indicated by the barrier, the lights and the notice. The shouts of Ramzan calling out "Taxiwalla stop, the road is closed, it is forbidden to come" or "Admi Sota, Admi," it is reasonable to believe, were either not heard by the appellant or were misunderstood by him. The utmost that it means is that the appellant was not attentive to hear what was being shouted out by people on the road; but it is hardly obligatory on the driver of a car to have his attention directed to shouts so long as he can trust his eyes and sees nothing in front. The question whether the appellant heard the shouts of the coolies after the car had passed over the men and the question whether the appellant did or did not feel a bump are hardly relevant in the face of the finding that the appellant was not driving at an excessive speed. If these shouts were heard and the bump was felt and the appellant understood what had happened and if the circumstances, as deposed to by the constable at the other end of the road, under which the car was stopped be found to have been established, that touches the question of

(3) (1856) 11 Ex. 781; 25 L. J. Exch. 212; 2 Jur. (N. S.) 333; 156 E. R. 1047; 105 R. R. 791.

(4) (1870) 5 C. P. 98 at p. 102.

the appellant's conduct as a gentleman, but has very little to do with the question of his culpability or otherwise in respect of the offence with which he was charged.

In my opinion though special care was called for on the part of the appellant, the degree of care which the learned Magistrate has expected of him is not warranted by the circumstances of the case, and it has not been established that the appellant was so rash or negligent as would render him guilty of an offence under s. 304-A, Indian Penal Code. The appellant, therefore, should be acquitted and released from his bail.

In conclusion I should like to observe that though the appellant escapes a conviction as the law is unable to reach him, if he had not chosen to drive on the road which was not open to traffic, the lives of two poor and innocent men who perhaps were the only supporters of their respective families would not have been lost, and the code of honour and morality demands that he should make adequate amends to the very best of his means to the dependants of those two men for the lamentable error of judgment on his part.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 563 OF 1925.

September 19, 1925.

Present:—Mr. Justice Sulaiman.

DIP SINGH—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 24, 25—Confession made under pressure of Police, admissibility of—Confession made to Police Officer, whether can be referred to, to explain discrepancy.

Where the pressure exercised by a Police Officer on an accused person is sufficient to furnish the latter with grounds which would appear to him reasonable for supposing that by making a confession he would gain an advantage or avoid an evil of a temporal nature, the confession would not only be weak in value, but would be wholly inadmissible under s. 24 of the Evidence Act. [p. 895, cols. 1 & 2.]

A confession made to the Police is totally inadmissible in evidence and cannot be referred to in order to explain away a discrepancy in a confession subsequently made to the Magistrate. [p. 895, col. 1.]

Criminal appeal from an order of the Sessions Judge, Farrukhabad, dated the 30th April 1925.

The Government Pleader, for the Crown.

JUDGMENT.—This is an appeal from a conviction under s. 328 and s. 458-75 of the Indian Penal Code. The prosecution case is that on the 6th January last the accused sold some flour to the complainant Bhaggi a money-lender, which had been poisoned with *dhatura* that his children partook of the loaves of bread made of it and were taken ill and that the accused with three others entered the complainant's house during the night and caused injuries to him.

The learned Sessions Judge is unable to believe the oral evidence for the prosecution. According to him "the case against Dip Singh must depend on whether the Court believes his confession."

The facts that Bhaggi's relations, who partook of the bread, were poisoned and that Bhaggi himself was assaulted during the night admit of no doubt. The only question is whether the comlicity of Dip Singh has been established by the evidence.

Bhaggi had known Dip Singh from before yet admittedly he did not recognise him as one of the assailants. Bhaggi did not go to the *thana* on the morning of the 7th January but a report was made by the village *chaukidar* the next day, although the *thana* was not very distant. Till then Bhaggi had not made any charge against Dip Singh. Neither the village *Mukhya* nor any other villager gave any early information to the Police. The learned Judge has rightly commented on this curious feature of the case.

When the Sub-Inspector went to the village on the 8th January, Bhaggi Singh did not name Dip Singh at all, but said that "a man of 45 years of age with black and white moustaches had brought the flour to him." As pointed out by the Judge, Dip Singh does not at all answer to this description. He is about 23 or 24 years of age and has not white hairs. The explanation of this discrepancy as given by Bhaggi was that he was not in his proper senses. The Judge has declined to believe this. He thinks that the motive for a wrong statement was fear. It is highly imporbable that some fear existed even after the Police had arrived.

In face of all these difficulties the learned Judge has discarded the oral evidence. The notice found posted outside Bhaggi's house which never came to the knowledge of Bahggi, was inadmissible in evidence against the accused. In fact having regard to the incorrect facts it contained, it was probably a fabrication by some mischievous person.

There remains the confession of the accu

ed. The fact that the accused adhered to it in the Magistrate's Court is certainly a matter of importance, and has influenced the Judge considerably. But the following facts have to be considered in connection with it.

Dip Singh was a previous convict, and, as such a person on whom the suspicion of the Police was likely to fall from the very start. The learned Judge has erred in law in referring to "the confession to the Police." The confession before the Magistrate was not made till the 19th January, *i. e.*, some 9 days after. The confession as it reads throws the major part of the blame on Bhola, and makes the accused take a minor, almost a passive part. Bhola is said to have 'mixed something of green colour' before telling the accused what it was. At that time he had no idea of any intended raid during the coming night. He was called out after night fall by Bhola who asked him 'to accompany him.' Then at the last moment when Bhola wanted to use the knife on Bhaggi's neck, the confession says that Dip Singh accused "stopped him and caught hold of his hand."

The learned Judge has himself pointed out that although the confession speaks of a knife (*chaqu*) being used, the medical evidence shows that 'the injuries were probably caused by a blunt weapon.' The learned Judge thinks that the injuries were caused by a blunt implement of some sort, whether of wood or metal. He has tried to explain away the discrepancy in the confession by a reference to Dip Singh's confession to the Police where he is stated not to have clearly mentioned a knife. The so-called confession to the Police was totally inadmissible in evidence, and the learned Judge has erred in referring to it in order to explain away a discrepancy, which favoured the accused.

As to the question whether the confession before the Magistrate had been voluntarily made the learned Judge has observed "It may be that some pressure was brought to bear upon him to make him confess." But he goes on to remark that this fact if true might only weaken the value of the confession. This is not always so If the pressure exercised by a Police Officer is sufficient to give the accused grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature, the confession would not only be weak in value, but wholly irrelevant under s. 24 of the Indian Evidence Act.

The learned Judge has relied on two circumstances as constituting material corroboration of the confession. The first is that an eight anna stamp was on search found in the house of Ganesh. But this was an undoubted fact, and it was fully known to Bhaggu that Ganesh had bought such a stamp which had not been used. Without mentioning this incident Ganesh could not have been dragged in. The second is that the accused mentioned the mixing of something green long before the report of the Chemical Examiner was received. But the fact that Bhaggu's children had been poisoned was a well known fact in the village, and, therefore, the subsequent chemical examination was hardly any material corroboration of the statement.

The motive for the raid was obviously not robbery, but revenge. Ganesh is said to have been displeased with Bhaggi, because although he had previously promised to lend Rs. 125, he advanced no more than Rs. 25. But no direct connection between Ganesh and the accused is established.

The learned Judge has not considered Dip Singh's confession as sufficient evidence against his co-accused. All the assessors disbelieved the confession entirely.

I find it difficult to uphold the conviction. Accordingly, I allow the appeal and setting aside the conviction and the sentence acquit the accused and order that he be released forthwith so far as this case is concerned.

M. A. A. *Appeal allowed.*
Z. K.

CALCUTTA HIGH COURT.

MISCELLANEOUS CASE No. 84 OF 1925.
July 7, 1925.
Present:—Mr. Justice Suhrawardy
and Mr. Justice Panton.

MAHARANI DASSI—PETITIONER
versus
COMMISSIONER OF POLICE, CALCUTTA
—OPPOSITE PARTY.

Calcutta Suppression of Immoral Traffic Act (XIII of 1923), s. 5—Criminal Procedure Code (Act V of 1898), s. 491—Police taking charge of girl under 16—Girl attaining age of 16, whether can be kept under charge.

Under s. 5 of the Calcutta Suppression of Immoral Traffic Act, the Police has no power to continue to keep a girl under their charge after she has attained the age of 16 years.

Rule against an order of the Commissioner, of Police, Calcutta.

Babu *Dijendra Krishna Dutt*, for the Petitioner.

Messrs. *B. L. Mitter* and *Satindra Nath Mukerjee*, for the Opposite Party.

JUDGMENT.—It appears from the report of the Police Surgeon that the girl Maharani Dassi is over 16 years of age. She was removed from a brothel under the provisions of the Calcutta Suppression of Immoral Traffic Act, 1923, and placed in a girls' school where she was receiving education. When the school closed for the annual vacation, she was placed in charge of a gentleman of the locality in compliance with the request made by a respectable gentleman who is interested in her. The Police took all possible care for the welfare of the girl. It took charge of her under s. 5 of the Act as she appeared to be below 16 years of age. This Rule was issued under s. 491, Cr. P. C., for an order of this Court that she might not be further kept in charge of the Police and be set at liberty. Now, it appears that according to her own and her mother's statement as also in the opinion of the Police Surgeon she is over 16. The Police has no further jurisdiction to exercise under the Act of 1923. We, therefore, direct that she be immediately set at liberty.

Z. K. *Order accordingly.*

BOMBAY HIGH COURT.

CRIMINAL REVIEW NO. 270 OF 1925.

September 17, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

KUTTA BELLA RAVAT—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Workman's Breach of Contract Act (XIII of 1859), s. 1—Elephant driver, whether workman or labourer.

An elephant driver is a workman or labourer within the meaning of s. 1 of the Workman's Breach of Contract Act.

Muni Chundra v. *Hariram Ahom*, 8 C. L. R. 254, dissented from.

Devappa Ramappa v. *Emperor*, 50 Ind. Cas. 492; 43 B. 607; 21 Bom. L. R. 277; 20 Cr. L. J. 316, distinguished.

Criminal revision from an order of the First Class, Magistrate, Karwar.

JUDGMENT.—In this case the accused undertook to serve the complainant as an elephant driver and received an advance of Rs. 10, on condition of working as agreed upon. He has been accordingly ordered, with his consent, to serve as an elephant driver and to re-pay the advance within a period of one year under s. 2 of the Workman's Breach of Contract Act.

Objection has been taken on the return as to this case that an elephant driver is not a workman or labourer as contemplated by s. 1 of the Act, and reference has been made to *Muni Chundra* v. *Hariram Ahom* (1) where the Calcutta High Court took the view that a *mahout* or elephant driver does not come within the provisions of Act XIII of 1859. In that case the Deputy Commissioner, who made the reference, was of opinion that the accused, an elephant driver, was a domestic servant. Although the judgment gives no reasons, we presume the Court agreed with this view. With due deference, it seems to us absurd that an elephant driver can properly be called a domestic servant, because the word "domestic" implies doing something inside or near a house. An elephant driver does no such duty, at any rate in a case like the present one. In *Devappa Ramappa* v. *Emperor* (2) the accused had entered into a contract with the complainant, engaging to remove a hundred logs of timber from a forest to a forest depôt, a distance of twenty-two miles and had received an advance of Rs. 440. It was held that a contract of this sort was not a contract of an artificer, workman or labourer. But the judgment says that the reason for that ruling was that the contract did not show that the person contracting to have the work done bound himself to render personal labour; and in that case it was also held that, although the contract contained a covenant that the accused should do the work on his own personal responsibility and with his personal labour, yet there was really no probability, or even possibility, of the accused doing such personal labour. The present case is quite different. Here the accused is an elephant driver who has actually to work with his hands in driving the elephant. That is he has manual duties which bring him within the category of a workman or labourer. In our opinion an elephant driver comes within the meaning of those words in s. 1 of the Act.

We, therefore, see no reason to interfere. The record and proceedings to be returned.

Z. K. *Order accordingly.*

(1) 8 C. L. R. 254.

(2) 50 Ind. Cas. 492; 43 B. 607; 21 Bom. L. R. 277; 20 Cr. L. J. 316.

CALCUTTA HIGH COURT.

CROSS-OBJECTION IN APPEAL FROM ORIGINAL DECREE No. 131 OF 1922.

July 8, 1925.

Present:—Justice Sir Hugh Walmsley, KT., and Mr. Justice Page.

PRAFULLA KAMINI ROY WIDOW OF TARANATH ROY—DEFENDANT—RESPONDENT No. 1—PETITIONER

versus

BHABANI NATH ROY AND OTHERS—PLAINTIFFS—APPELLANTS—OBJECTORS.

Hindu Law—Widow, estate of, nature of—Gift by widow—Surrender in favour of next reversioner—Reversioner, whether can recover gifted property during lifetime of widow—Civil Procedure Code (Act V of 1908), s. 98—Letters Patent (Cal.), cl. 36—Appeal from subordinate Court—Difference of opinion—Procedure.

Per *Walmsley, J.*—A Hindu widow can make a gift of her husband's estate which would be valid during her own lifetime. Even where the gift uses words of inheritance, it is a valid alienation for the term of the widow's life, and a reversioner would be able to attack the gift as voidable only after the death of the widow. Where the widow after making the gift makes a surrender of the entire estate of her husband in favour of the next reversioner, the act of surrender would not entitle the reversioner to recover the property gifted from the donee during the lifetime of the widow. [p. 898, col. 1.]

Per *Page, J.*—For purposes not authorized under the Hindu Law, a Hindu widow is entitled to alienate property which she inherited from her husband or any part thereof for a term which does not exceed the period during which she remains in the enjoyment of her husband's estate. [p. 902, col. 2.]

Where the widow puts an end to the estate which passes to her by way of inheritance from her husband by a surrender of her entire interest in the inherited property to the next reversioner, the latter is entitled to recover any portion of the estate of the deceased improperly alienated by the widow even during the widow's lifetime. [p. 905, col. 1.]

A person who is minded to enter into a business transaction with a Hindu widow must be taken to know the law and to be aware of the restricted power of alienation which a Hindu widow possesses. [p. 905, col. 2.]

Per *Curiam.*—Where a difference of opinion arises between two Judges forming a Division Bench hearing an appeal from a subordinate Court the appeal must be decided in the manner laid down in s. 98 of the C. P. C., and not in accordance with the provisions of cl. 36 of the Letters Patent. [p. 907, col. 2; p. 914, col. 2.]

[Case-law reviewed.]

Appeal against a decree of the Subordinate Judge, Second Court at Pabna, dated the 22nd December 1921.

Dr. *Radhabinode Pal* and Babu *Bhupendra Kumar Bose*, for the Appellant.

Babus *Rupendra Coomar Mitra* and *Bansori Lal Sarkar*, for the Respondents.

JUDGMENT.

Walmsley, J.—(*April 8th, 1925.*)—The appeal preferred by the plaintiff was dismissed for reasons which need not be stated, and we are now concerned only with the defendant's cross-objection.

The necessary facts are as follows. There were two brothers Prasanna Nath Rai and Bhabani Nath Rai. The former died in 1871, leaving a widow named Shyamrangini, who is still alive. She succeeded to a Hindu widow's estate in respect of the property left by her husband.

On April 26, 1915, she executed a deed of gift in favour of the defendant Tara Nath Rai by which she transferred to him one of the items of property described in Schedule *ga* to the plaint. In July 1917 she executed a second document, in favour of her husband's brother, Bhabani, by which she relinquished all her rights to him as reversioner. On his side he paid her a considerable sum in cash and undertook to make a monthly payment for the rest of her natural life. On the strength of this document Bhabani as plaintiff wants to eject Tara Nath from the property comprised in the deed of gift.

Tara Nath defended the suit on several grounds: he impugned the deed of relinquishment: in any case, he said, it did not specify the property described in the deed of gift: he alleged that the property given to him was bought by the widow from her *stridhan* and that her conduct showed an intention to treat it as *stridhan*.

The learned Judge found that Shyamrangini executed the deed of relinquishment voluntarily and with full understanding of its effect, and that she intended it to operate in regard to all the property including that given to Tara Nath Rai. With regard to that gift he held that it was not *bona fide* and he also held that, as it was not an alienation for valuable consideration, while the plaintiff has paid a substantial sum and is going to pay a monthly allowance, it was equitable that the property should go to the plaintiff and not to the defendant. He rejected the evidence about the *stridhan* character of the property as meagre and unsatisfactory.

On these findings he gave the plaintiff a decree for the property covered by the deed of gift.

For the defendant Tara Nath it is urged that the learned Judge's decision is wrong.

The first question is as to the reality of the gift. The learned Judge, relying mainly on a letter written by the defendant, held that the gift was not a *bona fide* gift,

That is a finding with which I cannot agree. The lady says that she made the gift, and the donee is in possession. The letter to which reference is made is very inconclusive, and cannot outweigh the donor's positive statement. In my opinion the deed of gift to the defendant was intended to be effective.

In regard to the deed of relinquishment the learned Judge has shown abundant reason for believing that the lady understood what she was doing and intended it tc be operative. It is true that it does not mention specifically the property covered by the deed of gift, but its terms are so comprehensive as to include it. The suggestion that the latter property was *stridhan* is not supported by any evidence worth acceptance.

There remains, therefore, the question whether the reversioner on the strength of the deed of relinquishment can obtain possession of the property given to the defendant immediately, or whether he can do so only on the natural death of the widow.

I think it is clear on the authorities that the widow could make a deed of gift valid for her own life. Mr. Mayne says "She cannot in the absence of legal necessity, bind the inheritance for her own personal debts or private purposes as against reversioners but she can do so for her own life. Any alienations in excess of her powers are not void but voidable". The deed of gift in favour of Tara Nath Rai used words of inheritance, but that makes no difference: for the term of the widow's life it is a valid alienation, but the reversioner will be able to attack it as voidable as soon as she dies. For the plaintiff, however, it is urged that he need not wait until the widow dies, but that the deed of relinquishment entitles him to immediate possession. In other words it is argued that by the doctrine of acceleration of the reversion the reversioner at once succeeds to the whole estate as completely as he would on the natural death of the widow. There are, of course, several authoritative pronouncements to the effect that a widow can operate her own death, but so far as I have been able to find out none of the decisions goes to the length of saying that she can do so where prior dispositions have created interests in third persons. The effect of adoption has been considered on several occasions, in Madras and Bombay, but I do not think it is of any use to refer to the decisions, partly because the two Courts have taken different views, partly because the results of adoption on the widow's interest are very definite. A decision of more relevance is to be found in the case of *Kottapalli Subbamma* v. *Jatavallabhula Subrahmanyam* (1). In that case the widow had created a mortgage before she executed a deed of relinquishment in favour of the reversioner. The learned Judges upheld the Trial Court's view that the relinquishment could not defeat the mortgagee's right to get a decree for sale of the widow's life-interest. It is true that in that case the alienation was for value, whereas in the present case the alienation was by gift, but I do not think that the presence of valuable consideration affects the question. The point is that the widow has made an alienation which she was competent to make, and she cannot re-call it by a voluntary act, which only by fiction has the same effect as her actual death would have.

There are two other points to be noticed in this case. The first is that the learned Judge has held that the sale and lease of parts of the property must stand good for the term of the widow's life, and that part of his judgment has become final. The second is that the widow has covenanted for a monthly payment in addition to a cash payment. Those two facts make it difficult to regard the relinquishment as of the whole estate, and as effecting the widow's death from the legal point of view.

I regret to differ from my learned brother, but, in my opinion, the defendant's cross-objection should be allowed and the suit dismissed as premature so far as it relates to the land covered by the deed of gift.

Page, J.—(*April 8th, 1925*).—This cross-appeal raises an interesting and important question in connection with a Hindu widow's power of alienation while possessing a widow's estate in property inherited from her deceased husband.

About the year 18:0 one Prasanna Nath Roy died intestate leaving as his heir Shyamrangini, his widow, and as his heir presumptive his brotner, the respondent Bhabani Nath Roy. At the time of Prasanna Nath Roy's death, Shyamrangini was 8 or 9 years old, and for about 10 years there-

(1) 32 Ind. Cas. 813; 39 M. 1035; 30 M. L. J. 260.

after she lived under the guardianship of Bhabani. After reaching her majority Shyamrangini obtained possession of her husband's property and on the 26th April 1915 she executed an absolute deed of gift by which she transferred to her cousin, Taranath Roy, her right and interest in certain lands and premises, the particulars of which were set out in the schedule to the deed. This deed of gift was duly executed and registered by Shyamrangini. On the 24th July 1917 Shyamrangini executed a deed of conveyance by which she surrendered and relinquished in favour of Bhabani the next heir of Prasanna Nath Roy, the entirety of the widow's estate which she had inherited. In the deed of relinquishment it was *inter alia* provided "You are the brother of my husband and the only presumptive heir of the properties left by him on my death. My husband had peculiar affection for you and I too have genuine love for you. Under these circumstances having made up my mind to attend to performance of religious duties, and giving up in your favour my entire life-interest I received by inheritance from my husband by this deed of release of life-interest, I agree and declare that I completely relinquish the entire Hindu widow's life-interest that I had in all the properties described in the under-mentioned schedule which I received by inheritance from my husband or acquired with the usufruct of properties so inherited which know as the entire estate inherited from my husband and over and above that in any other property, unknown to me which might have belonged to my husband. And further relinquish in your favour all arrear dues receivable from my tenants in those properties. From to-day I cease to have any interest or connection with those properties or the arrears realisable therefrom. On the strength of this deed of release you will from this day own and possess in absolute right my husband's share in the properties described in the under-mentioned schedule, and will continue to hold and enjoy the same with great pleasure down to your son, son's son etc., heirs and representatives in succession, with right to make alienation of every description such as gift, sale etc., and to grant subordinate settlements."

It is to be observed that in the schedule to this deed of relinquishment no mention is made of the *jote* and occupancy rights in the land and premises which were the subject-matter of the deed of gift of the 26th April 1915. On the 25th July 1917 Bhabani executed a deed of *mushihara* under which he agreed to pay an allowance of Rs. 150 a month to Shyamrangini, and declared that he had paid Rs. 3,000 to her. After the execution of these two deeds Bhabani was given possession of the properties then in the possession of Shyamrangini, and since July 1917 Shyamrangini has been receiving a monthly sum of Rs. 150; indeed she has accepted an instalment of the allowance even after the present suit was filed. On the 21st June 1920 Bhabani launched the suit out of which this appeal arises against Taranath Roy and his daughter in which he claimed *inter alia*

(1) "That on declaration of plaintiff's right of inheritance to the properties of Schedule (*kha* and *ga*) together with the house etc., standing thereon as described in the schedule and on declaration that no right has accrued to the defendant in respect thereof a decree for *khas* possession may be made in favour of the plaintiff on eviction of the defendants therefrom;

(2) "That a decree may be passed in plaintiff's favour for recovery of Rs. 925 in the shape of *waislat* from the defendant or should any larger amount be found due in course of trial, a decree for that amount on payment of the deficit Court-fees."

The properties described in Schedule (*ga*) to the plaint were the properties which were the subject-matter of the deed of gift of the 26th April 1915. On the 22nd December 1921 a decree was passed in the said suit by which the Court *inter alia* ordered that "the plaintiff's title be declared to the land and houses, etc., described in Schedule (*ga*) and the plaintiff do get possession thereafter" and "the plaintiff do get Rs. 50 in respect of mesne profits of the land in Schedule (*ga*)".

Bhabani and Taranath have died in the course of these proceedings. Against this decree the representatives of Bhabani appealed, and the representatives of Taranath filed a cross-appeal against so much of the said decree as related to the properties in Schedule (*ga*) which had been transferred to Taranath under the deed of gift. The appeal has not been prosecuted, and the cross-appeal alone has been contested before us.

The validity of the deed of gift and of the deed of relinquishment were challenged at the trial of the suit, and the learned Trial Judge held that inasmuch as Taranath had written a post card to the manager of Shyamrangini's properties after the execution of the deed of gift asking for instructions about the management of the estate, the deed of gift was not a *bona fide* gift. I am unable to regard this post card as evidence from which such a conclusion might reasonably have been drawn, and indeed, the argument on appeal proceeded upon the footing that the deed of gift was a genuine and duly executed document. On the other hand, it was contended that the property covered by the deed of gift had been purchased out of the *stridhan* of Shyamrangini. The learned Judge found that that was not the fact, and upon the evidence, in my opinion, his decision was correct.

As regards the deed of relinquishment it was urged that Shyamrangini did not understand the nature or effect of the document which she was signing, and that the Court ought not to allow this document to stand. It was further contended that the deed of relinquishment did not amount to a *bona fide* surrender of the entirety of Shyamrangini's interest in her late husband's property but was merely a device by which she attempted to divide the inheritance with Bhabani Nath. [*Rangasami Gounden* v. *Nachiappa Gounden* (2).] The learned Judge decided against both of these contentions, and, in my opinion, the conclusion at which he arrived was right. Shyamrangini was an educated and intelligent woman. She had experienced considerable trouble over the property; she was getting old, and was anxious to pass the rest of her days in meditation free from worldly cares. The joint income which Bhabani and Shyamrangini's husband had received from the ancestral estate was about Rs. 4,000, although at the date of the trial the estate had increased in value. It can well be imagined that Shyamrangini would be only too glad to receive Rs. 3,000 for the expenses of a pilgrimage, and a monthly income of Rs. 150, and to be relieved from further anxiety in respect of the family property. Not only did she act upon the above arrangement with Bhabani in respect of the monthly allowance, but in a letter to Bhabani's son Shamipada, she wrote that "Bhabani has amply repaid me for the trust I reposed in him in giving up the property". Further, with respect to the contention that Shyamrangini did not understand the nature and effect of what she was doing when she executed the deed of relinquishment, it is to be remembered that she was an educated woman; that the draft of the deed was considered by several Pleaders, that before she executed the deed it was read over and explained to her; that she herself had taken the draft to a Pleader Radha Bulluv, who was her relative, in order to obtain his advice thereon; that she herself had affixed the seal to the deed and had handed it to Bhabani; that subsequently she acted upon the deed, and has never taken any steps to have it set aside or declared to be invalid. In my opinion, there is no substance in the contention that the deed of relinquishment was not duly and validly executed, or that the deed of relinquishment was a mere device by which the inheritance was divided between Shyamrangini and Bhabani. I should add that I am not satisfied upon the evidence that Shyamrangini was possessed of any moveable properties which she had inherited from her husband, and for the purposes of this appeal it must be taken that no such moveables were in existence, at any rate at the time when the deed of relinquishment was executed.

In these circumstances an important question falls for determination, namely, whether Bhabani, the heir presumptive of Shyamrangini's husband, is entitled to have deed of gift to Taranath set aside during the lifetime of Shyamrangini.

Now, the nature of a Hindu widow's estate is not always understood. It is an anomalous estate which obstructs the normal course of succession, as laid down by Hindu sages. For that reason, therefore, it is regarded among the Hindu community as a praiseworthy act that a widow should contrive to put an end to the unnatural situation created by the existence of the widow's estate of inheritance. In the case of *Moniram Kolita* v. *Keri Kolitani* (3) Mr. Justice Dwarkanath Mitter observed:

(2) 50 Ind. Cas. 498; 42 M. 522; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72; 1 U. P. L. R. (P. C.) 66 (P. C.).

(3) 7 I. A. 115 at p. 119; 5 C. 776; 6 C. L. R. 322; 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 765; 4 Ind. Jur. 363; 3 Shome L. R. 198; 2 Ind. Dec. (N. S.) 1102 (P. C.).

"We think it scarcely necessary to remark that the estate of a widow under the Hindu Law is one of a very peculiar character. To compare it with a life-estate, or with any other estate known to the English Law, would be to misunderstand its nature completely; and if authority is needed to support this proposition, we have only to refer to the remarks made by the Privy Council in the case of *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (4). It is true that the widow is allowed to succeed to the estate of her deceased husband as his heiress-at-law; and it is also true that she is allowed to represent that estate fully, so long as her right to hold it continues to exist. But her dominion over it is rigorously confined within certain defined limits, beyond which she has no power to go; nor is it allowed to descend to her heirs after her death. As half the body of her deceased husband she takes his property in default of male issue, but being not more than half her power to deal with it is anything but that of an owner in the true sense of the term".

The Judicial Committee did not affect to impugn the accuracy of the above exposition of the general position of Hindu widows according to Hindu Law and usage, although Sir Barnes Peacock in delivering the judgment of the Privy Council in this case differed from Mitter, J., in thinking that a Hindu widow held the property which she had inherited from her husband as trustee. The correct view as Lord Dunedin observed in *Rangasami's case* (2) is that "the rights of a Hindu widow in her late husband's estate are not aptly represented by any of the terms of English Law applicable to what might seem analogous circumstances. Phrased in English Law terms, her estate is neither a fee nor an estate for life, nor an estate tail. Accordingly one must not, in judging of the question, become entangled in western notions of what a holder of one or other of these estates might do." The sage Vrihaspati laid down that "In scripture and in the code of law, as well as in popular practice, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him, whose wife is not deceased, half the body survives. How then should another take his property while half his person is alive? Let the wife of a deceased man, who left no male issue, take his share, notwithstanding kinsmen, a father, a mother, or uterine brother, be present. Dying before her husband, a virtuous wife partakes of his consecrated fire: or if her husband die (before her, she shares) his wealth: this is a primeval law. Having taken his moveable and immoveable property the precious and the base metals, the grains, the liquids, and the clothes let her duly offer his monthly, half yearly, and other funeral repasts". So Vishnu ordains "the wealth of him who leaves no male issue goes to his wife". Jimuta Vahana upon this passage made the comment that "It must not be alleged, that the mention of the widow is intended merely for the assertion of her right to wealth sufficient for her subsistence. For it would be irrational to assume different meanings of the same term used only once, by interpreting the word wealth as signifying the whole estate in respect of brothers and the rest, and not the whole estate in respect of the wife. Therefore, the widow's right must be affirmed to extend to the whole estate". Thus Vrihat Menu says "The widow of a childless man, keeping unsullied her husband's bed and persevering in religious observance shall present his funeral oblation and obtain (his) entire share". Again in the Dayabhaga Jimuta Vahana ordains that "on failure of heirs down to the son's grandson, the wife, being inferior in pretensions to sons and the rest, because, she performs acts spiritually beneficial to her husband from the date of her widowhood, (and not, like them, from the moment of their birth) succeeds to the estate in their default". Thus Vyasa says, "After the death of her husband, let a virtuous woman observe strictly the duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband. Let her day by day perform with devotion the worship of the gods and especially the adoration of Vishnu, practising constant abstemiousness. She should give alms to the chief of the venerables for the increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman, who is assiduous in the performance of duties, conveys her husband, though abiding in another world, and herself to a region of bliss". Again Jimuta Vahana expounds the law as follows:

(4) 8 M. I. A. 500; 2 W. R. P. C. 59; 1 Suth. P. C. J. 417; 1 Sar. P. C. J. 752; 19 E. R. 620.

"56. But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage or sale of it. Thus Catyayana says, 'Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it.'

57. Abiding with her venerable protector, that is, with her father-in-law or others of her husband's family, let her enjoy her husband's estate during her life; and not, as with her separate property, make a gift, mortgage or sale of it at her pleasure".

58. Nor shall the heirs of the woman's separate property (as her brothers etc.,) take the succession (on failure of daughters and daughter's sons, to the exclusion of her husband's heirs); for the right of those (persons, whose succession is declared under that head) is relative to the property of a woman (other than that which is inherited by her)".

59. Therefore, those persons, who are exhibited in a passage above cited as the next heirs on.....failure of prior claimants, shall, in like manner, as they would have succeeded if the widow's right had never taken effect equally succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested".

Dwarkanath Mitter, J., passed the following comment upon the law as laid down by these sages :—

"It would not be supposed that the above provisions were intended by their framers to serve as mere moral precepts which the widow is at liberty to obey or disobey at her pleasure; on the contrary, the utmost precautions appear to have been taken by them to secure their strict enforcement. We have already shown that according to the Hindu Law, women are deemed to be never fit for independence, and the widow in possession of her husband's estate is no exception to the general rule. 'When the husband is dead' (says Narada) 'his kins are the guardians of his childless widow. In the disposal of property and care of her person as well as in her maintenance, they have full power.' The authority of the text is distinctly recognised in the Dayabhaga, which says 'In the disposal of property by gift or otherwise, she is subject to the control of her husband's family, after his decease, and in default of sons', Dayabhaga Ch. xi, s. 1, Verse 64."

A Hindu widow does not possess a life-estate in the property which she has inherited, from her husband for during her lifetime she may, and often does, lose the estate which passed to her on her husband's death. On the other hand by effecting an alienation within the limited ambit of her power of disposal a Hindu widow is able to transfer to the assignee a proprietary title to the property alienated, but the restrictions upon her power of alienation are various and formidable. No doubt for certain religious, charitable or customary purposes, or those which conduce to the spiritual welfare of her deceased husband, or are founded on legal necessity, her capacity to dispose of the corpus of the estate is wide, if not unfettered. With respect to alienations for legal necessity it is to be remembered that. "When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved *aliunde*, and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one". Per Lord Dunedin in *Rangasami's case* (2). [See also *Debi Prosad Chowdhury* v. *Golap Bhagat* (5).]

I confess that I should have expected to find that all other alienations by a Hindu widow were utterly void and inoperative. But it is now settled beyond all doubt or controversy that for purposes not authorised under the Hindu Law, a Hindu widow is entitled to give, sell, mortgage or otherwise alienate property which she has inherited from her husband, or any part thereof, for a term which does not exceed the period during which she remains in the enjoyment of her widow's estate. See *Moniram's case* (3). Further, as between the widow and the assignee such alienations of the widow are regarded as valid and binding, and the widow herself is not entitled to impugn the validity of the transaction for she does not hold the property merely as a trustee for the reversioners, but, subject

(5) 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499.

to certain restrictions, as the owner thereof, and when she purports to act in the capacity of owner she is not permitted to derogate from her grant. On the other hand, unauthorised alienations by a Hindu widow are voidable at the instance of the reversioners. Per Lord Davey in *Bijoy Gopal Mukerjee* v. *Krishna Mahishi Debi* (6):

"A Hindu widow is not a tenant for life but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. It is true that the appellants prayed by their plaint a declaration that the *ijara* was inoperative as against them, as leading up to their prayer for delivery to them of *khas* possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances, which they relied on, for showing that the *ijara* or any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs."

During the continuance of the widow's estate the person or persons entitled to a reversionary interest in the husband's estate upon the determination of the widow's interest, are also entitled to restrain the widow from alienating the corpus of the property for purposes which are unauthorised, to prevent her from committing waste and to claim a declaratory decree that any such alienation is voidable as against them. [Per Lord Shaw in *Janaki Ammal* v. *Narayanasami Aiyer* (7).]

"A reversionary heir, although having only those contingent interests which are differentiated little, if at all from a *spes successionis*, is recognised by Court of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life.

"But a reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion The law on this subject was recently expounded in the judgment of this Board delivered by Mr. Ameer Ali in *Venkatanarayana Pillay* v. *Subbammal* (8).

"This representation is in law founded upon a different set of considerations from those which would seek to stamp the character of reversionary heir upon one individual. The latter operation attempted during the enjoyment of the life estates would necessarily be premature, and might, as stated, be futile. The former is justified by the considerations of keeping the estate intact for the persons to whom as reversioners it shall ultimately and at the proper time be determined that the estate shall go."

[See, also, *Balbhadra* v. *Bhowani* (9), *Isri Dutt Koer* v. *Hansbutti Koerain* (10), *Ram Pershad Chowdry Jokhoo Roy* (11) and *Munnalal Chaodri* v. *Gajraj Singh* (12).]

It follows, therefore, according to the principles of Hindu Law that a widow is impotent *suo motu* to affect the reversionary interests in her husband's estate by unauthorised alienations. The learned Vakil for the appellants, however, upon the assumption (contrary to his contention) that the deed of relinquishment put an end to Shyamrangini's estate as a Hindu widow, urged that Bhabani was not entitled to impugn the deed of gift to Taranath during the lifetime of Shyamrangini. In support

(6) 34 C. 329 at p. 333; 11 C. W. N. 421; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 31 I. A. 87 (P. C.).

(7) 37 Ind. Cas. 161; 39 M. 634 at p. 638; 20 M. L. T. 168; 31 M. L. J. 225; 14 A. L. J. 997; (1916) 2 M. W. N. 188; 20 C. W. N. 1323; 18 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W. 530; 43 I. A. 207 (P. C.).

(8) 29 Ind. Cas. 298; 38 M. 406; 42 I. A. 125; 2 L. W. 596; (1915) M. W. N. 555; 19 C. W. N. 641; 28 M. L. J. 535; 17 M. L. T. 435; 21 C. L. J. 515; 17 Bom. L. R. 468 (P. C.).

(9) 34 C. 853; 11 C. W. N. 956; 6 C. L. J. 233.

(10) 10 C. 324; 10 I. A. 150; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459; 5 Ind. Dec. (N. S.) 217 (P. C.).

(11) 10 C. 1003; 9 Ind. Jur. 149; 5 Ind. Dec. (N. S.) 669.

(12) 17 C. 246. 13 Ind. Jur. 413; 5 Sar. P. C. J. 452; 8 Ind. Dec. (N. S.) 702 (P. C.).

of his contention he relied upon the judgment of the Madras High Court in *Kotta Palli Subbamma* v. *Jatavallabhula Subramanyam* (1). In that case the plaintiff sued to recover the amount due on a mortgage-bond executed by a Hindu widow. It appears that during the pendency of the suit the widow had executed a deed of relinquishment in favour of the next heir. The Court held that the plaintiff was entitled to enforce his mortgage on the widow's life estate in the property notwithstanding the surrender of her entire interest therein to the heir presumptive of her deceased husband. It may be that that decision can be supported either on the ground that the deed of surrender was executed *pendente-lite*, or on the ground that the execution of the surrender was a fraudulent transaction to which both the widow and the next reversioner were parties. Sadasiva Ayyar, J., however, based his decision on the ground that "the artificial mediaeval doctrine of a widow having no full power of alienation and the consequent doctrine superimposed by the Bengalee lawyers on this doctrine, namely, the doctrine of acceleration of the reversion through a surrender by the widow of her rights as her husband's heir (this second doctrine having been adopted for South India also by the Madras High Court) cannot, in my opinion, be pushed to the extent to which Mr. Narasimha Rao wishes that they should be extended, namely, so as to defeat the claims of alienees for value who as Sir Bhashyam Ayyanger said in *Sreeramulu* v. *Kristamma* (13) were entitled to be protected in their reasonable expectation that they obtain a transfer valid for the widow's life except in the rare case of re-marriage." Napier, J., added that "the theory that change of status of an assignor or a surrender by such assignor rare can invalidate legal rights obtained by an assignee is, in my opinion, so contrary to equity and good conscience that it should not be accepted by Courts of this country whatever the ancient Hindu Law on the subject was." The observations of Bhashyam Ayyangar, J., to which Ayyar, J., referred were passed in a suit in which it was contended that the estate of the widow was determined, not by a deed of surrender in favour of the next reversioner, but by the widow's adoption of a son. His Lordship said :—

"The proposition that a son adopted by the widow cannot, before the termination of her widowhood by death or re-marriage, recover possession of any portion of his adoptive father's estate which she might have alienated prior to the adoption, is not only sound in principle, but is in consonance with justice and equity. A widow, having authority from her husband,—however, imperative such authority may be—is not bound to exercise the same and it is entirely optional with her to adopt or not as she may choose.....A person dealing with a widow reasonably calculates that the alienation will hold good, at any rate, during her lifetime, and except of course in the rare case of a re-marriage, this will be ensured by the conclusion herein arrived at even when an adoption takes place subsequent to the alienation. When the widow has made an alienation prior to the adoption, the parties concerned will, before giving the boy in adoption, be fully aware of the same and of the extent of the property remaining with the widow, which will immediately come into the possession of the adopted son and the extent of property which will come into his possession only after the lifetime of the adopting widow—provided such property had not been alienated for a necessary purpose."

In my opinion, the *ratio decidendi* of these two cases in substance was the same, namely, that during the lifetime, or widowhood of the widow unauthorized alienations by the widow made while she was in the enjoyment of her widow's estate are valid and unimpeachable. With great respect to the learned Judges who decided those cases the reasoning upon which the decisions rest, in my opinion, is vitiated by two fallacious assumptions (1), that a Hindu widow inherits from her husband an estate for a term which is co-terminus with her lifetime or, at any rate, with her widowhood; (2) that while she is in the enjoyment of the estate a Hindu widow has absolute power to alienate the property or any part thereof for a term which does not exceed the period of her lifetime of her widowhood. No doubt, an estate inherited by a Hindu widow from her husband in some cases has been loosely described as her "life-estate" or an "estate for her widowhood," but such expressions must be read with reference to the context in which they

(13) 26 M. 143; 12 M. L. J. 197.

appear, and for the reasons which I have stated, in my opinion, the estate which passes to a Hindu widow by way of inheritance from her husband subsists until it is determined by the happening of some event which according to the principles of Hindu Law puts an end to it. It is settled law that one of the events which effect the determination of a widow's estate is the surrender of her entire interest in the inherited property to the next reversioner. Per Lord Morris in *Behari Lal* v. *Madho Lal Ahir Gayawal* (14): "It may be accepted, that according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate." Per Lord Dunedin in *Rangasami Gounden* v. *Nachiappa Gounden* (2):

"To consider first the power of surrender. The foundation of the doctrine has been sought in certain texts of the Smritis. It is unnecessary to quote them. They will be found in the opinions of the learned Judges in some of the cases to be cited. But in any case it is settled by long practice and confirmed by decision that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death."

With respect to the second of the above assumptions I am of opinion that the power of alienation which a Hindu widow possesses so far from absolute or unfettered is rigidly limited and restricted in the manner which I have stated, and that every unauthorized alienation by the widow is voidable at the instance of the reversioners. The learned Judges then proceed to comment upon the hardship which would result to alienees of the Hindu widow, if the principles of Hindu Law were to be enforced, but where the law is clear there is no room for an *argumentum ab inconvenienti* although, for my part, I am unable to discern any harshness in the application of the Hindu Law on the subject. Why should the Court extend special protection to an alienee from a Hindu widow, and none to an alienee from a minor? Upon what principle of fairness and equity ought the Court to favour the interests of an alienee to the detriment of the rights of the reversioners? I can see none. In my opinion, a person who is minded to enter into a business transaction with a Hindu widow must be taken to know the law and to be aware of the restricted power of alienation which a Hindu widow possesses. In this controversy an *argumentum ab inconvenienti* appears to me to be out of place. Moreover, the learned Judges who were parties to these decisions seem to have been influenced unduly by the view which is widely entertained amongst Western communities that it is desirable, whenever possible, to remove the clogs which fetter the free transfer of property, and not to have borne in mind the danger of regarding the principles of Hindu Law from the standpoint of Western idealism of which Lord Dunedin gave the warning to which I have alluded. See also per Lord Gifford in *Cossinaut Bysack* v. *Hurroosoondry Dossee* (15) and *Khub Lal Singh* v. *Ajodhya Misser* (16). I desire to add, (although I express my opinion with diffidence and reserve, for the sources from which an European can draw information on this subject are necessarily restricted), that I am not aware of the existence of any desire on the part of the Hindu community generally to enlarge the powers of alienation possessed by a Hindu widow. Of course, it may be urged that, whereas the alienations in the above cases were for valuable consideration, the transfer in question is by way of gift, and "being a deed of gift it cannot possibly be held to be evidence of alienation for value for purposes of necessity. It follows, therefore, that the deed taken by itself cannot stand." Per Lord Dunedin in *Rangasami's case* (2). But for the purpose in hand it matters not, in my opinion, whether the alienation was for valuable consideration or not. The important feature of the transaction is not that it is voluntary but that it unauthorized, and, in my opinion, each and every alienation for purposes not permitted by the Hindu Law are to be treated as *in pari materia*. The reasoning upon which the decision in those cases was based has been rejected by the Bombay High Court [*Ram Krishna* v. *Tripurabai* (17).] In my opinion, it is not in consonance with the principles of Hindu Law or consistent with the course of judicial pronouncements, and

(14) 19 C. 236 at p. 241; 19 I. A. 30; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603 (P. C.).

(15) 2 Morley's Digest 198; 3 Ind. Dec. (o. s.) 907.
(16) 31 Ind. Cas. 433; 43 C. 574; 22 C. L. J. 345.
(17) 1 Ind. Cas. 647; 33 B. 88; 10 Bom. L. R. 1029.

with all due respect I am unable to acquiesce in it.

Applying the principles which I have enunciated to the facts of the present case, in my opinion, having regard to the oral evidence which was adduced at the trial and the evidence inherent in the deed of relinquishment, Shyamrangini by executing the said deed intended to relinquish in favour of Bhabani, the next reversioner, and thereby in fact surrendered to him, her entire interest in the estate which she had inherited as the widow of her deceased husband. It is true that *co nomine* the property which she had given to Taranath was not included in the schedule to the deed of relinquishment ; (it may be because she did not regard that property as still forming part of the estate ;) but it is clear, to my mind, that she intended to surrender to Bhabani her entire interest in her husband's estate.

In these circumstances the conclusion at which I have arrived is that, in so far as the decree declared that Bhabani was entitled to possession of the property described in schedule (*ga*), and ordered that possession and mesne profits in respect thereof be given to him, the decision of the learned Trial Judge ought to be confirmed. Further, even if it were to be held that Shyamrangini by executing the deed of surrender did not thereby relinquish in favour of Bhabani the entirety of her widow's estate, inasmuch as under the deed of gift to Taranath Shyamrangini did not merely transfer her own interest in the property for the period during which her interest therein enured, in my opinion, the Court ought to interfere at the instance of the reversioners to prevent the wrongful dissipation of the estate by Shyamrangini. By the deed of gift Shyamrangini admittedly purported to transfer her interest in the property, but in the deed it is further provided that "you will own and hold possession down to your sons, grandsons and other heirs and representatives, and remain in enjoyment and possession thereof with great pleasure, with power to alienate the same by gift or sale, and by causing mutation of your name in place of mine in the *sherista* of the *zamindar*. To that neither myself nor my heirs or legal representatives shall be competent to raise any objection ; even if raised, the same will not be fit to be heard". In my opinion, the effect of the deed of gift was not only that Shyamrangini thereby alienated her own interest in the property, but that under its provisions she set up a title adverse to that of the reversioners, and attempted thereby to change the course of succession to the property alienated. In my opinion, having regard to the principles and authorities to which I have referred, the reversioners would be entitled to impugn this transaction even during the subsistence of Shyamrangini's interest in the estate. I regret that my learned brother Walmsley's view on this subject differs from that which I have expressed, but for the above reasons I am of opinion that the cross-appeal fails, and ought to be dismissed.

[Arguments as to the result of the difference of opinion were heard on the 12th and 16th June 1925 and judgment was delivered on the 8th July 1925.]

Walmsley, J.—As my learned brother and I differed in regard to the order to be passed on the appeal, we have now to deal with the result of that difference, in other words to decide whether we are to follow the rule of seniority prescribed by cl. 36 of the Letters Patent or the rule of affirmance contained in s. 98 of the C. P. C.

This is the second time that I have had to consider the question and my learned brother on this occasion takes the view expressed by Suhrawardy, J., [see *Bechram Choudhuri* v. *Puran Chandra Chatteyi* (18)] on the former occasion, that we ought to follow the rule of affirmance. We have heard the learned Pleaders on the subject and I have had the advantage of considering my learned brother's judgment. In the circumstances it is clearly my duty to examine the matter anew.

In the first place I wish to repeat that I based my decision in the former case solely on what I deemed to be a correct reading of the judgment of their Lordships of the Privy Council in the case of *Bhaidas Shivdas* v. *Bai Gulab* (19). But for that judgment, I should without hesitation have followed the directions of s. 98, C. P. C., for I am satisfied that since 1884 when the Full Bench delivered judgment in the case of *Gossami Sri Sri Gridharji Maharaj Tickait*

(18) 88 Ind. Cas. 637; 29 C. W. N. 755; 41 C. L. J. 456; (1925) A. I. R. (C.) 845; 52 C. 894.

(19) 60 Ind. Cas. 822; 45 B 718; 40 M. L. J. 519; 25 C. W. N. 605; 33 C. L. J. 488; 19 A. L. J. 409; 23 Bom. L. R. 623; 3 U. P. L. R (P. C.) 22; 14 L. W. 7; (1921) M. W. N. 408; 29 M. L. T. 350; 30 M. L. T. 149; 48 I. A. 181 (P. C.).

v. *Purushotum Gossami* (20) it has been the practice of this Court to adopt the principle of affirmance when there has been a difference of opinion between two Judges hearing an appeal on the Appellate side ; and in my view that practice is just as correct under the present Code as it was under the Code of 1882.

The question, therefore, as it presents itself to me is whether or not the judgment of their Lordships is expressed in such terms as to embrace all differences of opinion, both those arising in appeals from Judges exercising the original jurisdiction and those arising in appeals from subordinate Courts.

It is true that their Lordships were dealing with an appeal in a suit tried by a Judge exercising the High Court's original jurisdiction. That fact of itself would be enough to warrant me in holding that the decision was meant to relate only to appeals of that particular class, if it were not for the very peculiar features of the case. The appeal to his Majesty in Council was limited to one ground, and that that the Judges of the Bombay Court had erred in following the procedure laid down in s. 98 C. P. C. When the controversy was of such a nature that is to say, when the appellant's contention was that the Judges had applied to that appeal the procedure that was applicable to appeals of a different class, whether reference was made in argument to the existence of such a class or not, I found it very difficult to distinguish the case merely on the principle of not extending a judgment to a different set of facts, or by laying emphasis on the words "in this instance". Again their Lordships' choice of *Nundeeput Mahta* v. *Alexander Shaw Urquhart* (21) as an illustration seemed to me a source of grave difficulty, for that was an appeal from the *mufassil*, and the judgment contains a passage of considerable importance. My learned brother Suhrawardy, J., may be right in his interpretation of the law as it stood in 1870, but the reasons given by Norman, C. J., are different.

Those are the two difficulties which lay in my way. I have now had the advantage of being able to study Suhrawardy, J's judgment in print and also of hearing further arguments, and of perusing the judgment which my learned brother is about to deliver, and I have come to the conclusion that I ought to defer to the opinion expressed by my learned brothers, and these are my reasons

In the first place *Nandeeputs' case* (21) was quoted only as an illustration of a fact, and I ought not regard the reference to it by way of illustration as endorsing by implication the reasoning on which the judgment was founded.

Secondly my learned brother in his judgment has explored the history of the matter and shown how it is that the principle of cl. 36 of the Letters Patent has been preserved for appeals within the Court and that the Legislature has consistently sought to enforce the principle of affirmance at any rate for Appellate side. It is abundantly clear that the Legislature had no intention of going back on the method established by the Codes of 1877 and 1882 when the present Code was introduced, and if the terms of s. 4 have that effect it is an accident.

Next I am more impressed than I was by the distinction between the two classes of appeal that is by the fact that the appeals of one class are within the Court while those of the other class are from subordinate Courts. The distinction is important because the C. P. C. makes no mention of the one while contains elaborate rules for the other. Coupled with this is the necessity of attaching some meaning to the words of s. 98, C. P. C., for in this Province at any rate they are superfluous unless they refer to Divisional Benches of this Court.

I have also studied the decision of the Bombay High Court in the case of *Bhuta Jayatsing* v. *Lakadu Dhansing* (22). The judgment was delivered before the decision in *Bhaidas' case* (19) but it is of value because the possible effect of s. 4 was present to the minds of the learned Judges.

For these reasons I think that I am not justified in differing from my two learned brothers in holding that in appeals from subordinate Courts, a difference of opinion between two Judges forming a Division Bench must continue to be regulated by the provisions of s. 98 of the C. P. C., and that the decision in *Bhaidas's case* (19) must be taken to refer only to that class of appeals to which it expressly relates.

A decree will now be drawn up in accordance with the judgment of my learned brother Mr. Justice Page. The hearing-fee in this Court is assessed at 6 gold *mohurs*.

(20) 10 C. 814; 5 Ind. Dec. (N. S.) 545.
(21) 13 W. R. 209; 4 B. L. R. A. C. 181.
(22) 50 Ind. Cas. 715; 43 B. 433; 21 Bom. L. R. 157.

Page, J.—Owing to the difference of opinion which has arisen between my brother Walmsley and myself it is incumbent upon the Court to determine whether this appeal is governed by cl. 36 of the Letters Patent of 1865 or by s. 98 of the C. P. C., of 1908. The controversy which has raged over this question is one that has vexed the Courts for 60 years, and can only satisfactorily be set at rest by the action of the Legislature now long overdue. The solution of the problem, however, as I apprehend the matter will be found to depend upon the answer which is given to two questions:

(1) What was the law in force at the time of the enactment of the C. P. C., (Act V of 1908)?

(2) Was the law then in force repealed by s. 4 of the said Act?

Upon the creation of the High Court at Fort William in Bengal, pursuant to (24 & 25 Vict. C. 104, 28 Vict. C. 15) and the Letters Patent of 1862 and 1865, the said High Court became vested *inter alia* with the original jurisdiction administered by the Supreme Court, and with the appellate jurisdiction from *Mofussil* Courts which formerly had been exercised by the Sudder Dewani Adalut. Now, in the case of an appeal to the Sudder Dewani Adalut, it was provided by s. 23 of Act XIII of 1861 that "if an appeal lies to the Sudder Court, it shall be heard and determined by a Court consisting of two or more Judges of that Court; if, when the Court consists of only two Judges, there is difference of opinion upon evidence in a case in which it is competent to the Court to go into the evidence, and one Judge agrees in the opinion of the lower Court as to the facts, the case shall be determined accordingly. If in a Court so constituted there is a difference of opinion upon a point of law the Judges shall state the point upon which they differ and the case shall be re-argued upon that question before one or more of the several Judges and shall be determined according to the opinion of the majority of the Judges of the Sudder Court by whom the appeal is heard." By the preamble to this Act (as also by that to Act VIII of 1859), the provisions of the said Act were not to extend to Courts established by Royal Charter. On the other hand by cl. 4 of the Letters Patent of the 26th March 1774, under which the Supreme Court of Judicature at Fort William was established, it was provided "that all judgments, rules, orders, and acts of authority, or power whatsoever, to be made or done by the said Supreme Court of Judicature, at Fort William in Bengal, shall be made or done, by and with the concurrence of the said four Judges or so many or such one of them, as shall be on such occasions respectively assembled or sitting as a Court, or of the major part of them so assembled and sitting, provided always, that in the case they shall be equally divided, the Chief Justice, or in his absence the Senior Judge present shall have a double or casting vote." In the Letters Patent of 1862 no provision was made for the course to be pursued in the event of the Court being equally divided in their opinion, but under cl. 36 of the Letters Patent of 1865 it was provided "And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge or by any Division Court thereof, appointed or constituted for such purpose in pursuance of s. 108 of the Government of India Act of 1915; and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided then the opinion of the Senior Judge shall prevail." In prescribing the mode of procedure laid down in cl. 36 the Crown appears to have had in mind the rule which had governed the Supreme Court in such cases, but whatever the source of the rule may have been from 1865 until 1877, when the C. P. C., (Act X of 1877) was enacted, the procedure in cl. 36 was followed uniformly in all appeals, whether they were preferred from the decision of a Judge in the exercise of the original civil jurisdiction of the High Court or from Courts subordinate to the High Court. *Shahazadee Hazara Begum* v. *Khaja Hussein Ali Khan* (23); *Nundeeput Mahta* v. *AlexanderShaw Urquhuart* (21). It is to be observed that by cl. 44 of the Letters Patent of 1865 it was provided that the Letters Patent were to be subject to the legislative powers of the Governor-General in Council, and

(23) 4 B. L. R. 86; 12 W. R. 498.

on the 20th March 1877 the C. P. C., (Act X of 1877), was passed by the Governor-General in Council. By s. 575:—

"When the appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges. If there be no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed: Provided that if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, the appeal may be referred to one or more of the other Judges of the same Court, and shall be decided according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it. When there is no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed. The High Court may from time to time make rules consistent with this Code to regulate references under this section."

The provisions of Act X of 1877 relating to appeals are reproduced in the C. P. C. of 1882 (Act XIV of 1882), and the terms of s. 575 are similar to those of s. 98 of the C. P. C. of 1908, except that whereas in s. 575 the reference to one or more other Judges of the Court is on law and fact, in s. 98 it is restricted to the point of law in respect of which the Appeal Bench has differed. I find it difficult to express my view of the rule laid down in cl. 36 of the Letters Patent with becoming moderation, for I cannot see in it a scintilla either of equity or of merit. It will suffice, however, for the purposes of this appeal, that I should refer to the observations of Mr. Arthur Hobhouse, Q. C., as he then was in presenting the report on the proposed C. P. C., to the Governor-General in Council on the 21st September 1876:—

"The law with respect to appeals where the Appellate Court consists of a plurality of Judges is not in a satisfactory state. According to s. 332 of the Code which applied to the Sudder Court, when an Appellate Court of two Judges differ upon a question of fact, and one of the Judges agrees with the Court below, the judgment of the Court below is to stand. When they differ upon a point of law, the point is to be re-argued before another Judge or other Judges, and is to be decided according to the opinion of the majority of the whole of the Judges who have heard the point argued. By the Charters of the High Courts, if a Division Court of two or more Judges is equally divided in opinion, the opinion of the Senior Judge is to prevail. Now, in that clause of the Charter, original business and appellate business were lumped together, and though the rule is a very good rule in respect to original business it is not satisfactory as applied to appellate business. The result of it is that the plaintiff may have a great preponderance of the judicial opinion in his favour and yet a decree be given for the defendant. It may happen that a man has obtained a decree in the Court below or in two Courts below and that half the Appellate Court is in favour of his retaining that decree but because a Single Judge being the other half of the Appellate Court, thinks otherwise, then the decree goes for the defendant. We had to consider this question very carefully last year in connexion with the Burma Courts Act, because the principal Court of Appeal in Burma consists of no more than two Judges, and the principle we applied there was that which prevails in England, and which seems to be the most reasonable of all principles; that if there is no majority of the Appellate Court, which can agree to alter and how to alter, the decree of the Court below, that decree shall remain unaltered. I must confess that in our Bill No. 3 we left that matter in a rather unsatisfactory position, for we copied too faithfully both the Code and the Charters, and the result was that we had introduced two conflicting principles. However, we found out our error and we have now adopted the principle which will be found embodied in s. 575 of Bill No. IV."

It is, I think, clear beyond all doubt or controversy that passing s. 575 of the C. P. C., of 1877 the Legislature intended to substitute in all appeals to which the provisions of s. 575 could reasonably apply the rule laid down in s. 575 for the rule in cl. 36 which was then in force:—

"It is quite plain that these provisions creat a totaly distinct method of procedure in the event of difference between two Judges from that which was laid down by s. 36. Under s. 36 of the Letters Patent the judgment of the Judge who was the

Senior Judge would be the judgment which the parties before the Court would have a right to obtain; under s. 98 the judgment to which they are entitled is the judgment of the majority of all the Judges who have heard the appeal; and this case shows that those two provisions might produce a totally different result." [Per Lord Buckmaster in *Bhaidas Shivdas* v. *Bai Gulab* (19).] It follows, therefore, that if and in so far as cl. 36 and s. 575 are extended to the same subject-matter and the two enactments are inconsistent they cannot stand together, and the earlier enactment *protanto* must be deemed to have been repealed by the later one. *Thomas Conservators* v. *Hall* (24) and *Probhat Chandra Barua* v. *Emperor* (25). That the two rules are incompatible, I apprehend, will be conceded but are they also applicable to the same subject-matter? Can it reasonably be suggested that the two enactments are able to stand together because s. 575 does not apply to the High Courts but to some other Courts, and, therefore, in relation to appeals to the High Court that the provisions of cl. 36 are still in force. By ss. 5 and 8 of the C. P. C., of 1877 and 1882, however, the Small Cause Courts are excluded expressly from the ambit of the appeal sections of these Codes, (see also ss. 7 and 8 and Os. L. and LI of the Code of 1908). To what Courts other than the High Courts, therefore, were the provisions of s. 575 intended to, or can they, apply? I know of none. In my opinion, it is an irresistible inference from the provisions of the Code of 1877 that it was intended that s. 575 should be applied to all appeals which up till the time of its enactment were within the ambit of s. 36 of the Letters Patent. It is to be remembered that the Code of 1877 contains no saving clause similar to s. 4 of the Code of 1908. On the contrary, by ss. 631 and 632 the Codes of 1877 and 1882 in express terms are made applicable to the Chartered High Courts, except as provided by s. 638, which contains no reference to s. 575. Moreover, some doubt having arisen as to whether the appellate jurisdiction of the High Court included the exercise of its powers of revision, by s. 628, a rule was applied to applications for review similar to that which governed appeals. [See O. XLVII (*b*) O. XLIX (3) of the Code of 1908 and *Chappan* v. *Moidin Kutti* (26).] In my opinion, it is clear and certain that the Legislature intended to substitute s. 575 of the Code for cl. 36 of the Charter, and to the extent to which the provisions of s. 575 applied to appeals to which cl. 36 also extended the provisions of cl. 36 must be regarded as no longer in force after the Code of 1877 was enacted. The same view of the meaning and effect of s. 575 was taken by Edge, C. J., in *Husaini Begam* v. *Collector of Muzaffarnagar* (27) where his Lordship observed:—

"I am of opinion that s. 27 of our Letters Patent is superseded in those cases only to which s. 575 of the C. P. C., properly, and without straining language, applied."

No distinction in this behalf, I think, can be drawn between first and second appeals from subordinate Courts to the High Court, and, in my opinion, s. 575 applied alike to both. This view has consistently been held by the High Courts in India since 1879, in which year the case of *Appaji Bhivrav* v. *Shivlal Khubchand* (28) was decided by Westropp, C. J., and Melville and West, JJ., in the Bombay High Court [see also *Shahzadee Begum's case* (23), *Narainasami Reddi* v. *Osuru Reddi* (29), and the cases cited in the judgment of Suhrawardy, J., in *Becharam* v. *Purna* (18).] Indeed, in *Gosami Sri Sri Gridharji Maharaj Tikait* v. *Purushotam Gossami* (20) in which a difference of opinion arose in an appeal from the decision of a Judge in the exercise of the original civil jurisdiction of the High Court, the Full Bench of the Calcutta High Court, consisting of Garth, C. J., Mitter, McDonnell, Prinsep and Wilson, JJ., went so far as to lay down in general terms that

"We agree in the view taken by the Bombay High Court in the case of *Appaji Bhivrav* v. *Shivlal Khubchand* (28) that the effect of s. 575 of the Code is to supersede the provisions in cl. 36 of the Letters Patent; that in the event of any disagreement between two Judges of a Division Bench, the judgment of the Senior Judge should prevail; but and still that, notwith-

(24) (1868) 3 C. P. 415; 37 L. J. C. P. 163; 18 L. T. 361; 16 W. R. 971.

(25) 81 Ind. Cas. 31; 51 C. 504; (1924) A. I. R. (C.) 663.

(26) 22 M. 68; 8 M. L. J. 231; 8 Ind. Dec. (N. S.) 49.

(27) 11 A. 176 at p. 182; A. W. N. (1889) 27; 13 Ind. Jur. 316; 6 Ind. Dec. (N. S.) 540.

(28) 3 B. 204; 2 Ind. Dec. (N. S.) 137.

(29) 25 M. 548.

standing that section, cl. 15 of the Letters Patent remains in full force."

I confess that I should have thought that the law as laid down in that case was correct. But after the decision of the Judicial Committee in *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (30) in which case their Lordships observed that "they do not think that s. 588 of the Act X of 1877..... applies to such a case as this, where the appeal is from one Judge of the Court to the Full Court", doubts were entertained founded partly (*a*) upon the language of s. 540 and kindred sections of the Code, and partly (*b*) upon the fact that the original civil jurisdiction of the High Court was derived not from the Code but from the Letters Patent, as to whether the sections of the Code relating to appeals were applicable to appeals from one Judge of the High Court to a Division Bench of the same Court. Now, there is no Court of Appeal within the High Court to which appeals can be preferred from the decision of a Judge or Judges of the High Court exercising the original civil jurisdiction with which the Court is endowed under the Letters Patent of 1865. The High Court was constituted after the model of the old Court of Kings Bench in England, in which no one Judge was subordinate to another, and in which an appeal from one Judge of the Court was preferred to the Court *on* appeal and not a Court *of* Appeal. I have often heard senior men who remembered the system as it obtained in England before the judicature Act of 1873 lament that the Judges suffered a serious diminution of prestige after the creation of the Court of Appeal in England. But, fortunately, in this country the constitution of the High Court has remained unchanged. Having regard to the constitution of the High Court in its ordinary original jurisdiction, therefore, inasmuch as the Courts regarded the provisions of the Code relating to appeals as mainly, if not wholly, applicable to appeals from subordinate Courts to a Superior Court, it was held that the appeal sections did not apply to appeals from one or more Judges of the Court to the High Court. In *Sabhapathi Cheti* v. *Narayanasami Chetti* (31) the Madras High Court held that "Both s. 540 of the C. P. C. relating to appeals from original decrees and ss. 583 and 591 relating to appeals from orders provide for appeals from one Court to another of higher grade. The provision made by s. 15 of the Letters Patent for appeals from one or more Judges of the High Court, to other Judges of the same Court is entirely foreign to the provisions of the C. P. C. relating to appeals from one Court to another." [See also *Chappan's case* (26) *Sesha Ayyar* v. *Nagarathna Lala* (32), *Debendra Nath Das* v. *Bibudhendra Mansingh* (33) and *Toolsee Money Dassee* v. *Sudevi Dassee* (34).] The language used in the appeal sections of the Code does not appear to me, however, to warrant the drastic inference which was drawn from it, and since the case of *Sabitri Thakurain* v. *Savi* (35) it must be taken as Lord Sumner observed that the decisions in the Madras cases "laid down their effect much more widely than was necessary and overlooked the distinction between rules which took away existing rights of appeal and rules which recognise these rights but regulate the procedure of the Court in which such appeals are pending... There is no reason why there should be any general difference between the procedure of the High Court in matters coming under the Letters Patent and its procedure in other matters.....The Code is framed on the scheme of providing, generally, for the mode in which the High Court is to exercise its jurisdiction, whatever it may be, while specifically excepting the powers relating to the exercise of original civil jurisdiction to which the Code is not to apply". The question to be determined is whether the particular provisions of the Code under consideration in each case extend to the ordinary civil jurisdiction of the High Court. For example, in *Mathura Sundari Dassi* v. *Haran Chandra Shaha* (36) Sanderson, C. J., held in the circumstances obtaining in the case, namely, where a suit was dismissed under O. IX, r. 8 of the C. P. C. that the Code of 1908 gave a right of appeal from a Judge exercising original civil jurisdiction of the High

(30) 9 C. 482; 10 I. A. 4; 12 C. L. R. 511; 7 Ind. Jur. 161; 4 Sar. P. C. J. 406; 4 Ind. Dec. (N. S.) 970 (P.C.).

(31) 25 M. 555 at p. 558; 11 M. L. J. 346.

(32) 27 M. 121.

(33) 33 Ind. Cas. 745; 43 C. 90.

(34) 26 C. 361; 3 C. W. N. 317; 13 Ind. Dec. (N. S.) 834.

(35) 60 Ind. Cas. 274; 48 I. A. 76; 40 M. L. J. 308; (1921) M. W. N. 159; 19 A. L. J. 281; 33 C. L. J. 307; 25 C. W. N. 557; 23 Bom. L. R. 681; 48 C. 481; 14 L. W. 362; 3 U. P. L. R. (P. C.) 57 (P. C.).

(36) 34 Ind. Cas. 634; 43 C. 857 at p. 866; 20 C. W. N. 594; 23 C. L. J. 443.

Court to the Court on appeal and that the provisions of the Code applied to such an appeal:

"By the terms of s. 117, the Code is made applicable to the High Court, and O. XLIII, r. 1, gives a right of appeal in the very case under discussion. But it is said that this Code and the rules made under it do not apply to an appeal from a learned Judge of the High Court. I cannot follow that argument. It is part of the defendants case that O. IX, r. 8 applies. That order is in effect a part of the C. P. C. It seems to me strange that the plaintiff should be subjected to O. IX r. 8 and be liable to have his suit dismissed for want of appearance, yet when he has had his suit dismissed under one of the rules of the Code and wants to call in aid another of the rules which,—when his application for re-instatement has been refused, gives him a right of appeal against that refusal, he is met with the argument that he cannot call in aid that rule because there is no appeal from the learned Judge of the High Court under the C. P. C. I think this is not a true view or a reasonable construction to put upon the Code and the rules made under it. In my judgment, the Code and the rules do apply and the plaintiff has a right of appeal."

I respectfully agree with the decision in that case and I do not think that it is open to the criticism passed upon it by Hayward, J., in *Bhuta Jayatsingh* v. *Lakada Dhan Singh* (22). On the other hand in *Tulsimoney Dasee* v. *Sudevi Dassee* (34) Ameer Ali, J., expressing a view against the extension of s. 575 observed :—

"In my opinion s. 588 of the C.P. C. applies only to orders made by subordinate Court, which derive their powers from the Code. The C. P. C. is applicable to the original side of the High Court in so far as the procedure is concerned, and some of its provisions have no doubt had the effect of curtailing the rights of appeal by giving finality to certain orders of a Judge exercising singly the ordinary original civil jurisdiction of the High Court. In other words, it lays down uniform procedure for all Courts of original civil jurisdiction including the High Court on its original side. But the powers of the High Court are not derived from the Code and consequently an order of a Judge of the High Court exercising its original civil jurisdiction, though made in accordance with the procedure laid down in the Code, can hardly be said to be made 'under the Code'. Besides, s. 589 of the Code indicates to my mind that the preceding section was applicable only to the orders of subordinate Courts." Again in *Debendra Nath Das* v. *Bibhudhendra Mansingh* (33) Jenkins, C. J., stated:—

"The Code makes no provision for an appeal within the High Court, that is to say, from a Single Judge of the High Court. This right of appeal depends on cl. 15 of the Charter.

"And here I may point out that a Judge sitting alone is not a Court subordinate to the High Court but performs a function directed to be performed by the High Court (cl. 36, Letters Patent)".

Accordingly it was held in *Chappan's case* (26), *Sabhapetty Chetti's case* (31), *Sesha Ayyar's case* (32), *Boop Laul* v. *Lakshmi Das* (37), *Lachman Singh* v. *Ram Lagan Singh* (38), *Surajmal Horniman* (39), *Bhutta Jugatsingh's case* (22), (in the Madras cases much reliance being placed on the third part of s. 652 of the Codes of 1877 and 1882 which was added by s. 2 of the C. P. C. Amendment Act (XII of 1895 and which was re-enacted in s. 129 of the Code of 1908), that the procedure of s. 36 remained unrepealed and in force in relation to appeals to the High Court from a Judge or Judges of the Court exercising original civil jurisdiction. In 1908, therefore, at the time when the C. P. C. of that year was passed the law in force relating to differences of opinion in appeals to the High Court from a Judge or Judges of the High Court exercising original civil jurisdiction was cl. 36 of the Letters Patent of 1865, while a difference of opinion arising in an appeal from a subordinate Court to the High Court was governed by s. 575 of the Code of 1882. I apprehend that no doubt can arise that in like manner the effect of ss. 117 and 120 of the Code of 1908 was to extend *inter alia* Part VII of the Code (in which s. 98 appears) to the Chartered High Courts of India. But by s. 4 (1) of the Code it is provided that

"In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by

(37) 29 M. 1.
(38) 26 A. 10; A. W. N. (1903) 162.
(39) 47 Ind. Cas. 449; 20 Bom. L. R. 185.

or under any other law for the time being in force."

Now, assuming that the law in force relating to differences of opinion in appeals to the High Court was that which I have stated, it follows that if cl. 36 now extends to appeals from subordinate Courts to the High Court, s. 4 must be taken to have effected *pro tanto* a repeal of the law in force at the time when the Code of 1908 was enacted. Indeed, this must be so, unless in construing s. 4 the provisions of the Code of 1908 are deemed to be a fresh start in litigation, and no regard is to be paid to the law in force at the date when the Code of 1908 was enacted. What a strange anomaly that a clause which was designed and purported to save laws and forms of procedure then in force should operate to repeal them. That it was neither intended nor contemplated by the Legislature that such a construction should be put upon s. 4 is plain, for Mr. Richards, K. C., as he then was, in presenting the report on the Bill of 1908 to the Governor-General in Council on the 6th September 1907 observed :—

"The next subject dealt with in the bill is the important one of appeals, and in regard to that I have little to say because in fact the provisions remain such as they are in the present Code."

Moreover, since the Code of 1908 was passed the Courts in India consistently have held that the law then in force was not repealed by s. 4 of 1908, and remained unaffected by the provisions thereof. It is urged, however, that the Judicial Committee of the Privy Council notwithstanding the matters to which I have adverted, in *Bhaidas' case* (19) have held that cl. 36 of the Letters Patent of 1865 extends to all appeals to the High Court by reason of s. 4 of the Code. I cannot persuade myself that their Lordships intended to decide, or in fact determined, so broad and general a question. In *Bhaidas' case* (19) the appeal was preferred from a decision of Macleod, J., exercising original civil jurisdiction to the High Court at Bombay, and the appeal was heard before Scott, C. J., and Heaton, J. They differed in opinion, Scott, C. J., holding that the appeal ought to succeed, Heaton, J., on the other hand, agreeing with the Judge who tried the suit:

"The course then taken was to refer the matter to two other Judges, Batchelor and Shah, JJ., who also decided adversely to the plaintiff's contention.

"The plaintiff has now brought an appeal before His Majesty in Council, and the first point that he has raised is this : that the order made referring the case to the decision of Batchelor and Shah, JJ., was *ultra vires* and void; that there was no jurisdiction in these two Judges to entertain the dispute, and that he is entitled, as of right to a decree in accordance with the opinion of Scott, C. J., the senior of the two Judges, before whom the appeal was first heard." [*Bhaidas' case* (19)]

It is to be observed that Scott, C. J., and Heaton, J., in *Bhuta Jyatsingh's case* (22) while the proceedings in *Bhaidas' case* (19) were pending, took a contrary view, and expressed the opinion that cl. 36 of the Letters Patent applied to an appeal from a Judge exercising original civil jurisdiction. Lord Buckmaster in *Bhaidas' case* (19) after citing s. 4 of the Code stated

"There is no specific provision in s. 98, and there is a special form of procedure which was already prescribed. That form of procedure s. 98 does not, in their Lordships' opinion, affect. The consequence is that the appellant is right in saying that in this instance a wrong course was taken when this case was referred to other Judges for decision, and he is technically entitled to a decree in accordance with the judgment of the Chief Justice. This view of the section is not novel, for it has been supported by judgments in Madras in Allahabad and in Calcutta: see *Roop Laul* v. *Lakshmi Das* (37), *Lachman Singh* v. *Ram Lagan Singh* (38) and *Nundeeput Mahta* v. *Alexander Shaw Urquhart* (21)."

Upon these observations is founded the contention that the Judicial Committee intended to decide that all appeals to the High Court are governed by cl. 36 of the Letters Patent. I do not think that the language used supports any such contention. Section 4 does not preserve every special law or form of procedure physically retained on the Statute Book and not expressly repealed, (which the learned Pleader for Taranath suggested was the position of cl. 36 when s. 4 was passed), but those only which were then *in force*. The provisions of s. 36 of the Letters Patent undoubtedly, were in force on that date in respect of appeals from the original side of the High Court; but is equally plain, as I apprehend the matter, that the provisions

of the Code of 1882 had been substituted for those of cl. 36 in respect of appeals from subordinate Courts to the High Court, and that to that extent s. 36, though not expressly repealed, was no longer in force. The appeal in *Bhaidas' case* (19) was from a Judge of the High Court exercising ordinary civil jurisdiction and it could not be doubted that cl. 36 extended to such an appeal. It is plain, I think, that the Judicial Committee were applying their minds to the case which was before them, and it is for that reason that Lord Buckmaster was careful to state.

"The consequence is that the appellant is right in saying that *in this instance* a wrong course was taken when this case was referred to other Judges for decision."

The words which their Lordships employed were apt in the circumstances of the case under appeal, but it was not the language which I venture to think that the Judicial Committee would have used if their Lordships had intended to lay down a general rule that would govern all appeals to the High Court. Their Lordships did not state that clause 36 was to have this general application. Why should it be assumed that such was their intention? Moreover, the three cases to which Lord Buckmaster referred do not warrant such a supposition; *Rooplaul's case* (37) being an appeal from a Judge of the High Court; exercising original civil jurisdiction *Luchman's case* (38) an appeal from a single Judge of the High Court sitting as a Divisional Bench; while in *Nundiput's case* (21) the appeal was decided at a time when no form of procedure regulating appeals to the High Court other than that contained in cl. 36 was in existence. No cases were cited, and no argument was addressed, to their Lordships relating to the law in force in 1908 governing appeals from subordinate Courts to the High Court. If the Judicial Committee had been minded to reverse the settled procedure laid down by the Courts of India in a long stream of judicial pronouncements during a period of nearly 60 years, I am persuaded that they would not have done so out of hand, and without argument or reference to the Statutes, the case law, and the history on the subject; much less would they have couched their decision in terms such as those which they employed. For these reasons I hold that the judgment in *Bhaidas' case* (19) is limited to appeals from Judges of the High Court exercising ordinary civil jurisdiction to the Court on appeal (such as the appeal which they were called upon to determine), and is not to be taken as deciding that the law relating to appeals from subordinete Courts to the High Court which for so long a period had been in force in India had been repealed by s. 4 of the Code of 1908. Since *Bhaidas' case* (19) the Calcutta High Court in at least three cases has acted upon the view which I entertain of the meaning and effect of the judgment of the Privy Council in that case, although my brother Walmsley at one time felt himself constrained by the language used to take a different view of the meaning to be attributed to the judgment of the Judicial Committee. In *Suresh Chandra Mukerji* v. *Shitekanta Banerjee* (40) Newbould, B. B. Ghose, JJ., and I expressed the opinion that s. 36 extended to differences of opinion in first appeals from a *Mofusil* Court to the High Court. But in that case the opinion of the Court was merely *obiter*; no argument I think was addressed to the Court on the point, and inasmuch as the Senior Judge was in favour of dismissing the appeal it was a matter of indifference whether s. 98 or cl. 36 was applied, for in either case the same result would have followed. After the exhaustive manner in which the subject has been argued before us on this appeal, I have come to the conclusion that the untutored opinion which I then expressed was wrong, and I resile from it. In my opinion, s. 98 applies to the difference of opinion which has arisen between my brother Walmsley and myself in this appeal, and I agree that the appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

(40) 78 Ind. Cas. 679; 28 C. W. N. 637; 51 C. 669; (1924) A. I. R. (C.) 855.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO 14 OF 1923.

August 6, 1925.

Present:—Mr. Justice Phillips.

THAYAMMAL—PLAINTIFF—APPELLANT

versus

PERUMAL CHETTY AND ANOTHER—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Trust, creation of—Direction to pay money—Agreement to pay money to deceased brother's daughters

Hindu Law—Will by undivided father—Bequest to daughter—Consent of sons—Will—Unsigned document, whether effective as Will.

To constitute a trust there must be a trustee with an express trust and an estate or interest in lands vested in the trustee, and which, therefore, the trust must affect. [p. 916, col. 1.]

If the terms upon which a person receives money are that he is bound to keep it separate, either in a Bank or elsewhere, and to handle that money so kept as a separate fund of the person entitled to it, then he is a trustee of that money, if, on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and can deal with it as he pleases, and when called upon to do so, he is to hand over an equivalent sum of money then, he is not a trustee of the money but merely a debtor. [*ibid.*]

Where no specific property is assigned in trust, but a sum of money is to be paid out of the whole family property of a person, no trust can be held to have been created. [*ibid.*]

Cunningham v. *Foot*, (1878) 3 App. Cas. 974 at p. 993; 38 L. T. 889; 26 W. R. 858, and *Henry* v. *Hammond*, (1913) 2 K. B. 515 at p. 521; 82 L. J. K. B. 575; 108 L. T. 729; 57 S. J. 358; 29 T. L. R. 340, relied on.

Two Hindu brothers undertook at the time of the death of their undivided brother to pay out of a sum of money due from a debtor of the family the marriage expenses of the brother's daughter and hand over the balance to her on her attaining majority. In a suit by the daughter to recover the money, brought more than three years after her attaining majority :

Held, (1) that no trust was created in favour of the plaintiff ; [p. 916, col. 1.]

(2) that the agreement to pay plaintiff was purely voluntary, without any consideration therefor and was not legally binding on the brothers ; [p. 917, col. 1.]

(3) that in any case the plaintiff was a mere creditor and the suit was barred by limitation. [p. 916, col. 2.]

A suit to recover a specific sum of money with accumulated interest cannot be deemed to be a suit for an account. [p. 916, col. 1.]

A member of an undivided Hindu family has no power to devise property by Will. [p. 916, col. 2.]

A father in a joint Hindu family can, however, but only with the consent of his adult sons and with the consent of his relations who may be interested in his minor sons, bequeath a portion of his ancestral property to his daughter provided the portion is reasonable in extent. [*ibid.*]

Appan Patra Chariar v. *Srinivasa Chariar*, 40 Ind. Cas. 118; 40 M. 1122; 32 M. L. J. 364; 5 L. W. 544; (1917) M. W. N. 355; 21 M. L. T. 408, *Subbarami Pandipati Reddi* v. *Pandipati Ramamma*, 59 Ind. Cas. 681; 43 M. 824; 12 L. W. 249; (1920) M. W. N. 529, relied on.

An unsigned document can be effective as a Will only where there is evidence of the witnesses who were present when it was drawn up that the Will was drawn up according to the instructions of the testator, and that he signified in their presence his assent thereto, in which case the document would be good evidence of an oral Will. [*ibid.*]

Tara Chand Bose v. *Nobeen Chunder Mitter*, 3 W. R. 138, referred to.

Second appeal against a decree of the District Court, North Arcot, Vellore, in A. S. No. 149 of 1920, preferred against that of the Court of the Temporary Subordinate Judge, Vellore, in O. S. No. 72 of 1917.

Mr. *A. Krishnaswami Iyer*, for the Appellant.

Mr. *T. M. Krishnaswamy Iyer*, for the Respondents.

JUDGMENT.—The appeal only deals with the question of interest but a memorandum of objections has been filed by respondents Nos. 1 and 2 defendants Nos. 2 and 3 in which the whole decree is sought to be impeached and it will be necessary to deal with the memorandum of objections first.

The plaintiff is the daughter of one Ramu Chetti, whose brothers, Perumal Chetti and Gopal Chetti, are defendants Nos. 2 and 3. In her plaint she alleges that her father deposited with Madar Sahib, 1st defendant, a sum of Rs. 4,000 out of his self-acquisitions and directed that defendants Nos. 2 and 3 should, out of the said sum and its interest, pay the plaintiff's marriage expenses and hand over the balance to her on her attaining majority. Both the lower Courts have found that Ramu Chetti had no self-acquisitions and that he and his two brothers were members of an undivided family whose whole property was held as joint family property. It has also been found that there was no entrustment to the 1st defendant, whose legal representatives are consequently not impleaded here. In the plaint, the plaintiff states, that the arrangement pleaded by her was referred to in a Will executed by her father. This Will is Ex. A dated 28th January 1906. It is not signed by Ramu Chetti, but at the end of the document we have the recital "as just when writing of this Will was finished, it became impossible to sign it as referred to above as Nos. 1 and 2 agree to act as stated in the Will." This is signed by defendants Nos. 2 and 3. By that recital they undertook within two years from the date of the document to marry the plaintiff and to pay her for her *stridhanam* Rs. 3,794-0 6 out of their self-acquired and ancestral properties. Both the Courts have found that the arrangement was as recited in Ex. A and it is in evidence that on the date of the Will the 1st defendant was indebted to Ramu Chetti's family in the said sum of Rs. 3,793 0 6. The lower Appellate Court has exonerated the 1st defendant and his legal repesentatives, but has held that defendants Nos. 2 and 3 are trustees, and are bound to re-pay this sum

with interest from the date of the plaintiff's marriage. It is now argued that the lower Appellate Court is wrong in holding that any trust was created and I think this contention must be upheld. No specific property was assigned in trust for plaintiff, but a sum of money was to be paid to her out of the whole family property of defendants Nos. 2 and 3. The entrustment to 1st defendant having been found against, it follows that there was no specific money or property which was assigned in trust. The lower Court also finds that the suit is one for an account but gives no reasons for this finding and I do not understand how a suit to recover a specific sum of money with accumulated interest can be deemed to be a suit for account.

As pointed out in *Cunningham* v. *Foot* (1) to constitute a trust "There must be a trustee with an express trust and an estate or interest in lands vested in the trustee, and which, therefore, the trust must affect." In that case an annuity was bequeathed to the testator's wife to be paid "Out of all profits arising from all and every part of my estate and property whatsoever": and it was held that although this might create a charge and a liability in favour of the annuitant, the charge and the liability together do not amount to an express trust to establish fiduciary relations which such a trust implied; because the charge was general and the liability affected everything bequeathed or devised." The very same arguments appear to be applicable in the present case; the bequest, if any, to the daughter was to be made out of the whole family property and no specific property was set apart as trust property. I may also refer to *Henry* v. *Hammond* (2) Channel, J., observes. "It is clear that if the term upon which the person receives the money are that he is bound to keep it separate, either in a Bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money,.....If, on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money then, in my opinion, he is not a trustee of the money, but merely a debtor". If there is no trust, the plaintiff's suit would be barred by limitation. Under Ex. B the money was to be paid within two years from 28th January 1906 and consequently the plaintiff's cause of action accrued on 28th January 1908. She was then a minor, but it has been found that she has brought this suit more than three years after attaining her majority. This suit is, therefore, barred by limitation.

It is then contended for the plaintiff that Ex. A is an effective Will. In the first place a member of an undivided family has no power to devise property by Will. In the second place, the Will has not been executed, as it is not signed by the testator. As regards the second point, it is urged, that even an unsigned Will may be effective. Reliance is placed on the ruling in *Tara Chand Bose* v. *Nobeen Chunder Mitter* (3), but in that case not only was the unsigned document produced, but there was also evidence of the witnesses who were present when it was drawn up that the Will was drawn up according to the instructions of the testator, and that he signified in their presence his assent thereto. This would in effect be good evidence of an oral Will. Such circumstances and evidence are absent in the present case, for, there is no suggestion that the testator assented to the terms of Ex. A before he died or that he made any oral Will.

As regards the first point reliance is placed on the decision of a Bench of this Court in *Appan Patra Chariar* v. *Srinivasa Chariar* (4) where it was held that a father in a joint Hindu family can, with the consent of his adult son and with the consent of his relations who are interested in his minor son, bequeath a portion of his ancestral property to his daughter provided the portion is reasonable in extent. The validity of this decision has been questioned in a later case *Pandipati Subbarami Reddi* v. *Pandipati Ramamma* (5) but not definitely dissented from on the ground that the testator obtained the consent of all his co-parceners. In the present case it is alleged that there were sons of defendants Nos. 2 and 3 in existence on the date of the Will and we have no evidence that the

(1) (1878) 3 App. Cas. 974 at p. 993; 38 L. T. 889; 26 W. R. 858

(2) (1913) 2 K. B. 515 at p. 521; 82 L. J. K. B. 575; 108 L. T. 729; 57 S. J 358; 29 T. L. R. 340.

(3) 3 W. R. 138 Civ.

(4) 40 Ind. Cas. 118; 40 M. 1122; 32 M. L. J. 364; 5 L. W. 544; (1917 M. W. N. 355; 21 M. L. T. 408.

(5) 59 Ind. Cas. 681; 43 M. 824; 12 L. W. 249; (1920) M. W. N. 529.

assent of their guardians was obtained. The decision in *Appan Patra Chariar* v. *Srinivasa Chariar* (4) is not, therefore, applicable to the facts of the present case. I may also add with reference to the claim based on the Will, that no such claim is put forward in the plaint, the plaint being based entirely on an arrangement. It is unnecessary to decide the point, but it appears to me that the agreement evidenced by Ex. A being purely a voluntary agreement on the part of defendants Nos. 2 and 3 for there is no evidence that they obtained any consideration for it, it would not be legally binding upon them, although they might be under a moral obligation to pay the money. It would appear that defendants Nos. 2 and 3 were willing to pay the amount decreed against them, for they did not appeal against the decree and offered to pay off the money if 1st defendant would pay them. Unfortunately the plaintiff has been sufficiently ill-advised as to press her claim for further interest and consequently has given the defendants an opportunity of setting aside the whole decree, but possibly they may yet recognise their moral obligation to pay the plaintiff some money as *stridhanam*.

In the result the memorandum of objections must be allowed and the second appeal dismissed. The plaintiff's suit is dismissed with costs throughout.

V. N. V.

Z. K. *Suit dismissed.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 16 OF 1924.

November 5, 1925.

Present:—Mr. Justice Hasan and Mr. Justice Misra.

Syed HASAN BAQAR—PLAINTIFF—APPELLANT

versus

Thakur SHEO NARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), ss. 3 (17), 7A (5)—Transfer of Property Act (IV of 1882), s. 55 (4) (b)—Sale of sir lands—Covenant to relinquish ex-proprietary rights, validity of—Purchase-money, reduction in—Vendor and purchaser—Lien for unpaid purchase-money, whether can be enforced against transferee for value without notice—Admission of receipt of consideration, value of—Account books, non-production of, effect of—Presumption.

An admission by a vendor of the receipt of a portion of the consideration for the sale contained in the sale-deed is of great weight and must prevail unless the effect of the admission is negatived by the evidence or other circumstances appearing in the case. [p. 920, col. 1.]

Where entries in certain account books would be relevant for the determination of a question which the Court is called upon to decide, the failure of the party in whose possession the account books are to produce the account books would lead to the inference that if the books had been produced they would not have supported the case of that party. [p. 920, col. 2.]

The lien which a vendor has as against the property sold for the amount of any portion of the purchase-money which remains unpaid is an equitable lien and cannot be enforced against a subsequent transferee of the property for value and without notice of the lien. [p. 922, col. 2; p. 923, col. 1.]

The rule of law laid down in cl. (*b*) of sub-s. (4) of s. 55 of the Transfer of Property Act is merely a statutory recognition of an old equitable principle, the limitations of which are well defined. [p. 923, col. 1.]

The policy of sub-s. (5) of s. 7A of the Oudh Rent Act is not to be defeated by any ingenious devices, arrangements or agreements between a vendor and a vendee for the relinquishment by the vendor of his *sir* land or land which he has cultivated continuously for twelve years at the date of the transfer, for instance, by providing in the sale-deed for a reduction of the purchase-money in case of the vendor's failure or refusal to relinquish such lands in favour of the vendee. All such devices, arrangements and agreements are in contravention of the policy of the Act and are contrary to law, illegal and void and cannot be enforced by the vendee in any Civil or Revenue Court. The vendee cannot in such a case be relieved from his obligation to pay any portion of the purchase-money to the vendor on the ground that the vendor has broken his contract in respect of the relinquishment of his ex-proprietary rights in the *sir* lands included in the sale-deed. [p. 922, col. 1.]

[Case-law referred to.]

First civil appeal against a decree of the Subordinate Judge, Bara Banki, dated the 28th November 1923.

Mr. *Niamatullah*, for the Appellant.

Messrs. *N. C. Dutt*, *K. P. Missra*, *D. K. Seth*, *Ganga Dayal Khare* and Dr. *J. N. Misra*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Bara Banki, dated the 28th November 1923.

There is no serious controversy as to the facts of this case except as to one fact which we will state in the course of our judgment. On the 25th February 1920 the plaintiff-appellant, Syed Hasan Baqar, sold the entire *Mahal* Andika, situate in *Parganna* Siddhaur, District Bara Banki, to Sheo Narain Singh, defendant No. 1 to the suit out of which this appeal arises. A sale-deed of that date was executed in due form and registered on the same date. The purchase-money as stated in the deed was the sum

of Rs. 60,000. In the statement of the payment of the purchase-money as given in the deed of sale Rs. 10,000 were stated to have been received by the vendor previous to the execution of the deed, a sum of Rs. 1,000 was set off against a debt due to the vendee from the vendor on a pro-note of the 20th February 1920 and a sum of Rs. 5,000 was stated to have been received by the vendor at the registration of the document in the presence of the Sub-Registrar. The fact of the last-mentioned payment is also stated in the registration endorsement.

It appears that the entire *mahal* was on the date of sale in the possession of Mathura Prasad and others under a usufructuary mortgage and on the same date a sum of Rs. 23,451-14-0 was found to be due to Mathura Prasad under his mortgage. This amount was left with the vendee, Sheo Narain Singh, to be paid to Mathura Prasad within 45 days of the execution of the deed of sale. Another mortgagee of the property in question was one Abid Husain. To satisfy his claim under the mortgage a sum of Rs. 4,000 was again left with the vendee for payment to Abid Husain within 15 days of the sale. Abid Husain's mortgage deed was dated the 15th May 1915 and is on the record of the case as Ex. WI. There were two other simple creditors of the vendor, Putti Lal and Baiju Sah. The vendee was to pay off Putti Lal out of the purchase-money to the extent of Rs. 7,000. Rupees 5,000 were found to be due to Baiju Sah. He was also to be paid by the vendee within two months of the sale and finally a sum of Rs. 4,458-2-0 was left with the vendee for payment to the vendor within two months of the date of the sale. It is admitted on both sides that Mathura Prasad's usufructuary mortgage was redeemed by the vendee on payment of the amount due to him and it is also admitted that the vendee entered into possession of the *mahal* sold to him subsequent to the redemption. It is further admitted that the money due to Putti Lal was also paid by the vendee. On the other hand, it is also admitted on both sides that the Rs. 5,000 due to Baiju Sah and the Rs. 4,000 due to Abid Husain and also the Rs. 4,458-2-0 due to the plaintiff have not been paid by the vendee. The plaintiff also admits that the sum of Rs. 1,000 due from him under the pro-note of the 20th February 1920 was rightly set off against a portion of the purchase-money and he further admits that he received the sum of Rs. 5,000 at the registration of the instrument of sale. The payment of the sum of Rs. 10,000 stated in the deed of sale as having been received by the vendor previous to the execution of the deed is a matter in controversy. The plaintiff's case is that the vendee never paid this amount to him On the other hand, the vendee says that he had paid it.

From the foregoing narrative of facts it would appear that the only question of fact of any serious importance in the appeal relates to the payment of Rs. 10,000. The defendant No. 2, Janki Prasad, is the purchaser of the entire *mahal* under an auction-sale in execution of a simple money-decree which he held as against the vendee, Sheo Narain Singh. The sale certificate which was granted to Janki Prasad is before us and is Ex. B 5 on the record of the case. This auction sale took place on the 26th January 1923 and it is common ground that since then Janki Prasad has been in possession of the *mahal* in question. While Sheo Narain Singh, the vendee, was in possession of the *mahal* he executed certain mortgages in respect of that *mahal*, one was in favour of Sripal Das, defendant No. 4. It was done under a registered-deed of mortgage dated the 21st May 1921 for a sum of Rs. 2,000 (Ex. DI). The defendant No. 3 Mahant Kesho Ram, also holds a mortgage in respect of a share in the *mahal* executed by Sheo Narain Singh on the 9th April 1920 in favour of Mahant Narain Das, the predecessor-in-interest of Mahant Kesho Ram, (Ex. CI). This explains the array of parties.

In the first instance the plaintiff claims a decree for a sum of Rs. 32,673-2-9 with future interest at the rate of 1 per cent. per mensem by sale of *Mahal* Andika. In the alternative he prays for a decree for possession of the *mahal* by cancellation of the sale-deed of the 25th February 1920. The sum of Rs 32,673-2-9, for which the claim is laid is made up of the items stated in Schedule A attached to the plaint. We may briefly reproduce those details in this judgment.

It appears that Baiju Sah had two claims against the vendor, Syed Hasan Baqar. One was under an unregistered bond dated the 30th December 1918 (Ex. 2) and the other under a hand-note of the 1st January 1920 (Ex. 3). Both carried interest at the rate of 1 per cent per mensem. The bond (Ex. 2) was for a sum of Rs. 3,800. In Schedule A the sum due under the unregis-

tered bond was stated to be Rs. 1144-3-3 and under the pro-note Rs. 3,855-12-9, the aggregate of the two figures being a sum of Rs. 5,000 as due to Baiju Sah on the date of the sale. Since the date of the sale up to the date of the institution of the suit, interst has been added at the rate of 1 per cent. per mensem to this amount of Rs. 5,000 and the total amount under this head comes to Rs. 5,194-12-0. It also appears that Baiju Sah obtained a decree for the debt due to him from the plaintiff-appellant from the Court of the Subordinate Judge of Bara Banki and under that decree he was awarded costs as against the plaintiff to the extent of Rs. 480-10 (Ex. 6). This amount of costs is also claimed by the plaintiff together with interest and the total amount as stated in the schedule is Rs. 685. Adding the last-mentioned figure to Rs. 5,194-14-9 the total claim made is for Rs. 7,483-11-0. Under the head of money due to Abid Husain in respect of the deed of mortgage of the 15th May 1915 (Ex. WI) Rs. 4,000 as principal and interest from the date of the sale to the date of the institution of the suit to the extent of Rs 1,307-3-3 total Rs. 5,307-3-3 is claimed. Lastly a sum of Rs. 14,458 2 together with interest thereon for the same period as mentioned before at the rate of 1 per cent. per mensem is claimed. It may here be mentioned that this figure of Rs. 14,458-2-0 is made up of two items of Rs. 10,000, which is in controversy and of Rs. 4,458-2-0, which were left to be paid to the plaintiff within two months of the date of the execution of the deed of sale.

The defence put forward by the vendee, Sheo Narain Singh, was that the plaintiff, vendor, had undertaken to satisfy a certain mortgage within one month of the date of the sale but that he had not done so and consequently he is estopped from bringing the claim which he has brought. This mortgage was without possession but the deed is not before us. The condition on which the defendant relies is stated in para. 7 of the deed of sale (Ex. 1). To this matter we will revert later. The second line of defence was that the plaintiff had sold not only his proprietary interest in the *sir* lands of 51 *bighas* odd situate within the *mahal* but that he had also sold his ex-proprietary tenancy rights in the same and had further executed a separate deed of relinquishment on the date of the sale in respect of the *sir* lands. He claimed those lands in his rights of ex-proprietary tenancy and obtained them by an application in the Court of Revenue. It is said that this conduct of the plaintiff-appellant debarred him from claiming any relief as against Sheo Narain Singh. That the plaintiff-appellant purported to sell and did ,as a matter of fact, sell his proprietary interest in the *sir* land is not disputed. Indeed para. 2 of the deed of sale is quite clear on the point. It is also common ground that he executed a separate deed of relinquishment in respect of the *sir* lands in favour of the vendee and the deed of relinquishment was registered on the same date as the instrument of sale. The third and the last line of defence was that the plaintiff was not entitled to recover from Sheo Narain Singh the sum of money which was left with the latter for payment to Baiju Sah for the reason that Baiju Sah had already obtained a decree from Court as against the plaintiff-appellant. The defence put forward on behalf of the other defendants is that they are transferees for valuable consideration and in good faith and as such they are not affected by the lien which the plaintiff might have in law as against the original vendee, Sheo Narain Singh, in respect of any portion of unpaid purchase-money.

The learned Subordinate Judge has held that the sum of Rs. 10,000 was paid to the plaintiff by the vendee. The rest of the claim he has dismissed on the sole ground that the defendant vendee suffered loss exceeding in amount to the plaintiff's claim for the unpaid purchase-money on account of the plaintiff's conduct in recovering the *sir* lands in spite of the relinquishment.

On both the above points we find ourselves in disagreement with the learned Subordinate Judge. We will first deal with the question of payment of Rs. 10,000. It is true that the sale deed of 25th February 1920 recites that the vendor had "already received as advance before executing the sale" this sum of Rs. 10,000. It is also true that he made a similar admission at the registration of the document and that admission is incorporated in the endorsement made by the registering officer. (We regret the fact that the registration endorsement is not printed. We think it ought to have been). The learned Subordinate Judge has based his finding on this part of the case on the admission of the plaintiff to which reference has just now been made. While differing from him we should not be understood to lay down any broad proposition that the

admission on which reliance is placed is not of any evidential value. On the other hand, we think it is of great weight and must prevail unless its effect is negatived by other circumstances appearing in the case. This view is in consonance with the decision of their Lordships of the Privy Council in the case of *Chandra Kunwar* v. *Chaudhri Narpat Singh* (1). In our judgment there are such circumstances. In the first place we regard it as highly improbable that a sum of Rs. 10,000 would have been advanced by Sheo Narain Singh to Syed Hasan Baqar a few days before the execution of the deed of sale without any writing in proof of the fact of payment. Our opinion is immensely strengthened by the fact that five days before the execution of the deed of sale Sheo Narain had admittedly advanced a sum of Rs. 1,000 to Syed Hasan Baqar and this transaction was done under a duly executed pro-note of the 20th February 1920. Sheo Narain Singh's version of this transaction as given in his evidence in the case is that he had no money but that 15 days before the payment of the sum of Rs. 10,000 he had borrowed that amount from one Mathura Prasad by executing a deed of mortgage in his favour. This alleged deed of mortgage has not been produced by Sheo Narain Singh. What is produced is a document executed by Sheo Narain Singh in favour of Mahant Narain Das on the 9th April 1920 for a sum of Rs 50,000 (Ex. C1). To this deed of mortgage is attached a statement showing the manner in which the Rs. 50,000 was received by the executant Sheo Narain Singh. In this statement there is an entry to the following effect :—

"Left in deposit with the mortgagee for payment to Surajbali, Mathura Prasad and Gaya Prasad, prior mortgagees Rs. 10,000."

The learned Subordinate Judge supports his finding with this recital in the deed of the 9th April 1920. We are, however, of opinion that it is of little or no evidential value. In the first place, it is a statement made by Sheo Narain Singh himself and he cannot be permitted to use it in his own favour. In the second place, it does not definitely indicate that the sum of Rs. 10,000 as mentioned in the document of the 9th April 1920 was borrowed by Sheo Narain Singh at any time previous to the execution of the sale-deed in question. Further it is said by Sheo Narain Singh in his evidence in the case that one Kallu and the Lalla who writes accounts were also present when this sum of Rs. 10,000 is said to have been paid. Neither Kalu nor the Lalla has been produced. Sheo Narain Singh also says that the alleged payment was entered in the account-books The account-books have not been produced. There is no explanation before us as to why they have not been produced and we think it is a legitimate inference that had those books been produced they would have gone against the defendant. In similar circumstances a similar inference was drawn by their Lordships of the Privy Council in the case of *Jag Prasad Rai* v. *Singari* (2). In delivering the judgment of the Board Sir John Edge said :—

"The non-production of any of those books of account has not been satisfactorily explained by or on behalf of the plaintiffs, and their Lordships draw the inference that if they were produced they would not support the case of the plaintiffs".

Finally we think that there are traces in the deed of sale itself which lead to the same conclusion. In para. 3 of the deed it is said "that if the vendee does not pay the money due to the mortgagees in possession within 15 days from the execution of this deed.....or that.....then this sale will be considered null and void and that Rs. 16,000 which the vendee has paid to me, the vendor, the vendee will not be entitled to get back." We think it absolutely impossible for ourselves to accept the view that the vendee would have taken the risk of losing the Rs. 16,000 if he had paid them. An explanation given by the plaintiff in the witness-box is that the payment of the Rs. 16,000 was deferred to the mutation of names taking place in favour of the vendee. This explanation was supported by other witnesses produced by the plaintiff. We think that in the circumstances of the case the explanation is reasonably probable. The vendee was not to obtain possession of the property conveyed to him under the deed of sale until Mathura Prasad, the prior mortgagee, had allowed redemption. Further the trouble from the ex-proprietary rights of the vendor in the *sir* lands was well anticipated to arise. We, therefore,

(1) 34 I. A. 27; 29 A. 184; 4 A. L. J. 102; 11 C. W. N. 321; 5 C. L. J 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267 (P. C.).

(2) 86 Ind. Cas. 122; 2 O. W. N. 229; 23 A. L. J. 97; (1925) A. I. R. (P. C.) 93; L. R. 6 A. (P. C.) 111; 27 Bom. L. R. 760; 49 M. L. J. 162; 29 C. W. N. 941 (P. C).

think that it was highly consistent with the circumstances of the case that the vendee should retain this sum of Rs. 10,000 in his hands until after all the troubles were over. Our finding is that the sum of Rs. 10,000 forming part of the purchase-money was never paid by Sheo Narain Singh to the plaintiff-appellant, Syed Hasan Baqar.

Before giving our judgment on the effect of the claim of Syed Hasan Baqar in respect of his ex-proprietary tenancy rights in the *sir* lands we propose to dispose of the condition given in para. 7 of the sale-deed of the 25th February 1920. It is true that the plaintiff undertook to satisfy the claim of certain mortgagees within one month from the date of sale. It is equally true that he has not done so but as against this we have the admitted fact that the defendant vendee has not satisfied any incumbrances out of his own pocket up to this moment. He is or at least has been till the auction-sale, to which reference has already been made, in possession of the entire *mahal* and the fact that there was a previous mortgage without possession in favour of other persons did not in any manner either interfere with the vendee's enjoyment of the property in question or put him to any loss. That condition, therefore, in our judgment is no defence whatsoever to the plaintiff's claim.

The other line of defence is equally futile. The fact that Baiju Sah has obtained a decree from the Court of the Subordinate Judge of Bara Banki in respect of his claim as against the plaintiff-appellant furnishes no ground whatsoever for resisting the present claim of the plaintiff. This money due to Baiju Sah was clearly a portion of the price for which the property was purchased by Sheo Narain Singh and in the deed of sale he undertook the liability to satisfy Baiju Sah's claim out of the purchase-money. He has not done so. We must assume, in the absence of any evidence to the contrary, that Baiju Sah will execute his decree against his judgment-debtor and recover the money due to him thereunder. Ultimately the result would be that the sum of money due to Baiju Sah made payable by the vendee to him out of the purchase-money will be paid by the plaintiff. The vendee, therefore, must pay that portion of the sale consideration to the vendor.

Now we come to the ground on which the plaintiff's suit has been dismissed by the Trial Court. Exhibit A-1 is a certified copy of the judgment of the Court of Revenue dated the 29th September 1922 under which on a claim by Syed Hasan Baqar the plaintiff's ex-proprietary rights in the *sir* land were declared in his favour. Sheo Narain Singh had obtained mutation of names in his favour on the 14th August 1920. It appears that in consequence of a previous usufructuary mortgage Syed Hasan Baqar had already obtained the entry of his name in the village records as an ex-proprietary tenant in respect of the *sir* lands of the *mahal* and when the mutation was made in favour of Sheo Narain Singh the *patwari* of the village reported for orders as to whether the entry should be maintained. The Court held that the relinquishment of ex-proprietary rights made by Syed Hasan Baqar in favour of Sheo Narain Singh was inoperative in law. The result was that the entry of Syed Hasan Baqar's name as an ex-proprietary tenant of the *sir* lands was ordered to be maintained (Ex. A-1). It is not disputed that Syed Hasan Baqar has all along remained in possession of his *sir* lands either actually or through his sub-tenants. The method by which the learned Subordinate Judge has rejected the plaintiff's claim is somewhat peculiar. He begins by quoting the well-known maxim that he who seeks equity must also do equity. He finds on evidence (with which we are not satisfied as being sufficient evidence) that owing to Syed Hasan Baqar's possession of the *sir* lands the vendee has been put to a loss of Rs. 400 a year. Then he finds that the property sold yielded a profit of Rs. 1,700 a year and those profits fetched the price of Rs. 60,000. Finally by operating on the familiar rule of three he found that the loss of Rs. 400 a year amounted in proportion to a loss of Rs. 14,118-2-0 to the defendant vendee and the claim of the plaintiff after excluding his claim for Rs. 10,000 only came to Rs. 13,458. He set off one figure against the other and found a balance in favour of the defendant. On this reasoning he dismissed the plaintiff's suit altogether. Now there was no claim of a set off in the case. The sale or the relinquishment of the future ex-proprietary rights was wholly void. From a transaction of such a character no legal consequences could flow. The defendant vendee consequently could not ask for a reduction of the purchase-money on account of the plaintiff breaking his contract in respect of the *sir*-lands. Section 7A, sub-s. (5) of

the Oudh Rent Act (XXII of 1886) is as follows:—No sale or agreement, relinquishment or other transaction having the effect of a surrender or relinquishment of ex-proprietary rights executed or carried out within the six months immediately preceding or succeeding the transfer of proprietary or under-proprietary rights shall affect or detract from the rights created by the obove provisions." This provision of law is imperative and must be given effect to. We may mention that the clause quoted above was introduced by the Amending Act (IV of 1921) of the Local Legislature, but the policy of the law has always been the same as is evidenced by the decision of Mr. (now Sir Edward) Chamier in the case of *Bhikham* v. *Ghasi Ram* (3). The same is the law in the neighbouring Province of Agra. In the case of *Moti Chand* v. *Ikramullah Khan* (4), arising in the latter Province their Lordships of the Privy Council stated the law in the following words:—"The policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by the vendor of his *sir* land or land which he has cultivated continuously for twelve years at the date of the transfer, *for a reduction of purchase-money on the vendor's failing or refusing to relinquish such lands*; or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands. All such devices, arrangements, and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any Civil Court or in any Court of Revenue." (The italics are ours). The result is that we cannot relieve the vendee from his obligation to pay any portion of the purchase-money to the vendor on the ground that the vendor has broken his contract in respect of the relinquishment of ex-proprietary rights in the *sir* lands. It is not disputed that the plaintiff is also entitled to interest on the sums which remained unpaid from the date of the deed of sale to the date of the suit and we think he is similarly entitled till the date of payment. Nor is the rate of 12 per cent. per annum at which the plaintiff claims interest in any sense excessive. It follows that the plaintiff is entitled to a decree for the whole amount claimed by him as well as future interest at the rate of 1 per cent. per mensem as against the vendee, Sheo Narain Singh.

It now remains to consider whether we can direct the recovery of this sum of money by the sale of the property in question. The plaintiff-appellant prays for such a direction. That he is entitled to that direction if the property were in the hands of Sheo Narain Singh is not disputed but it is argued on behalf of the transferees that the lien which the vendor holds in respect of the unpaid portion of the purchase-money as against the property in question does not subsist when that property has gone into the hands of transferees for valuable consideration and in good faith. To this question we have given our anxious consideration and have come to the conclusion that the argument advanced on behalf of the transferees must be accepted. The law on the subject is to be found in s. 55, sub-s. (4), cl. (*b*) of the Transfer of Property Act, 1882. According to that law "the seller is entitled where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part there of remaining unpaid, and for interest on such amount or part." A literal interpretation of the language of cl. (*b*) would seem to extinguish the lien when the property is not in the hands of the buyer. But this would obviously lead to startling results. A buyer without paying any portion of the purchase-money may on the next day of the purchase make a gift of the purchased property in favour of any body he likes and thereby defeat the lien. The lien would also seem to come to an end once the property has devolved by inheritance on heir of the purchaser. These results surely could not have been enacted in cl. (*b*) already referred to. We think, however, that we are entitled to interpret this provision of law in the light of the general principles of equity. We clearly realize that the application of those principles is not in any manner excluded by the language of the enactment. The lien which the vendor has as against the property sold for the amount of any portion of the purchase-money is an equitable lien. Its scope

(3) 10 O. C. 243.

(4) 39 Ind. Cas. 454; 44 I. A. 54; 39 A. 173; 15 A. L. J. 150; 5 L. W. 388; 21 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L. R. 433. 26 C. L. J. 24; (1917) M. W. N. 453 (P. C.).

is well defined and understood in English Law from which it has been borrowed. The leading case is *Mackreth* v. *Symmons* (5). The decision in that case is reproduced in the second volume of White and Tudor's Leading Cases on Equity, 8th Edition, page 946. In the notes to that case the learned authors stated the nature of the lien in the following words:—

"A vendor's lien for unpaid purchase-money is a charge upon the property sold created by construction of equity independently ofany supposed agreement." At page 956* the scope of this equitable lien is described as follows:—

"The lien prevails against the purchaser, his heirs, and all volunteers claiming under him, against second purchasers for value with notice, against second purchasers for value without notice, unless such purchasers have the legal estate or a better equity than the vendor."

No case of a distinction between the purchase of the legal estate and of the beneficial estate arises before us nor is any claim of a better equity in favour of the vendor pressed on his behalf. If, therefore, the transferees in the present case are transferees for value and without notice of the lien the lien cannot prevail against them.

The learned Counsel for the appellant has cited cases decided by the High Court at Allahabad in favour of his client's claim for the relief of sale. Those cases are *Maina* v. *Bachchi* (6) and *Megh Raj* v. *Abdullah Khan* (7). It is true that they support in a certain measure the contention put forward by the learned Advocate for the appellant but we would content ourselves by placing as against those cases the latest decision of the same High Court in the case of *Gur Dayal Singh* v. *Karam Singh* (8). As we have already said, the rule of law laid down in cl. (*b*) of sub-s. (4) of s. 55 of the Transfer of Property Act, 1882, is not a new rule of law. It is merely a statutory recognition of an old equitable principle, the limitations of which are equally well recognised.

The view which we are taking has consistently been adopted in this Court. We will refer only to one of such decisions and that is the case of *Parbhu Dayal* v *Babban Lal* (9). The same view seems to have been repeatedly taken in the Calcutta High Court. We may by way of example refer to the decision in the case of *Akshoy Kumar Banerjee* v. *Corporation of Calcutta* (10).

It now remains to consider the question as to whether the defendants Nos. 2, 3 and 4 are or are not transferees for value and without notice. There is no question that they are transferees for value and there is no proof before us that they had notice of the lien for any portion of the purchase-money subsisting in favour of the original vendor, Syed Hasan Baqar. Janki Prasad, defendant No. 2, purchased the entire *mahal* at an auction-sale in execution of a simple money-decree of his own. The other two defendants are mortgagees. There is no reason to hold apart from direct evidence that any one of these transferees had notice of the fact that on the dates of their respective transfers any money remained unpaid to the vendor. The vendee Sheo Narain Singh had as we have already stated, been in possession of the entire *mahal* all along. He also obtained mutation of names in his favour immediately after the sale. On behalf of the plaintiff-appellant reliance was placed upon Ex. 8 printed at page 34 of the Printed Record, Part III, on an entry in column 10 of the sale statement prepared by the *patwari* in relation to the contemplated sale in execution of Janki Prasad's decree against Sheo Narain Singh. That entry is not acurately translated in the English Printed Record and we should like to give our own translation of it in this judgment. The entry is as follows:—

"Rupees 14,000 remains to be paid to the creditors as directed by Mir Hasan Baqar in the sale-deed." This entry according to our judgment does not prove that any money was due to the vendor as part of the price of the sale. On the other hand, it clearly shows that the creditors or mortgagees of Syed Hasan Baqar had not till then been paid off to the extent of Rs. 14,000, we, therefore, hold that the defendants Nos. 2, 3 and 4 are transferees for value without notice.

For reasons set forth above, we allow this appeal, set aside the decree of the lower Court and in lieu thereof pass the following decree:—

A decree will be granted to the plaintiff-appellant for the recovery of Rs. 32,673-2-9 with interest at the rate of one per cent.

(5) (1808) 15 Ves Jun. 329; 33 E. R. 778.
(6) 28 A. 655; 3 A. L. J. 551; A. W. N. (1906) 165.
(7) 25 Ind. Cas. 208; 12 A. L. J. 1034.
(8) 35 Ind. Cas. 289; 38 A. 254; 14 A. L. J. 304.
(9) 23 Ind. Cas. 867; 1 O. L. J. 34.
(10) 27 Ind. Cas. 261; 42 C. 625; 19 C. W. N. 37; 21 C. L. J. 177.

*Page of White & Tudor's Leading Cases on Equity, Vol. II, 8th Edition—[*Ed.*]

per mensem from the date of institution of the suit till the date of payment as against Sheo Narain only. The plaintiff-appellant will be entitled to his costs as against the same defendants in both the Courts. The suit of the plaintiff-appellant is dismissed as against the other three defendants. These three defendants will be entitled to their costs from the plaintiff-appellant in both the Courts.

G. H. *Appeal allowed.*
Z. K.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 258 AND 333 OF 1922.
August 26, 1925.
Present :—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

IN A. S. NO. 258 OF 1922.

KASTURI NARASIMHA SURYANARAYANA *alias* APPA RAO—DEFENDANT NO. 6—APPELLANT

versus

ATCHUTANA LAKSHMINARASIMHAM AND OTHERS—PLAINTIFFS NOS. 1 TO 5 AND DEFENDANTS NOS. 1 TO 5 AND 7—RESPONDENTS.

IN A. S. NO 333 OF 1922.

VEDANTAM RAMACHARAYULU AND OTHERS—DEFENDANTS NOS. 1 TO 5 AND 7—APPELLANTS

versus

ATCHUTANA LAKHSMINARASIMHAM AND OTHERS—PLAINTIFFS AND DEFENDANT NO. 6—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 11, 92—Hindu Law—Temple—Suit for removal of trustee and other reliefs—Interest in trust, what amounts to—Worshipper, whether entitled to maintain suit—Decision in previous suit relating to temple—Res judicata—*Trustee, whether can be removed for neglect.*

The question whether the plaintiffs in a suit under s. 92 of the C. P. C. have an interest, such as is required by the section, in the trust property or not, is a pure question of fact. [p. 925, col. 1.]

The interest which the plaintiffs must possess in the trust property for the purposes of such a suit must be near and not remote, substantial and not illusory and must be an existing interest and not a mere contingency. [p. 925, col. 2.]

Although *prima facie* any Hindu has a right to worship in any Hindu temple, it does not necessarily follow that every Hindu has in relation to every Hindu temple the interest which gives him the right to sue in respect of the temple under s. 92 of the C. P. C. On the other hand it would not be correct to say that unless a person habitually resorts to a temple for purposes of worship he cannot be said to have an interest in the temple within the meaning of the section. [p. 925, col. 1.]

Persons living in villages in the neighbourhood of that in which a temple is situated who attend the temple on important occasions and celebrate their marriages in the temple are entitled to maintain a suit in respect of the temple under s. 92 of the C. P. C. [*ibid.*]

A decision given after a real and genuine contest in a suit relating to a temple, in which the trust is properly represented, is binding on all persons interested in the temple, whether they were parties to the suit or not, and the questions decided in the suit cannot be re-opened and re-tried in a subsequent suit instituted at the instance of persons interested in the temple but who were not parties to the previous suit. [p. 926, col. 2.]

Where in a suit by the hereditary trustee of a temple against the *archakas*, it is found that the lands in the possession of the latter were granted for *archaka* service and that the defendants were entitled to appropriate the income arising out of the lands for their own use after spending some amount for the daily worship in the temple, the finding operates as *res judicata* as against all persons interested in the temple and cannot be questioned in a subsequent suit instituted by worshippers of the temple under s 92 of the C. P. C. [p. 926, col. 1.]

Where the *archakas* of a temple are permitted to appropriate the income arising out of a certain property for their own use after spending some portion of it on the daily worship in the temple, a conflict is likely to arise between the interest and the duty of the *archakas*, inasmuch as whatever is not spent on the worship is to be appropriated by the *archakas*. In such a case it is desirable that, having regard to all the circumstances of the case, a certain proportion of the income may be directed to be set apart for the maintenance of the daily worship and the balance may be permitted to be appropriated by the *archakas*. [p. 926, col. 2; p. 927, col. 1.]

In a suit under s. 92 of the C. P. C. against the hereditary trustee of a small temple in a petty village it was found that the trustee had been guilty of neglect but that the corpus of the temple properties had not been wasted or alienated, and that the neglect of the trustee had aroused little public attention and the services of an efficient trustee were not likely to be secured:

Held, that this was not a fit case in which the hereditary trustee should be removed from his office. [p. 927, col. 1.]

Appeals against a decree of the Court of the Additional Subordinate Judge, Guntur, dated the 30th January 1922, in O. S. No. 37 of 1921.

Messrs. *G. Lakshmanna* and *K. Kameswara Rao*, for the Appellant.

Messrs. *P. R. Ganapathi Aiyar*, *V. Krishna Mohan*, *G. Krishna Arya* and *Viraraghavalu*, for the Respondents.

JUDGMENT.

Venkatasubba Rao, J.—This is a suit instituted under s. 92 of the C. P. C. It relates to the temple dedicated to Chennakeswaraswami at Cherukupalli, Repali Taluk. There are five plaintiffs and the plaint asks for reliefs contemplated by s. 92, C. P. C. The learned Subordinate Judge has passed a decree and the present appeals have been filed by the defendants in the suit.

The appellants in Appeal Suit No. 333 of 1922 firstly contend that the plaintiffs are not persons having an interest in the trust within the meaning of s. 92 and the suit, therefore, does not lie. The lower Court has rejected this plea and, in my opinion, rightly. The first plaintiff is a resident of Arumbaka, and Cherukupalli where the temple is situated is a hamlet of this place.

The first plaintiff's marriage was performed at the temple in question. He is the *karnam* of Cherukupalli. The 2nd plaintiff resides at Balusulapalem which is at a distance of two miles from Cherukupalli. The 3rd, 4th and 5th plaintiffs reside at Sirupudi which is within three miles from the suit temple. At both these places the temple owns lands. According to the evidence, persons belonging to these villages attend the suit temple on important occasions and they also celebrate at that temple their marriages.

Can it be said that in these circumstances the plaintiffs are not persons having an interest in the trust? The case that has been most strongly relied on by the appellants is *Ram Chandra Iyer* v. *Parameswaram Unni* (1) but, in my opinion, this case does not support them. Whether the plaintiffs have an interest in the trust or not is a pure question of fact and the case cited must be understood with reference to the facts of that case. All that is decided is, that although *prima facie* any Hindu has a right to worship in any Hindu temple it does not necessarily follow that every Hindu has in relation to every Hindu temple the interest which gives him the right to sue under s. 92. The danger of the extreme view contended for in that case is very well pointed out by Sir John Wallis, C. J. for according to that view any Hindu out of the millions of Hindus in India may institute a suit in respect of any temple. Coutts-Trotter, J., (as he then was) also refers to the absurdity of this position by pointing out that a Hindu resident of Peshawar cannot be said to have an interest within the meaning of s. 92 in a temple in Malabar. While avoiding this extreme view, one must not commit the mistake of going to the other extreme. The view now urged by the appellants is that unless a person habitually resorts to a temple for worship he cannot be said to have an interest under the section. As pointed out in one of the judgments in that very case, the Christian conception of a Parish with special local rights in its perishioners is utterly foreign to the Hindu mind. This fact must not be lost sight of when dealing with Hindu institutions and there is nothing in s. 92 to compel the Courts to adopt the very limited and narrow construction suggested by the appellants. A Hindu will feel surprised to be told that he has no interest in a temple which is within a few yards of his residence because he does not habitually attend that temple for purposes of worship. To worship the god in the temple it may not be always necessary to resort to the temple. Can it be said that a man who lives in the vicinity of a temple and regularly comes out to worship the idol when it is taken in procession is not a person having an interest in that temple. The C. P. C. of 1877 (s. 539) provided that the persons authorised to sue must have a "direct interest" in the trust. The word "direct" is omitted in the present Code and the very object of this change will be defeated if the narrow construction suggested is adopted. The interest which the plaintiffs possess must be real and not remote, must be substantial and not illusory, must be an existing interest and not a mere contingency. The most authoritative statement of the law is that contained in *Vaidyanatha Ayyar* v. *Swaminatha Ayyar* (1). Their Lordships of the Judicial Committee say: "That the bare possibility however remote that a Hindu might desire to resort to a particular temple, does not give him an interest under s. 92 in the trust". This is the limitation we must recognise but it is not a proper inference from this, that whatever may be the proved facts, the mere circumstance that the plaintiffs do not habitually resort to a temple is sufficient to debar them from exercising the right under the section.

The next plea raised in the appeal relates to the question of *res judicata*. Defendants Nos. 1 to 5 are hereditary *archakas* and they claim with reference to a large extent of the property, the subject-matter of the suit, that it was in the remote past set apart as a special endowment for (1) *archaka* services and (2) *nitya dhupa deepa*

(1) 50 Ind. Cas. 693; 42 M. 360; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492; (1919) M. W. N. 370.

(2) 82 Ind. Cas. 804; 47 M. 884; 47 M. L. J. 361; 35 M. L. T. 189; (1924) A. I. R. (P. C.) 221; (1924) M. W. N. 749; 10 O. & A. L. R. 1076; 26 Bom. L. R. 1121; 20 L. W. 803; 22 A. L. J. 983; 40 C. L. J. 454; 29 C. W. N. 154; 51 I. A. 282; 26 P. L. R. 1; L. R. 6 A. (P. C.) 17; 1 O. W. N. 617 (P. C.).

naivedyam. According to their case, their ancestors who were *archakas* were put into possession of these lands and they were to perform the *archaka* services and provide the articles of worship. In other words, it was a unified or a combined endowment and from the income of the property monies were to be spent not only for the purchase of materials but also for remunerating their own services, *i. e.*, the services of the *archakas*. Has this question become *res judicata* by reason of the judgment of the High Court (In A. S. No. 283 of 1914) in the previous Suit No. 77 of 1910? The present 6th defendant, the hereditary trustee, was the plaintiff and the present defendants Nos. 1 to 5 the *archakas* were the contesting defendants, in that suit. The hereditary trustee claimed in it possession of these properties and the *archakas* resisted that claim. They put forward in that suit the same defence as they have now put forward in this. In para. 3 in the written statement in O. S. 77 No. of 1910 the *archakas* claimed that the lands in question "were originally endowed specifically for *archaka* service which consists of daily worship, *naivedyam* and lighting." A portion of the second issue in that case runs thus :—

"Were the lands originally granted for *archaka* service and are the defendants entitled to hold them without the interference of the *dharmakartha*, if any."

The case was disposed of finally by the learned Judges of this Court and the contention of the defendants was accepted by them. We have carefully read the judgment and we cannot help coming to the same conclusion. After referring to the contention raised in para. 3 of the written statement the learned Judges said :—"The origin of this endowment is not known but the evidence is that these lands have been in the possession always from time immemorial of the *archakas* and that they have applied the profits for the services mentioned in the written statement."

They decided that the trustee was not entitled to possession of these lands and made the following observation :—

"The long possession of the defendants raises a strong presumption in their favour that their possession had a legal origin."

Not only did the learned Judges find that the defendants were entitled as against the trustee to remain in possession but they also found that their possession had a legal origin. What can this legal origin be referred to ? The *archakas* claimed that the lands had been put in their possession for certain specific purposes mentioned. That claim the High Court recognised in the earlier part of the judgment and the finding in favour of a legal origin can only refer to the recognition of the same claim as then put forward.

The respondents' learned Vakil has laid stress upon the following portion of the judgment :—

"As regards the possession of these lands we are of opinion that the plaintiff has made out no cause of action".

What the learned Judges meant to say was, that in a suit framed as one for possession, the plaintiff could get no relief on their findings. Nothing more could have been meant. They merely intended to say that although the contention of the *archakas* was well-founded, nevertheless if breach of trust or mismanagement could be shown on their part, the plaintiff could obtain relief in appropriate proceedings. This does not mean that they decided only the question of possession. I am, therefore, clearly of the opinion that the *archakas* put forward their right in the previous suit, that it formed the subject of an issue and that in the final judgment in the case the High Court upheld that right. Are then the plaintiffs not bound by that adjudication ? When in a suit where the trust is properly represented, after real and genuine contest a decision is given, it will be absurd to hold that persons not parties to the previous suit, although they may have an interest in the trust, can ask the matter to be re-opened and the question to be re-tried. I am satisfied that the plea of *res judicata* must prevail.

The learned Subordinate Judge has disallowed the claim of these defendants to about 23 acres out of 130 acres claimed by them. He has found that this land had been endowed for the lighting of the *akhandam*. This finding has not been questioned in the appeal and we confirm it.

The result is that after excluding the lands set apart for the *akhandam* the rest of the land out of 130 acres will be declared as having been set apart for the *archaka* services and for *nitya dupa deepa naivedyam*.

In the case of this endowment there arises a conflict between interest and duty. The position of the *archakas* offers to them the temptation of spending as little as

possible on *nitya dhupa deepa naivedyam*, for, whatever is not spent in that way may be retained by themselves as remuneration for their own services. We, therefore, think it necessary that we should fix the proportion 3/7ths of the net produce we desire to set apart for purposes connected with *nitya dhupa deepa naivedyam* and the *archaka* will be at liberty to retain the balance, that is, 4/7ths as remuneration for the *archaka* services.

Lastly remains the question (raised in Appeal No. 258 of 1922) is it necessary to remove the hereditary trustee? In our opinion, it is neither necessary nor desirable. The temple is in a petty village and it is not likely that the services of an efficient trustee will be available. Most of the charges against the trustee show that he has been guilty of neglect, but it must be said that he has not wasted or alienated the corpus and has for a long time been fighting with the *archakas* with a view to get for the temple the properties in their possession. This temple though well endowed is apparently not an important one and the neglect of the trustee has aroused little public attention. It seems to us that the present suit was directed more against the *archakas* than against the trustee. The decision in the previous suit having been against the trustee, this was a fresh attempt made in the same direction to get the lands claimed as a special endowment declared to belong to the general endowment of the temple. We do not think that in the interests of the temple, the 6th defendant should be removed from the office of trustee. We declare that the office is hereditary in his family and we direct that he shall continue as trustee.

The *archakas* will be directed to deliver up possession to the 6th defendant of all lands which have not been declared to be the subject of the special endowment referred to above. The *archakas* will be entitled to retain with themselves 4/7ths of the net produce of the lands forming the special endowment and to hand over to the 6th defendant the remaining 3/7ths.

We understand that the *interim* trustee appointed by the Court has certain monies with him either in his hands or in deposit in Court. These sums he will be directed to pay into the hands of the 6th defendant who shall deal with them in accordance with the rights declared in this judgment.

In the scheme to be framed, it will not be necessary to insert any provision regarding the repairing or the re-building of the temple. These are matters which, no doubt, the trustee will attend to at any early date in the discharge of his duties.

Each party will bear his costs in these appeals. So far as the costs of the suit in the lower Court are concerned, the plaintiffs will get $\frac{2}{3}$rds of their costs from the 6th defendant from and out of the temple funds; the balance of $\frac{1}{3}$rd they shall get from defendants Nos. 1 to 5 and 7 personally.

The parties are required to bring in a scheme to-morrow.

A copy of this judgment and the scheme will be forwarded to the Religious Endowments Board.

Madhavan Nair, J.—I agree with the judgment just now delivered by my learned brother. As regards the meaning of the terms "interest" as used in s. 92, C. P. C., I have already expressed my opinion in my judgment in A. S. No. 88 of 1922 and for that reason I do not think it necessary to further deal with it here. On the facts of this case, I am clearly satisfied that the plaintiffs have the interest contemplated by s. 92, C. P. C.

V. N. V.

Z. K. *Scheme framed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 201 OF 1924.

November 12, 1925.

Present:—Mr. Justice Missra.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Mahant HARCHARAN DASS—PLAINTIFF, JAGAN NATH AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings—Amendment, whether can be allowed in appeal—Amendment allowed by consent, whether can be objected to—Transfer of Property Act (IV of 1882), s. 123—Registration Act (XVI of 1908), ss. 17 (1) (b), 49—Gift, deed of, unregistered, whether admissible in evidence—Possession, evidence of—Oudh Rent Act (XXII of 1886), s. 3 (10)—Grove-holder, whether tenant—Dispossession by landlord—Suit by grove-holder to recover possession—Jurisdiction of Civil and Revenue Courts.

Leave to amend a plaint may be granted at any stage of the proceedings, for instance, even in appeal. [p. 929, col. 1.]

Where a party agrees to the amendment of the opposite party's pleadings on certain conditions and the amendment is allowed subject to those conditions the amendment cannot subsequently be objected to. [*ibid.*]

Although an unregistered deed of gift is not admissible in evidence to prove the *factum* of the gift, it is relevant for the collateral purpose of showing the continuous possession of the donee over the subject of the gift from the date of the gift and the character of such possession. [p. 929, col. 2.]

A grove-holder cannot be regarded as a tenant until there is a contract between him and the landlord to pay rent. He is entitled to hold possession so long as the land retains the character of a grove and the mere fact that the land is liable to resumption or assessment of rent, if brought under cultivation, does not make the grove-holder a tenant liable to ejectment. [p. 930, col. 1.]

Where, therefore, a grove-holder is ejected illegally by the landlord, a suit by him to recover possession lies in the Civil Court and not in the Revenue Court. [p. 930, cols. 1 & 2.]

Second civil appeal against the judgment and decree of the Subordinate Judge, Sultanpur, dated the 13th February 1924, dismissing the decree of the Munsif, Sultanpur.

The Government Pleader, for the Appellants.

Mr. *H. K. Ghosh* (for Mr *A. P. Sen*) and Mr. *Niamat Ullah*, for Respondent No. 1.

JUDGMENT.—This is an appeal arising out of a suit for possession of two plots brought by the plaintiff, Mahant Harcharan Das, against the defendants-appellants, the Secretary of State for India in Council, and the Chairman Municipal Board, Sultanpur, and 11 others, in the Court of the Munsif of that place. The plots in dispute are Nos. 1659 (10 *bisi*) and 1685 (4 *bis* 17 *bisi*) situate in *Mohalla* Paltan Bazar of the town of Sultanpur. The plaintiff alleged that one Shankar Lal was the owner of these plots and had made a gift of them in favour of Baba Ram Saran Das, his predecessor-in-title by a deed of gift dated the 14th December 1883, and that he had remained in possession of the said plots throughout. The Municipal Board, Sultanpur, gave these plots to defendants Nos. 3 to 12 for building purposes and thus had caused dispossession of the plaintiff. The plaintiff, therefore, claimed a decree for possession of the land as proprietor. The Secretary of State was also impleaded as a co-defendant in the case because the Municipal Board took possession of these plots as belonging to the *nazul*. The suit was contested by the Secretary of State and the Chairman, Municipal Board, Sultanpur, defendants Nos. 1 and 2. The defendants Nos. 1 and 2 denied that the plots belonged to Shankar Lal and also the gift made by him in favour of Baba Ram Saran Das. It was also contended that the gift being unregistered was invalid and conveyed no title to the plaintiff's predecessor-in-title. It was also alleged that the said plots of land belonged to defendant No. 1 being *nazul* property and under the orders of the Government the Municipal Board was entrusted with the management thereof.

The Trial Court found that Shankar Lal was not the owner of these plots but was merely a grove-holder and that the deed of gift was inoperative being unregistered.

On these findings it dismissed the suit.

On appeal the learned Subordinate Judge allowed the plaintiff to amend the plaint by allowing him to claim as a grove-holder, and having found that the plaintiff had continuously been in possession of those plots of land he decreed the plaintiff's claim.

In second appeal the following points were urged on behalf of the Secretary of State:—

(1) That the learned Subordinate Judge was wrong in having allowed the amendment;

(2) that the plots of land did not constitute the grove of Shankar Lal and the plaintiff could not claim the rights of a grove-holder;

(3) that the deed of gift was invalid being unregistered and was, therefore, ineffective to pass any title to the plaintiff; and

(4) that the suit for possession as a grove-holder lay only in the Revenue Court and not in the Civil Court. I now proceed to deal with each of these grounds in *seriatem*.

Regarding the plea of amendment it appears from the record of the lower Appellate Court that the appeal was set down for hearing on the 11th of December 1923 on which date the arguments of the parties were heard and the case reserved for judgment. Soon after the conclusion of the arguments the Pleader for the appellant put in an application for amendment of the plaint. The Court ordered that a copy of the application should be served on the Pleader of defendants Nos. 1 and 2 and the case was fixed for the hearing of the said application on the 10th of January 1924. The case came up for heraring on that date and the Pleaders of the parties were heard. The Pleader for the defendants Nos. 1 and 2 raised no objection to the amendment provided that the plaintiff was

not allowed to produce additional evidence. The plaintiff's Pleader agreed not to produce any further evidence and the amendment was thereupon allowed. After allowing the amendment the Court proceeded to hear the appeal.

It is now urged in appeal that the lower Appellate Court was not justified in allowing the amendment. I cannot accept the contention. Order VI, r. 17 of the C. P. C. provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and also such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. It is, therefore, clear that leave to amend a plaint may be granted at any stage of the proceedings. It may be granted in appeal. Section 107 cl. (2) of the Code provides that the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein. The learned Subordinate Judge had, therefore, power to allow the plaintiff to amend the plaint. The Trial Court had held that Shankar Lal was a grove-holder in respect of the plots in suit and there was nothing wrong in allowing the plaintiff to amend his plaint so as to restrict his claim to that of a grove-holder Moreover, when the application for amendment came on for hearing on the 10th of January 1921 no objection was raised on behalf of the present appellants regarding the prayer for amendment made by the plaintiff-respondent. The only objection to the amendment which was raised by the Pleader on behalf of the defendants Nos. 1 and 2 was that the plaintiff should not be allowed to put in any further or additional evidence. To this the Pleader for the plaintiff-respondent agreed and the amendment was allowed. Under these circumstances I do not see any force in the contention now raised on behalf of the appellants, and, therefore, decide the point against them.

Regarding the second point it appears to me that the evidence on the record fully justifies the finding arrived at by both the Courts below. Exhibit 17 is a copy of the old Settlement *Khasra* which shows that Nos. 1331 and 1333 belonged to ShankarLal. Number 1331 is shown as an orchard or *phulwari* containing 16 lemon trees and 50 guava trees. Exhibit 7 which is a copy of the map prepared at the time of the same Settlement shows that the plot of land bore the character of land on which trees then stood. It is established by a comparison of Ex. 7 with Ex. 13 which is a map of the recent Settlement that the new numbers of these plots are 1659 and 1685. It also appears from the report of *peskhar* dated the 4th of May 1875 (Ex. 9) that the plot No. 1331 was then described as the grove of Shankar Lal. It seems to me, therefore, to be clearly established that the plots in suit bore the character of a grove at the time of the First Regular Settlement and that the findings of the Courts below on this point are fully justified from the evidence on the record.

Regarding the third point relating to the invalidity of the deed of gift (Ex. 12) it is, no doubt, clear that the said deed having been executed on the 14th of December 1883 after the passing of the Transfer of Property Act (IV of 1882) was invalid for want of registration. It is, however, equally clear that the plaintiff-respondent has been in possession of the grove ever since the date of gift right up to the date of suit for a period of close about 40 years. The deed may be invalid but it is relevant for a collateral purpose to show the continuous possession of the plaintiff. It is clear that Shankar Lal or his heirs could not have claimed back the grove from the plaintiff-respondent or his predecessor-in-title after the expiry of 12 years from the date of the execution of the deed of gift. The right to possession became perfected after the expiry of 12 years from the date of the gift. I am supported in this view by a ruling of their Lordships of the Privy Council reported as *Varada Pillai* v. *Jeevarathnammal* (1). At page 249* the following observations in the judgment might well be quoted :

"It was not contended before the Board that the above transactions effected a valid gift of the property to Duraisami for such a gift must, under s. 123 of the Transfer of Property Act, be made by registered deed. Nor, having regard to s. 91 of the Evidence Act, can the recitals in the petitions be

(1) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J 274; 46 I. A. 285; 2 U. P. L. R. (P. C.) 64; 22 Bom. R. 444 (P. C.).

*Page of 43 M.—[*Ed.*]

used as evidence of a gift having been made. But the defendant's case is that Duraisami, although she may have acquired no legal title under the transactions referred to, in fact took possession of the property when it was transferred into her name and retained such possession until her death in December 1911, after which date it passed to the defendant as her successor, and accordingly that the plaintiffs' claim is barred by upwards of 12 years' adverse possession. The High Court upheld this contention; and their Lordships, aftar considering the evidence, have arrived at the same conclusion." It is, therefore, clear that by virtue of the fact that the plaintiff-respondent and his predecessor-in-title remained in continuous possession of the grove from 1883 right up to the end of 1921 when the suit was brought they acquired the status of a grove-holder, a status to which Shankar Lal was clearly entitled. I am, therefore, of opinion that although the deed of gift was invalid, being unregistered, yet the defect was cured by the plaintiff having been in continuous possession for more than 12 years.

Regarding the plea of jurisdiction I am also of opinion that it has no force. The plea depends on the determination of the question as to whether a grove-holder is a tenant as defined in the Oudh Rent Act. In s. 3 cl. 10 of the Oudh Rent Act a "tenant" is defined as a person, not being an under-proprietor, who is liable to pay rent. Shankar Lal being a grove-holder was not liable to payment, nor was his predecessor-in-title liable for the same. The plaintiff cannot, therefore, be considered to be a tenant of the plots in suit. I am supported in this view by the decision of Pandit Kanhaiya Lal, A. J. C., in *Durga Prasad* v. *Ram Charan* (2). It was held in that case that a grove-holder could not be considered to be a tenant until there was a contract between him and the landlord to pay rent and that he was entitled to hold possession so long as the land retained the character of a grove and the mere fact that the land was liable to resumption or assessment of rent if brought under cultivation did not make the grove-holder a tenant liable to ejectment. It is, therefore, clear that if a grove-holder has been ejected illegally by the landlord a suit for possession by him lies in the Civil Court and not in the Revenue Court. I, therefore, decide the plea of jurisdiction also against the appellants

Having decided all the pleas against the appellants, I dismiss the appeal with costs.

G. H.

Z. K. *Appeal dismissed.*

(2) 48 Ind. Cas. 417; 5 O. L. J. 639.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 69 OF 1925.

November 10, 1925.

Present :—Mr. Justice Sulaiman and Mr. Justice Mukerjee.

GOPAL DAS—DEFENDANT—APPLICANT

versus

Lala BAIJ NATH AND OTHERS—PLAINTIFFS AND SHIVA PRASAD AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 105, O. XXX, r. 1, Sch. II, paras. 1, 16—Suit against firm—Reference to arbitration—All partners not parties to reference—Award, whether binding—Decree based on award—Revision—Interference by High Court.

Where objections are raised to a proceeding before an arbitrator and they are the subject of a decision by the Trial Court, the order of the Trial Court cannot be interfered with in revision. Where, however, an applicant in revision challenges not the propriety of the proceeding before the arbitrator but the proceeding of the Court itself and attacks the reference made by the Court to the arbitrator, it is not merely a question of a wrong decision of the Court but may be one of irregularity or illegality committed by the Court in the exercise of its jurisdiction in referring the matter to arbitration. In such a case it would be open to the High Court to interfere with the order of the Trial Court in revision. [p. 931, cols. 1 & 2.]

Under para. 1 of Sch. II of the C. P. C. it is imperative that all parties interested should agree that a matter in difference between them be referred to arbitration. It is not necessary that *pro forma* defendants must also join nor is it necessary that persons who are not interested in the matter in difference between those joining in the reference should join the reference, but it is necessary that all persons who are interested in the matter which is in difference between the parties and which is going to be referred to arbitration should join in the reference, although it is not absolutely necessary that they should all sign the application made to the Court. [p. 931, col. 2; p. 932, col. 1.]

Rule 1 (2) of O. XXX of the C. P. C. does not empower one partner to refer a case to arbitration so as to bind the other partners who have not agreed to or joined in the application for reference. An agreement for reference to arbitration by only one of the persons in a firm is not binding on the other persons merely because the suit is against the firm as such. [p. 932, col. 1.]

Where a party interested in the subject-matter of a reference does not join in the reference, it is not

bound by the award merely because it did not choose to put in an appearance and contest the suit. [p. 932, col. 2]

Where all the parties interested in the subject-matter of a reference do not agree to the reference, subsequent agreement cannot make the reference itself valid, though under certain circumstances it may amount to estoppel. [*ibid.*]

Per *Mukerjee, J.*—The object of enacting O. XXX of the C. P. C. was not to give any one of the members of a partnership any higher authority than he possessed under the law before the enactment of the Code. [p. 933, col. 1.]

When a reference is made to arbitration in a suit in which a firm is a party all the members of the firm who are sought to be bound must join in making the reference. [*ibid.*]

Civil revision from an order of the First Subordinate Judge, Cawnpore, dated the 18th April 1925.

Messrs. *R. K. Malaviya* and *K. N. Malaviya*, for the Applicant.

Dr. *K. N. Katju*, for the Opposite Parties

JUDGMENT.

Sulaiman, J.—This is a civil revision from an order disallowing certain objections to an award and directing that a decree be prepared in terms of the award.

A preliminary objection is taken on behalf of the respondents that no matter whether the decision of the Court below was right or wrong as to the objections raised before it the order is not open to revision by this Court. Where objections are raised as to the proceedings before an arbitrator and they are the subject of a decision by the Trial Court it cannot be suggested that there has been any irregularity committed by the Court in the exercise of its jurisdiction. Such objections, therefore, cannot be properly raised again in revision. But where the applicant challenges the proceedings of the Court itself and attacks the reference made by the Court to the arbitrator it is not merely a question of a wrong decision by the Court but may be one of irregularity or illegality committed by it in the exercise of its jurisdiction. The learned Counsel has relied on the case of *Ajodhya Prasad* v. *Badurul Husain* (1) where a learned Judge of this Court did observe that objections as to the validity of a reference ought to be raised under r. 15 of Sch. II of the Code. But in the case of *Kanhya Lal* v. *Jagannath Pershad Hanuman Pershad* (2) decided by a Bench of which the same learned Judge was a member it was remarked that objections as to the validity of a reference to arbitration was not an objection within the meaning of r. 15 and had no finality attached to it. With this last observation we agree. The objection is not as to the validity of the award only but as to the illegality of the reference to the arbitration. This reference having been made by an order of the Court it is open to the revision after the case has terminated It would not have been possible for the applicant to come up in revision from an interlocutory order. We accordingly overrule this preliminary objection.

The facts of this case are that a suit was instituted by the plaintiffs against a firm named Gobind Prasad Makund Ram which has two partners Gopal Das and Sheo Prasad, father and son. In the plaint the plaintiffs expressly asked that notices should be served on the two partners named individually. The notices were ordered to be issued to them separately. Only Sheo Prasad filed a written statement and engaged a Vakil and in the *vakalatnama* he purported to engage the Vakil as a partner of the firm. Gopal Das did not put in any appearance in the Court of the Subordinate Judge. Before the evidence commenced one of the plaintiffs and the Vakil for all the plaintiffs as well as Sheo Prasad signed an application referring the dispute between the parties to a named arbitrator. In this application Gopal Das did not join.

The matter was referred to the arbitrator and an award was made against the defendant firm. Objections were filed both by Sheo Prasad and Gopal Das to the validity of the award, but they have been overruled by the learned Subordinate Judge. Gopal Das the father has now come up in revision and challenged the validity of the reference on which the award is based.

There can be no doubt that under Sch. II, r. 1 it is imperative that all parties *interested* should agree that any matter in difference between them be referred to arbitration. Of course, it is not now necessary that *pro forma* defendants must also join, nor is it necessary that persons who are not interested in the matter in difference between those joining in the reference should be impleaded. But all the same it is necessary that all persons who are interested in the matter which is in difference between the parties and which is going to be referred to arbitration should join. Although it is not absolutely necessary that they should all sign the applica-

(1) 41 Ind. Cas. 357; 39 A. 489; 15 A. L. J. 427
(2) 60 Ind. Cas. 857; 19 A. L. J. 33; 43 A. 305.

tion made to the Court, it is necessary that they should agree to the reference. The learned Advocate for the respondents has relied on the provisions of O. XXX, r. 1 sub-cl (2) under which when a suit is brought against a firm then in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant it is sufficient if such pleading or other document is signed, verified or certified by one of the partners. It may, however, be noted at once that under no provision of the Code is an agreement or application to the Court required to be signed verified or certified by a party. All that Sch. II, r. 1, sub-cl. (2) requires is that application to the Court should be in writing. It does not require that it should be signed by the party From the case of *Umed Singh* v. *Sobhag Mal Dhadha* (3) it is clear that the agreement need not be in writing; it may be oral. Thus O. XXX, r. 1, sub-cl. (2) does not empower one partner to refer the case to arbitration so as to bind the other partners who have not agreed to or joined in the application for reference. It may be pointed out that once a decree has been passed against a firm it can be executed under O. XXI, r. 50 not only against the property of the partnership but also against any person who has appeared as a partner or who has been individually served as a partner with a summons and has failed to appear. Thus the consequences of a decree passed against a firm are to make the partners who have been served individually liable.

I therefore, think that it could never have been in the contemplation of the Legislature to make an agreement for reference to arbitration by only one of the partners binding on all the partner merely because the suit is against the firm as such.

Reliance has been placed on the case of *Ishar Das* v. *Keshab Deo* (4) where it was held that a minor defendant whose guardian *ad litem* did not put in an appearance in the case nor contested the suit was not a person interested in the matters which were referred to arbitration and that, therefore, his not joining in the reference did not invalidate it. It may be that the learned Judges on the facts came to the conclusion that the matter referred to arbitration did not affect the interest of the minor at all. We are not prepared to hold that if a defendant is interested in the subject-matter of the reference and does not join in the reference he is bound by the award merely because he did not choose to put in an appearance and contest the suit. In the present case as already remarked Gopal Das was directly interested in the subject-matter of the reference.

I am accordingly of opinion that there is nothing in the C. P. C. which entitles Sheo Prasad as one of the partners to refer the entire dispute to arbitration without the agreement of the other partner Gopal Das.

The learned Advocate for the respondents has lastly relied on the finding of the Subordinate Judge that although Gopal Das had not agreed to the reference to arbitration at the time when it was so referred and had not signed the application, nevertheless he acquiesced in the proceedings and did actually on one occasion appear before the arbitrator. The question before us is really one of the illegality of the reference. If there was no agreement of all the parties at the time of reference then a subsequent agreement cannot make the reference itself valid though under certain circumstances it may amount to estoppel. In the present case, however, we cannot hold that Gopal Das is precluded by his subsequent conduct from challenging the validity of the reference. He might have tried to make the best of the situation, but when the case did not succeed before the arbitrator he falls back on his right to challenge its validity.

We are not satisfied that the learned Judge has come to any distinct finding that, as a matter of fact, Sheo Prasad had authority to make the reference on behalf of the other partner Gopal Das. He has merely referred to four previous occasions on which such a thing was done, but it might very well be that on those occasions Sheo Prasad had special authority or it might be that no objection was raised on the point and considered. Furthermore those cases were cases which came up before a *kapra* committee (a previously appointed board of arbitrators), whereas in the present case it was a new arbitrator—a Pleader who was going to constitute the private tribunal.

(3) 32 Ind. Cas. 161; 43 C. 290; 20 C. W. N. 137; 30 M. L. J. 67; 14 A. L. J. 97; 3 L. W. 145; 19 M. L. T. 101; 23 C. L. J. 130; (1916) 1 M. W. N 67; 18 Bom. L. R. 308; 43 I. A. 1 (P. C.).

(4) 7 Ind. Cas. 68; 32 A. 657; 7 A. L. J. 807.

I would accordingly allow this revision and setting aside the order of reference (with which the award and the decree fall to the ground), direct that the case be restored to its original file and disposed of according to law.

Mukerji, J.—I agree. I wish to add just a few words to emphasize my view that when a reference is made to arbitration in a suit in which a firm is a party all the members of the firm who are sought to be bound must join in making the reference. The object of enacting O. XXX of the C. P. C. of 1908 was not to give any one of the members of the partnership any higher authority than he possessed under the law before the enactment. For brevity of reference it was sometimes expedient to describe certain partners merely by the name of the firm. A firm is not a corporation and has got no entity apart from the entities which constituted the firm. In order to establish the proposition that one of the members of a partnership business could refer a dispute to arbitration, on behalf of all the members of the partnership, something more than the rules enacted in O. XXX of the C. P. C., should be pointed out. It will be noticed that in r. 2 of O. XXX, a defendant may at any time call upon the plaintiffs, who are suing under the name of their firm, to disclose the identity of the partners who constitute the firm. If they fail to disclose their names the proceedings must be stopped. This shows that the Legislature meant that where necessary, all the individuals who constitute the plaintiff or the defendant firm must come before the Court under their original names and descriptions. This is an additional reason for holding that a partner is not entitled, except under a deed of authority, to refer a matter to arbitration so as to bind all his partners.

By the Court.—The revision is allowed, the award and the decree are set aside and the case be restored to the original file and be disposed of according to law. As Gopal Das is partly to be blamed we direct that the costs should abide the event.

Z. K. *Revision allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 740 OF 1923.

August 19, 1925.

Present:—Mr. Justice Viswanatha Sastri.

Diwan Bahadur G. KRISHNAMACHARI—PLAINTIFF—PETITIONER

versus

THE MUNICIPAL COUNCIL, SRIRANGAM, REPRESENTED BY ITS PRESENT CHAIRMAN Mr. K. SINGAM IYENGAR—DEFENDANT—RESPONDENT.

Madras District Municipalities Act (V of 1920), ss. 3 (25), 95, 354, Sch. IV, cl. (28)—Professional tax—Residence, meaning of—Person owning house and residing temporarily within Municipal limits, liability of—Suit for refund of assessment, maintainability of.

A person permanently residing outside the limits of a Municipality but having a house within such limits, where he comes and spends a portion of his holidays in the year, must be deemed to be resident within the Municipal limits within the meaning of s. 3, cl. (25) of the Madras District Municipalities Act and is, therefore, liable to be assessed to professional tax under s. 95 of the Act.

Section 354 (2) of the Madras District Municipalities Act read with cl. (28) of Sch. IV of the Act bars a suit for refund of professional tax imposed on a person who has not resided within the Municipal limits for the requisite period. In such a case the remedy of the aggrieved party is only by way of appeal to the Municipal Council.

Municipal Council, Nellore v. *Rangayya*, 19 M. 10; 6 Ind. Dec. (N. S.) 711 and *Municipal Chairman, Virudupatti* v. *Saravana Pillai*, 54 Ind. Cas. 454; 10 L. W. 592, followed.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree in S. C. S. No. 5450 of 1920 on the file of the Court of Small Causes, Trichinopoly.

Mr. *K. R. Rangaswamy Iyengar*, for the Petitioner.

Mr. *N. Rajagopalachariar*, for the Respondent.

JUDGMENT.—Petition by the plaintiff in S. C. S. No. 5450 of 1922 on the file of the Court of Small Causes, Trichinopoly, to revise the decree dated 16th April 1923.

The suit was to recover back professional tax collected from the plaintiff. The plaintiff is a resident of Hyderabad and has a house within the Municipal limits of Srirangam where he comes and spends a portion of his vacation. He was called upon to pay professional tax for carrying on money-lending business at Srirangam and paid a sum of Rs. 50, under protest. It was urged before me that as he did not reside within the Municipal limits of Srirangam for 60 days in the half year for which the tax was collected, he was not liable to be assessed. It was conceded that during the

half year for which the tax was levied, the plaintiff did come and reside at his house at Srirangam for some days Such being the case, he was a person liable to be assessed, in case he came under s. 95 of the District Municipalities Act. The term 'residence' is defined in s. 3, cl. (25) of the Act, and the plaintiff must, therefore, be deemed to reside within the limits of the Srirangam Municipality. Now assuming, for a moment that he ought to have resided for 60 days in the half year for which he was assessed, s. 354 (2) of the Act read with cl. (28) of Sch. IV bars the suit. The case appears to me to be on all fours with the case of *Municipal Council, Nellore* v. *Rangayya* (1) which was followed in *Municipal Chairman, Virudupatti* v. *Sararana Pillai* (2). There a house which was completed only on 15th August 1893 was assessed on 11th September 1893 and tax collected for the half year ending 30th September 1893. It was held that although the building was not in a habitable state for 60 days in the half year, it should not be said that there was any illegal levy, and that the remedy lay only by way of appeal to the Municipal Council. I dismiss the petition with costs.

Petition dismissed.

V. N. V.

Z. K.

(1) 19 M. 10; 6 Ind. Dec. (N. S.) 711.
(2) 54 Ind. Cas. 454; 10 L. W. 592.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 155 OF 1924.

October 23, 1925.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Lindsay.

ABDULLAH—DEFENDANT—APPELLANT

versus

MR. BADR-UL-ISLAM—PLAINTIFF—RESPONDENT.

Custom—Wajib-ul-arz, *entry in, construction of*—Pukhta *house, meaning of*—*Transfer, right of*—*Previous transfers, whether can be referred to.*

According to a certain clause in a *wajib-ul-arz* a particular class of the inhabitants of a town had the right to transfer *pukhta* houses which they had built at their own expense:

Held, (1) that for the purpose of determining the sense in which the expression "*pukhta*" was used in the *wajib-ul-arz* it was permissible to refer to evidence relating to previous transfers of houses in the town which had taken place without the right of transfer being questioned by the landlord; [p. 935, col. 1.]

(2) that the expression "*pukhta*" did not necessarily imply the use of "kiln-dried" bricks in the building of the house and that it was applicable to a building of a substantial character made of sun-dried bricks. [*ibid.*]

Letters Patent Appeal against a judgment of Mr. Justice Neave, dated the 23rd June 1924.

Mr. *M. A. Aziz*, for the Appellant.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the Respondent.

JUDGMENT.—What we have to deal with in this appeal is the true construction of a *wajib-ul-arz* and in particular the clauses in it which relate to the right of residents in the town of Jahangirpur to transfer their houses.

According to the *wajib-ul-arz* the inhabitants of this town are divided into two classes—the first consisting of persons who are described as "*sharif qaum*" or respectable classes, and the second class consisting of agriculturists and others.

The *wajib-ul-arz* sets out that persons in the first class, that is to say those who are "*sharif*" have a right to transfer "*pukhta* houses which they have built at their own expenses." The right of transfer is expressed to be a right to transfer the houses as they stand. In this connection it is also to be noted that the *wajib-ul-arz* expressly declares that the *zemindars* of the village have no right whatever to interfere with this privilege of people who belong to the "*sharif qaum.*"

In the case of the ordinary "*riaya*" and lower classes inhabiting the town it is distinctly provided that they have no right to transfer their houses although they have the privilege of selling the materials of their houses.

It is also to be added that neither class of residents has any power to transfer the sites of the houses, those sites being the property of the *zemindar*.

In the present case it appears that in the year 1910 a shop was sold to the defendant appellant Abdulla. In the year 1921 we have this suit brought by the *zemindar* asking for the ejectment of Abdulla, for the demolition of the shop and for the clearance of the site. It is not to be denied that when Abdulla took this property under the sale-deed just mentioned his vendor, a person who is described as a *bania*, was represented as having sold to Abdulla the site of the house. On all hands it is clear that this *bania* had no right whatever to part with the site of the house which did not belong to him.

In the sale-deed the property which is sold is described as "*dukan kham*" which means a "*kutcha*" shop.

The first Court decreed the plaintiff's claim. The first Court of Appeal reversed this decision and dismissed the suit being of opinion (1) that Abdulla's vendor was a person belonging to the privileged class, (2) that he had a right to sell the house to Abdulla and that the landlord had no *locus standi* to interfere with this transaction or to claim possession of the site.

That decision has been reversed by a learned Judge of this Court against whose decision this present appeal is being entertained.

It has been argued before us that the learned Judge of this Court has placed too narrow an interpretation upon the language of the *wajib-ul-arz*. He has, it seems, definitely laid down that the power of transfer which is vested in members of the respectable class in this town is limited to cases in which the houses being transferred are what is properly known as *pukka* houses, that is to say, houses which have been built of kiln-dried bricks.

In the present case it is proved that the building is not a building which has been built of what is ordinarily known as *pukka* bricks. It is a building which has been constructed with sun-dried or *kutcha* bricks. In spite of this, however, the First Appellate Court held that the terms of the *wajib-ul-arz* applied to this building on the ground that it was a building of a substantial character. The Subordinate Judge thought that the expression "*pukhta*" did not necessarily imply that houses to which the term was applied were houses built of kiln-dried bricks.

He also referred to the evidence on the record to show that a considerable number of transfers of buildings of this description had taken place without the right of transfer being questioned by the landlord. He was, undoubtedly, entitled to refer to this evidence for the purpose of showing the sense in which the expression "*pukhta*" is used in this town of Jahangirpur.

It appears to us after listening to the arguments of the learned Counsel that the learned Judge of this Court has placed too narrow a construction on the expression "*pukhta*", and we think that the better sense was arrived at by the first Appellate Court.

Taking the language as it stands in the context we are of opinion that the interpretation adopted by the first Court of Appeal is more appropriate than that which found favour with the learned Judge of this Court. In the circumstances, therefore, we are of opinion that this appeal ought to be allowed, that the decree of the learned Judge of this Court should be discharged and that the decree of the first Appellate Court should be restored. We direct accordingly and also direct that the appellant do get all his costs in this Court including fees on the higher scale.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2203 OF 1922.

August 7, 1925.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Cuming.

HEM CHANDRA JELIA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SATYA KINKAR SEN AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Construction of document—Landlord and tenant—*Kabuliyat *providing for payment of rent in kind—Money value of rent stated in* kabuliyat, *effect of—Default in payment—Landlord, whether entitled to market value, or value stated in* kabuliyat.

A *mourasi mokarrari kabuliyat* provided that the tenant would pay certain fixed quantities of paddy and straw (the then value of which was stated in the *kabuliyat*) without variation and that in case of default he would pay *bari* (*i. e.*, addition as interest) at a certain rate in kind, the money value of the *bari*, however, was not stated in the *kabuliyat*:

Held, (1) that the parties intended that only paddy and straw should be paid as rent and that it would be inconsistent with their intention to hold that a fixed sum, which might be a wholly inadequate value of the paddy at the date of the suit, was agreed upon to be paid in the event of non-delivery of the paddy and the straw in order to avoid any question as to their value; [p. 936, col. 2; p. 937, col. 1.]

(2) that, therefore, in default of payment of the paddy and straw mentioned in the *kabuliyat* the landlord was entitled to their market value at the date on which they should have been paid and not merely to the sum mentioned in the *kabuliyat* as the value of the paddy and straw. [p. 938, col. 1.]

[Case-law referred to.]

Appeal against a decree of the District Judge, Bankura, dated the 25th of May 1922, modifying that of the Munsif, Second Court, Bankura, dated the 6th of January 1922.

Babu *Panchanon Ghose*, for the Appellants.

Babu *Asita Ranjan Ghose*, for the Respondents.

JUDGMENT.

Chatterjea, J.—The question involved in this appeal is whether the plaintiff is entitled to the market value of the paddy and straw reserved as rent in a *kabuliyat*, or to the price of the same stated in it.

The material portion of the *kabuliyat* is as follows: "I having prayed to you for being granted a Permanent Settlement of about 7 *bighas* of land comprising *jore*, *hasil* and *patit* and described in the boundaries given in the Schedule out of the same and which is held in *khas* by you, you have been pleased to grant me in accordance with my prayer a Permanent Settlement at a *jama* of 10 (ten) *maps* of *sanja* paddy, measured with a *Rajhati pai* of full measure, (the price whereof is Rs. 50) and 10 (ten) *pons* of straw (the price whereof is Rs. 2) at a *jama* of the said *sanja* paddy, etc., the total price being Rs. 52 per annum. Accordingly I give in writing this *kabuliyat* that I shall deliver the said *sanja* paddy and straw without variation every year in the month of *Magh*, to you and later on to your heirs and representatives and shall make the *patit* (fallow) lands culturable and cultivate the same along with the *hasil* (culturable) land in *khas* or have the same cultivated by letting out to tenants and shall go on holding and enjoying the same with great facility for ever down to my sons, son's sons and so on in succession. If I make any default in delivering the *sanja* paddy, then I shall deliver *bari* (addition) of 2 (two) *salis* of paddy for every map per every year. I shall not get any remission of the stipulated *sanja* on the grounds of drought, inundation and sand-drift and so forth. On no account there shall ever be any reduction or enhancement of the land and *jama* aforesaid." The learned District Judge held that the plaintiffs were entitled to the market value of paddy and straw. The defendant has appealed to this Court and it is contended that the plaintiffs are entitled only to the price of the paddy as mentioned in the *kabuliyat*.

Looking to the terms of the *kabuliyat* there can be no doubt that the rent stipulated to be paid was a *sanja* rent (paddy and straw). A Settlement was made of the 7 *bighas* of land at a *jama* of 10 maps of paddy (measured with a certain measure) and ten *pons* of straw, the tenant agreed to deliver the *sanja* paddy and straw without variation in the month of *Magh* every year, and to pay *bari* (addition *i. e.*, interest) at the rate of 2 *salis* for every *map* every year. There was to be no reduction of enhancement of the said *jama* It is true the price of the paddy is stated to be Rs. 50 and that of straw Rs. 2 total Rs. 52. But nowhere is it provided that on default of delivery of the paddy and straw the tenant would pay Rs. 52 as rent or that the landlord would realise the said sum of Rs. 52 as rent. Then again in default of payment of the paddy and straw in the month of *Magh*, the tenant is to pay *bari* (addition by way of interest) at 2 *salis* per map. No price is stated of the same, and although the price may be worked out, the *kabuliyat* does not state either that Rs. 52 was payable for the *sanja* rent or any money was payable for the *bari*.

Contracts for payment of rent in kind are very common and have come up for consideration to this Court in many cases. The decisions are not uniform. They were reviewed in the case of *Gurudas Sen* v. *Gobinda Chandra Sinha* (1), as pointed out in that case: "Contracts for payment of *bhag* paddy as stated above are very common, and it is well known that middle class people, specially of the *bhadra loque* class who cannot cultivate lands themselves, let out their lands for getting paddy for the consumption of their family, and in some cases the *bhag* paddy is the only means of subsistence of the family. A certain value has to be fixed for the paddy in the *kabuliyat*, not only for the ascertainment of the registration fee, but also (and specially for fixing the stamp duty payable, though it is not so expressly stated in the *kabuliyat*. It is said that the parties may agree as to the value the paddy in order to avoid disputes and the going into any question as to the value in the event of its non-delivery. But that would be a question of intention, and if it is clear from the *kabuliyat* (for instance where it is provided that the paddy is to be delivered in a particular month or measured with a certain measure) that it is only paddy which the parties intended should be paid, it would be inconsistent with that intention to hold that a fixed sum (which might be a

(1) 54 Ind. Cas. 914; 24 C. W. N. 85.

wholly inadequate value of the paddy at the date of the suit) was agreed upon to be paid in the event of non-delivery of the paddy in order to avoid any question as to its value, in cases where the value is merely mentioned without any express stipulation to pay such value in the event of non-delivery of the paddy.

"It is a matter of great hardship in such cases, as the value of the paddy at the date of the *kabuliyat* might be one rupee a maund, while at the date of the suit, it might be four rupees per maund, and if he is to get the value of the paddy mentioned in the *kabuliyat*, he would get only one fourth of the paddy agreed upon to be paid.

"A distinction may perhaps be drawn between such cases, and cases where there is an express stipulation to pay the sum mentioned in the *kabuliyat* as the value of the paddy in the event of its non-delivery. But as stated above, even where there is such an express stipulation to pay the value mentioned in the *kabuliyat* in the event of non-delivery of the paddy, it has been held upon a construction of the contract in some cases, that the value mentioned was the value of the paddy at the date of the contract or stated for the purposes of registration, while a contrary view has been taken in some other cases". It may be pointed out that the expression *bhag* meant *sanja* in the above judgment.

The case of *Asutosh Mukhopadhya* v. *Haran Chandra Mukerjee* (2) is relied upon on behalf of the appellants In that case the *kabuliyat* stipulated to pay cash rent at the rate of Re. 1-6-8 and 7 *aris* of paddy. It further stated that the market value of the paddy was Rs. 15 and that the *total rent was Rs. 16-6-8* obtained by the addition of the rent in cash and the money value of the rent in kind. The learned Chief Justice (Sanderson C. J., and Mookerjee, J.,) held that the rent was fixed at Rs. 16-6-8 if the tenant should fail to deliver the paddy under the terms of the contract. In the case of *Dwarika Nath* v. *Dwijendra Nath* (3) also, upon which reliance was placed in the above case, the *kabuliyat* provided for rent Rs. 59-10 and also the payment of 1½ *bish* of paddy which "may be valued at Rs. 30 by guess" making a total of *Rs. 89-10 as the assessed rent*. The total rent was described as *abadharita jama* (fixed rent) in the lease which was a *mourasi mokarari* lease, and the learned Judges (Maclean, C.J., and Banerji, J.) held that the rent was fixed at Rs. 89-10, and that though the parties intended to pay so much in kind and so much in money, in order to avoid disputes and going into any question as to the value of the paddy in the event of its non-delivery the parties agreed that it should be valued at Rs. 30 by estimation and that view was supported by the words "making a *total of Rs. 89-10 as the assessed rent*".

There are no such provisions in the present case, no *money rent is fixed nor is Rs. 52 stated to be payable* in the event of the non-delivery of the paddy nor the cash rent for the *bari*. Although as pointed out in the case of *Gurudas Sen* v. *Gobinda Chandra Sinha* (1) some observations in the case of *Afar* v. *Surja Kumar Ghose* (4) and some recent decisions also, affect the class of decisions where a money value is merely stated without any agreement to pay such value, and it is desirable that the question should be settled by a Full Bench, the terms of the contract in the present case are materially different from those in *Asutosh Mukhopadhya* v *Haran Chandra Mukerjee* (2) (a decision of three Juoges Newbould, J., dissenting), and *Dwarka Nath* v. *Dwijendra Nath* (3). We do not think, therefore, that the case should be referred to a Full Bench.

It may be pointed out that in *Afar's case* (4) the plaintiff attempted to prove by oral evidence that the value of the paddy was mentioned in the lease for the purpose of the registration fee; and Mookerjee, J., accordingly held that it was not competent to the plaintiff to do so having regard to the provisions of s. 92 of the Evidence Act. But there is no question of adducing oral evidence in the present case. The Court has to construe the contract, and the question is whether the price of the paddy and straw was stated in the *kabuliyat* for the purpose of fixing the rent at Rs. 52 or it was so stated as a price must be mentioned in every case for fixing the stamp duty and the registration fee payable.

That is a matter of construction and having regard to all the terms of the *kabuliyat* there can be no doubt that Rs. 52 the price of the paddy and straw was not

(2) 53 Ind. Cas. 332; 23 C. W. N. 1021; 30 C. L. J. 41; 47 C. 133.

(3) 53 Ind. Cas. 103; 30 C. L. J. 37; 47 C. 139n.

(4) 7 Ind. Cas. 842; 15 C. W. N. 249; 12 C. L. J. 649.

the rent *agreed upon* as payable upon non-delivery of the paddy.

The Settlement is a *mokarrari* one, and there is to be no variation in the *jama*. But the *mokarrari* rent is 10 *maps* of paddy and 10 *pons* of straw. That remains fixed whatever fluctuation there may be in the market price of the paddy and straw.

We were referred to a recent case decided on the 9th July 1924. In that case at the end of the *kabuliyat* it was stated "The present market price of the said paddy and straw is Rs 59", and the learned Judges held that that was the sum fixed as rent by the contract. There was no stipulation to pay *bari* at so much per *map* as in the present and the case is distinguishable. As we have said, each case must be decided upon the terms of the contract, and having regard to the terms of the contract in the present case we think that the decision of the Court below is correct. The appeal is accordingly dismissed with costs.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 324 OF 1924.

November 12, 1925.

Present:—Mr. Justice Hasan.

CHANDRA SEN SINGH—DEFENDANT—APPELLANT

versus

BHAGWAN SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), ss. 3 (17), 7-A (5)—Execution of decree—Sale of sir *land—Ex-proprietary rights—Auction-purchaser, rights of—Trees planted on* sir *land, effect of.*

A question of pure law which was raised but not pressed before the lower Court can be argued in second appeal. [p. 938, col. 2.]

Where *sir* land is sold at an auction sale in execution of a decree against the proprietor, the auction-purchaser acquires only the rights of the proprietor to recover rent from the ex-proprietary tenant and is not entitled to recover actual possession of the land. [p. 939, col. 2.]

All arrangements in contravention of the policy of the law which secures ex-proprietary rights in *sir* lands to the proprietor on a transfer of proprietary rights are contrary to law, illegal and void and cannot be enforced by the vendee in any Civil or Revenue Court. [p. 939, col. 2; p. 940, col. 1.]

The fact that trees are planted on *sir* land does not destroy the character of the land as *sir*. [p. 939, col. 2.]

Appeal against a decree of the Subordinate Judge, Hardoi, dated the 30th April 1924, reversing that of the Munsif, Shahabad, dated the 1st of November 1922.

Mr. *Raj Narain Shukla*, for the Appellant.

Mr. *Motilal Saksena*, for the Respondents.

JUDGMENT.—This is the defendant's appeal in a suit brought by the plaintiffs-respondents for possession of grove No. 184 situate in village Ismailpur, *Pargana* Pachoha, in the District of Hardoi, and also for damages. The respondents' claim has succeeded in both the lower Courts.

In the memorandum of appeal to this Court five grounds of objection were taken against the judgment of the lower Appellate Court. At the hearing of the appeal before me the learned Pleader for the appellant confined his arguments to grounds Nos. 1, 3 and 4 only. The substance of these grounds is that plot No. 184 being the *sir* land of the original proprietor could not be and was not sold to the plaintiffs-respondents under the auction-sale of the 20th January 1915. On the basis of this contention it was argued that the suit for possession of plot No. 184 was not maintainable, the original proprietor having acquired ex-proprietary tenancy rights in the same.

It is not disputed that the proprietary right in the plot in question vests in the respondents. The question is whether they are entitled to actual possession of it or only to rent in the right of proprietor from the ex-proprietary tenant. The point now raised in the appeal before me was not raised in the Trial Court but it was distinctly raised in the grounds of appeal before the lower Appellate Court. It appears, however, from the judgment of the lower Appellate Court that at the hearing of the appeal before that Court the point was not pressed. The question being one of pure law I am of opinion that the appellant is not estopped from raising it in this Court. I now proceed to state the facts of the case and give my judgment in the appeal.

Plot No. 184 is admittedly a grove and was included within a 1 *biswa* 17 *biswansis zemindari* share of the ancestors of Subedar Singh, defendant No. 2 to the suit out of which this appeal arises. A 1 *biswa* out of this share was mortgaged on the 3rd July 1896 to Lalta Singh, father of the defendant-appellant Chandrasen Singh. Lalta Singh brought a suit to enforce the mortgage of the 3rd July 1896 and obtained a decree. This 1 *biswa* share was sold at auction in

execution of Lalta Singh's decree and purchased by the plaintiffs-respondents on the 20th January 1915. Afterwards on the 5th February 1921 Subedar Singh sold the grove in suit together with other properties to the defendant-appellant Chandrasen Singh. Chandrasen Singh obtained mutation of names in respect of the property conveyed to him including the grove in question and entered into the possession of the same. This had the effect of dispossessing the plaintiffs-respondents and gave cause of action for the present suit.

In the proclamation prepared for the purpose of the sale in pursuance of Lalta Singh's decree plot No. 184 is shown amongst the *sir* plots of the judgment-debtor with a total area of 4 *bighas* and 14 *biswas* and is described as a grove. The plaintiffs claim their share of 2 *bighas* 10 *biswas* and $2\frac{1}{2}$ *biswansis* in the area constituting the grove No. 184. The sale certificate, which was granted to the plaintiffs-respondents (Ex. 2), describes the property sold as 1 *biswa* "*haqiat*" in village Ismailpur comprising an area of 35 *bighas* 7 *biswas* and 15 *biswansis*. It is perfectly clear and indeed it is common ground that the sale of the 1 *biswa zemindari* share carried with it the proprietary rights in the corresponding area of grove No. 184. It is equally clear that if that grove constitutes *sir* land within the meaning of cl. (17) of s. 3 of Act XXII of 1886 the sale gave rise to the right of ex-proprietary tenancy in that plot in favour of the defendant-judgment-debtor, Subedar Singh. Clause (17), to which reference has just now been made, was added to Act XXII of 1886 by s. 5 of the Local Legislative Act IV of 1921. According to sub-cl. (*a*) of cl. (17) "land which for the seven years immediately preceding the passing of this Act had been continuously dealt with as *sir* in the distribution of proprietary or under-proprietary profits and charges" means "*sir*": "Provided, *secondly*, that land which was recorded as *sir* at the last Settlement prior to the passing of this Act and has been continuously so recorded since, shall be presumed to be land of the class mentioned in cl. (*a*) till the contrary is proved: Provided, *thirdly*, that land which is *sir* under cls. (*a*), (*b*), (*c*) or (*d*) shall cease to be *sir* when it becomes the subject of an ex-proprietary tenancy." In the *khasras* for 1301 and 1302 plot No 184 is recorded as *bagh sir bandobast*. The same entry has continued since as is evidenced by the *khasras* for 1316, 1318 and 1322 *Faslies* (Exs. 9, 10 and 11 respectively). It is clear, therefore, that plot No. 184 is *sir* within the meaning of sub-cl. (*a*) of cl. (17) of s. 3 of Act XXII of 1886. Further it has been repeatedly held by the Board of Revenue that the fact that trees are planted on *sir* land does not destroy the character of the land as *sir*. Reference may be made in this connection to the decision of the Board of Revenue in the case of *Lachmi Narain* v. *Jai Kishan* [Volume 3 of the Unpublished Decisions, page 159.] The same view has prevailed in the High Court at Allahabad as appears from the decisions of that Court in the following cases: *Deoki Nandan* v *Dhian Singh* (1), *Jugal* v. *Deoki Nandan* (2) and lastly, *Shiam Lal* v. *Anant Ram* (3). According to s. 7-A Subedar Singh acquired by virtue of the sale of the 20th January 1915 ex-proprietary rights in the land of plot No. 184.

Two alternative constructions are possible of the sale of the 20th January 1915 in favour of the respondents. The construction which is consistent with law is that at that sale only proprietary rights in the corresponding area of plot No. 184 passed in favour of the purchasers. The second possible construction is that it carried with it even the right of actual possession, in other words it did not respect the right of ex-proprietary tenancy which the law gave to the judgment-debtor. If the first construction is to be adopted as it should be it would follow that the plaintiffs are not entitled to take actual possession of the plot in suit. But even if the second construction is to be adopted the result would be the same because if the sale purported to wipe off the ex-proprietary tenancy to that extent the sale was illegal and wholly void and consequently the ex-proprietary rights of the defendant-judgment-debtor remained unaffected. In giving the judgment of their Lordships of the Privy Council in the case of *Moti Chand* v. *Ikram Ullah Khan* (4), Sir John Edge said that all arrangements in contravention of the policy

(1) 8 A. 467; A. W. N. (1882) 192; 5 Ind. Dec. (N. S.) 181.

(2) 9 A. 83; A. W. N. (1886) 320; 5 Ind. Dec. (N. S. 489 (F. B.).

(3) 17 Ind. Cas. 302.

(4) 39 Ind. Cas. 451; 44 I. A. 51; 15 A. L. J. 150; 5 L. W. 388; 21 M. L. T. 267; 32 M. L. J. 383; 21 C. W. N. 616; 19 Bom. L. R. 433; 39 A. 173; 26 C. L. J. 24; (1917) M. W. N. 453 (P. C.).

of the law which secures ex-proprietary rights in *sir* lands on a transfer of proprietary rights are "contrary to law and are illegal and void and cannot be enforced by the vendee in any Civil Court or in any Court of Revenue."

On behalf of the respondents it was argued that the defendant-appellant is in no better position than the plaintiffs-respondents. The sale of the 5th February 1921 of the plot in suit in favour of the defendant-appellant gave him no right to the possession of the same. This is perfectly true but the appellant is in the fortunate position of a defendant. The maxim "*in pari delicto potior est conditio possidentis*" applies. The Court will help neither party. "Let the estate lie where it falls."

On the grounds stated above, I allow this appeal, set aside the decrees of the Courts below and dismiss the plaintiffs' suit. As the point on which the appeal now succeeds was not taken in the Court of first instance and though taken in the lower Appellate Court was not pressed I order that the parties shall bear their own costs throughout.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

REFERENCE CASES No. 3 OF 1924 AND No. 8 OF 1925.

August 17, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice and Mr. Justice Beasley.

THE COMMISSIONER OF INCOME-TAX, MADRAS—REFERRING OFFICER

versus

Sri KRISHNA CHANDRA GAJAPATHI NARAYANA DAS, RAJA OF PARLAKIMIDI—ASSESSEE.

Income Tax Act (XI of 1922), ss. 9 (1) (7), 34—House furnished and ready for occupation, whether vacant—Deliberate omission to assess property owing to erroneous construction of statutory provision—Property, whether can be assessed in the following year.

Where a person who owns a house keeps it furnished and ready for his own occupation or for the occupation of his guests, the house cannot be said to have been vacant during a particular year within the meaning of s. 9 (1) (7) of the Income Tax Act merely because it was not actually occupied by the owner or by his guests at any time during that year. The owner must be deemed to be in occupation of the house and is liable to be assessed in respect of the house. [p. 911, col. 1.]

Section 34 of the Income Tax Act applies to a case where the Income Tax Officer has deliberately adopted an erroneous construction of a provision of the Act and has thus failed to assess a particular item of income, just as much as to a case where he has not considered the matter at all and has simply omitted an assessible item from his view and from his assessment. [p. 911, col. 2; p. 912, col. 1.]

Where, therefore, an Income Tax Officer proceeding upon an erroneous assumption that certain property is not liable to assessment has failed to assess the income arising from such property in a particular year, such item is liable to be assessed in respect of that year in the following year under s. 34 of the Act. [p. 911, col. 2.]

Cases stated under s. 66 (2) of the Income Tax Act by the Commissioner of Income Tax referring the following questions for the decision of the High Court.

(1) Whether the interest on arrears of rent charged by a land-holder to his tenants is "agricultural income" within the meaning of s. 2 (1) (*a*) of the Income Tax Act?

(2) Whether income which the Assessing Officer in 1922-23 deliberately refrained from taxing can be taxed in 1923-24 under s. 34 of the Income Tax Act? and

(3) Whether under s. 9, cl. (1), sub cl. (*vii*) of the Income Tax Act XI of 1922, the buildings mentioned in the schedule to his letter No. 102 of 1924, dated the 16th March 1925, are exempt from income-tax for the period found vacant?

Mr. *M. Patanjali Sastriar*, for the Commissioner.

Mr. *T. R. Ramachandra Iyer* for Mr. *L. A. Govindaraghava Iyer*, for the Assessee, in Reference Case No. 3 of 1924.

Mr. *L. S. Veeraraghava Iyer*, for the Assessee in Reference Case No. 8 of 1925.

JUDGMENT.

Coutts Trotter, C. J.—The short point here is whether certain bungalows which belong to the Rajah of Parlakimidi are or are not assessable, under s. 9 of the Indian Income Tax Act XI of 1922. The sub section material to this question is sub-s. (1) (7):—"In respect of vacancies, such sum as the Income Tax Officer may determine having regard to the circumstances of the case, is to be the tax payable by the assessee". The question we have to determine is what the section means by "vacancies". The Executive Authorities have issued for the guidance of their officers a manual and this case has been put forward in the form of asking us to say whether s. 32 of the manual is in consonance with the words of the Act. Ordinarily we should not view the matter from the point of view because the manual which is called

notes of instructions is obviously merely a document for the guidance of officials. All we have to determine is two short questions, first, whether these bungalows in the circumstances of the case can be described within the meaning of the section as being vacant, the second question which I shall deal with separately in a moment is whether the assessment in this case can be made retrospective for one year under the provisions of s. 34. To take the first question, the manual says outright that the subsection only applies to property which is usually let to a tenant. Without deciding whether that is correct or not and whether a man who had a house that he never let, but who dismantled it and locked it up for the year would or would not be assessable, it is clear that these houses are in fact never let. The description of the case stated by Mr. Strathie is quite clear: "Bungalow No. 1 is kept by the Rajah as a guest house for Government officers and others visiting Parlakimidi. Bungalow No. 2 is only used by the Rajah or his officers who visit Berhampore. Bungalow No. 3 is occupied only about 2 months in the year when the Rajah visits Madras during the season. Bungalow No. 4 is occupied during the hot weather", obviously by the Rajah. It is clear from the way in which the case is framed that the contention put forward was that, although these bungalows were ready for occupation and, therefore, must necessarily have been equipped with the furniture necessary for the occupation of the Rajah, they are not assessable if in fact it so happened in any one year that they were not lived in by the Rajah or the other persons in question, guests or officers of the Rajah's staff. In my opinion there is nothing in the section to warrant that construction and if a man owns a house ready for his own occupation, ready for him to live in when he chooses to do so and there is a statement here that not only was that the case but that servants of the Rajah were actually kept on the premises in order to get it ready for occupation whenever he wanted to go there he is assessable. In these circumstances I think that the case falls within the exact words of Lush, J., in *R.* v. *Assessment Committee of St. Pancras* (1). The words are to be found at page 588* where the learned Judge says this:—"If, however, he (that is, the owner) furnishes it (that is, the vacant house) and keeps it ready for habitation whenever he pleases to go to it, he is an occupier though he may not reside in it one day in a year". That seems to me to be conclusive and I respectfully agree with that view and think that that is the proper construction of the Statute. In my opinion, therefore, the assessee is liable for assessment in respect of all the bungalows referred to in the case.

The next point is whether the assessment can be made retrospective. It appears that in the previous year the Income Tax Officer had to consider the question and came to the conclusion that the Rajah was not assessable in respect of these bungalows. The section of the English Act of 1918, s. 125, is quite clear, because it provides expressly for the case where an allowance or exemption or abatement unauthorised by the Act has been deliberately made by the predecessor or the surveyor with whom the section is concerned. The Indian Act (s. 34) is not quite so explicit. What it says is this: "If for any reason, income chargeable with income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income Tax Officer may, within a year, serve a notice." It is said that 'escaped assessment' must mean not that the question has been considered and decided in favour of the assessment, but that the Income Tax Officer has omitted to consider the question at all or was unaware of the existence of the property now sought to be taxed and, therefore, passed it over and that it does not apply to cases where the Income Tax Officer on consideration came to the conclusion, *ex hypothesi* an erroneous conclusion that the property in question was not assessable. It seems to me that that construction is forbidden by the alternative case put in the section; "where the income has been assessed at too low a rate", that cannot be a matter of mere inadvertance, that must refer to a deliberate assessment made by the Income Tax Officer in the preceding year with knowledge of the facts and circumstances. It appears to me that a similar view must be taken of the previous words ('escaped assessment') and that it applies the cases where the Income Tax Officer had deliberately adopted an erroneous construction of the Act just as much as to a case where the officer has not

(1) (1877) 2 Q. B. D. 581; 46 L. J. M. C. 243; 37 L. T. 126; 25 W. R. 827.

*Page of (1877) 2 Q. B. D.—[*Ed.*]

considered the matter at all, but simply omitted the assessable property from his view and from his assessment. In my opinion, the questions referred to us must both be answered adversely to the assessee and it must be held that the property referred to us is not property describable as vacant during the year of assessment and that there is nothing in the Statute to prevent the Assessing Officer from recovering income-tax for the previous year as allowed by s. 34.

Rs. 150 will be allowed for costs in each case.

Beasley, J.—I agree.

V. N. V.

Z. K. *Order accordingly.*

OUDH CHIEF COURT.

SECOND CIVIL APPEALS NOS. 250 AND 251 OF 1924.

November 23, 1925.

Present:—Mr. Justice Misra.

Chaudhuri GAJRAJ SINGH—PLAINTIFF—APPELLANT

versus

NANHU SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal, second—Custom, question of—Wajib-ul-arz, *entry in, value of—Finding of fact—Interference by High Court.*

The question whether an entry in a *wajib-ul-arz*, even if unrebutted, is or is not sufficient proof of the custom recited therein, is a question of fact and cannot be agitated in second appeal. [p. 942, col. 2.]

It cannot be laid down as a proposition of law that an entry in a *wajib-ul-arz*, if not rebutted, must be accepted as sufficient proof of the custom recorded therein. [p. 943, col. 1.]

[Case-law referred to.]

Second appeal against the judgment and decree of the Subordinate Judge, Unao, dated the 12th March 1924, reversing that of the Munsif, Safipur, dated the 19th December 1923.

Mr. *Motilal Suksena*, for the Appellant.

Mr. *S. M. Ahmad*, for Respondent No. 2.

JUDGMENT.—These two appeals arise out of two suits for pre-emption brought by the plaintiff-appellant on the basis of two mortgages, one executed on the 14th April 1923 by *Musammat* Janaka defendant No. 2 and Jodha Singh, defendant No. 3 in favour of Nanhu Singh defendant No. 1 and the other executed on the 14th July 1923 by the same Jodha Singh in favour of the same Nanhu Singh. The plaintiff alleged that according to the custom recorded in the *wajib-ul-arz* pre-emption could be claimed in regard to mortgage transactions. The defendants in both the suits denied the custom and contended that even if such a custom be established it was unreasonable and could not be enforced.

The Trial Court, the Munsif of Safipur, held that the custom was established but he held that the custom was an unreasonable one and should not, therefore, be enforced. He thereupon dismissed both the suits of the plaintiff.

On appeal the learned Subordinate Judge of Unao held that custom was not established and without going into the question as to whether the said custom was reasonable or otherwise he dismissed the plaintiff's appeals.

In second appeal it is contended before me that the learned Subordinate Judge was wrong in finding that the custom had not been established. In my opinion the finding of fact arrived at by the learned Subordinate Judge in appeal is binding upon me and I cannot disturb it in second appeal. It is contended that the learned Subordinate Judge should have accepted the entry in the *wajib-ul-arz* as sufficient proof of custom especially in view of the fact that no evidence in rebuttal had been given by the respondents. I cannot accept this contention It was held by the late Court of the Judicial Commissioner of Oudh so far back as the year 1901 in the case of *Pragi* v. *Baiju* (1), that the question whether a single *wajib-ul-arz*, even if unrebutted was or was not sufficient proof of a custom entered therein, could not be agitated in second appeal inasmuch as it could not be considered a question of law but was one of fact. There in his judgment on pages 77 and 78*, Mr. Spankie, A. J. C., observed as follows:—

"It follows from what I have said above that the question, whether a particular *wajib-ul-arz* is sufficient proof of a custom recorded in it, is a question not of law, but one of fact, as it is a question as to the weight or value to be attached to it. The District Judge held that the *wajib-ul-arz* in this case, if not rebutted, was conclusive proof of the custom. Here I think that he was wrong. But he has also looked at the *wajib-ul-arz* in another way, that is to say, in the way in which I think he should have looked at it, namely, to see what weight should be attached to it as proof of the custom, mere-

(1) 4 O. C. 71.

*Pages of 4 O. C.—[*Ed.*]

ly as a piece of evidence. Looking at it in that way he was of opinion that the entry in it was sufficient proof of the custom, if the entry was not rebutted. Sitting as a Court of Second Appeal, I am not competent to consider whether the District Judge should or should not have attached as much value to the *wajib-ul-arz* as he has done, dealing with it on the assumption that it is not conclusive proof, even if not rebutted."

This has been the accepted view of law all along in the Province of Oudh. In *Lalman* v. *Nand Lal* (2) Mr. Lindsay, A.J.C., held that the question whether or not a custom exists is one of fact and it is not competent to a Court of Second Appeal to consider the credibility of any particular evidence which has been put forward in proof of the issue. To the same effect is the decision of the Allahabad High Court reported in *Hashim Ali* v. *Abdur Rahman* (3). In *Ram Kumar* v. *Har Prasad* (4) Cuming, A. J. C., held the same view.

On behalf of the appellant reliance was placed upon a recent ruling of their Lordships of the Privy Council reported in *Balgobind* v. *Badri Prasad* (5). It is no doubt true that in that case their Lordships of the Privy Council considered the *wajib-ul-arz* to be sufficient proof of the custom relied upon. The two Courts in India had differed upon the question of custom and their Lordships were called upon to decide the question as a question of fact. That case cannot be considered to be an authority for the proposition that in every case it should be held as a matter of law that an entry in the *wajib-ul-arz* if not rebutted must be accepted as sufficient proof of the custom recorded therein. That this is not so would be clear from another decision of their Lordships of the Privy Council in *Anant Singh* v. *Durga Singh* (6).

Sitting as a Court of Second Appeal it is not my duty to consider whether the learned Subordinate Judge was right or wrong in rejecting the bare entry in the *wajib-ul-arz* relied upon by the appellant as sufficient proof of the custom. It was for him to accept it or to reject it. If he has rejected it his decision cannot be disturbed in second appeal. In my opinion it is not open to the appellant to contest the finding of fact arrived at by the learned Subordinate Judge in second appeal.

The appeals fail and are, therefore, dismissed with costs.

Z. K. *Appeals dismissed.*

(2) 20 Ind. Cas. 894; 17 O. C. 1.
(3) 28 A. 698; 3 A. L. J. 467; A. W. N. (1906) 187.
(4) 76 Ind. Cas. 1021; 9 O. & A. L. R. 648; (1925) A. I. R. (O.) 64.
(5) 74 Ind. Cas. 449; 26 O. C. 217; 21 A. L. J. 578; (1923) A. I. R. (P. C.) 70; 9 O. & A. L. R. 581; 45 M. L. J. 289; 45 A. 413; 38 C. L. J. 302; (1923) M. W. N. 799; 33 M. L. T. 317; 10 O. L. J. 368; 50 I. A. 196; 29 C. W. N. 465 (P. C.).
(6) 6 Ind. Cas. 787; 32 A. 363; 14 C. W. N. 770; 12 C. L. J. 36; 7 A. L. J. 704; 13 O. C. 163; 37 I. A. 191; 12 Bom. L. R. 504; 8 M. L. T. 79; (1910) M. W. N. 327 20 M. L. J. 601 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 711 OF 1924.
August 11, 1925.
Present :—Mr. Justice Phillips.
VASTEVA HOLLA AND ANOTHER—DEFENDANTS—APPELLANTS
versus
P. MAHABALA RAO—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 76—Redemption suit—Mortgagee in possession—Liability to pay enhanced assessment—Costs.

In the absence of a contract to the contrary, a mortgagee in possession is bound to pay enhanced assessment on the mortgaged property, apart altogether from the provisions of s. 76 of the Transfer of Property Act. [p. 944, col. 1.]

Abid Husain Khan v. *Kaniz Fatima*, 80 Ind. Cas. 1019; 46 A. 269; (1924) A. I. R. (P. C.) 102; 10 O. & A. L. R. 281; 22 A. L. J. 284; 34 M. L. T. 78; 19 L. W. 703; 27 O. C. 72; 11 O. L. J. 427; (1924) M. W. N. 657; 29 C. W. N. 214; 51 I. A. 157; L. R. 5 A. (P. C.) 212; 1 O. W. N. 33 (P. C.), relied on.

In a redemption suit the mortgagee would ordinarily be entitled to his costs but this is subject to the discretion of the Court where he raises questions which involve a denial of the mortgagor's right to redeem. [p. 944, col. 2.]

Second appeal against a decree of the Court of the Subordinate Judge, South Kanara, in A. S. No. 89 of 1923 (A. S. No. 294 of 1922, on the file of the District Court, South Kanara), preferred against that of the Court of the District Munsif, Kundapur, in O. S. No. 594 of 1920.

Mr. *K. T. Adiga*, for the Appellants.

Mr. *B. Sitarama Rao*, for the Respondent.

JUDGMENT.—In this appeal against a redemption decree, the defendants, mortgagees, raise three points for consideration. The first point urged is that the mortgagees

money and it was his duty to see that Brindaban actually received the amount.

The prosecution case is that the appellant having drawn the money by a cheque in his own name, against the rules, had it paid into his own shop and embezzled the amount. The appellant denied the alleged payment into his shop and pleaded that the practice was that all the money drawn from the Treasury in the names of the President or the Secretary "never remained in their custody but was handled by the accountant Narayan Prasad" and that Narayan Prasad had informed him that the money was paid to Brindaban who had come for it.

That the appellant was guilty of a breach of the Municipal Account Rules and had incurred a liability for the amount, is admitted and in fact he made good the amount after the Police inquiry commenced. The question now is whether he dishonestly converted the amount to his own use and is, therefore, criminally liable. In para. 6 of his judgment the Additional Sessions Judge says :—

"Now the cheque is drawn in the name of the Secretary the voucher is signed with the words 'contents received' by the Secretary ; therefore, clearly the Secretary is responsible for seeing that this sum reaches the proper hands and is duly accounted for. In fact the note to Account Rule 26 mentioned above lays it down so. Hence the Secretary is responsible to make good the amount but that is not sufficient to render him criminally liable under s. 409. But when in addition to these facts there is evidence to show that he did actually receive the money and paid it into his own shop, then if evidence can be believed the liability of the Secretary becomes more than a mere book liability and the burden of proof is shifted to him to show that he used this money honestly, otherwise a clear presumption can be drawn that his action was dishonest."

This is a correct statement as regards the law and the facts which, if proved, would establish criminal liability.

The evidence to prove that the appellant received the money and paid it into his own shop is that of Narayan Prasad (P. W. No. 12), Lachman Singh (P. W. No. 10) and Munshi Lal (P. W. No. 9). I agree with the remarks of the Additional Sessions Judge in para. 11 of his judgment that the posecution case rests principally on the evidence of these three witnesses, and that without their evidence the rest of the case would not be sufficient to convict the accused of a crime although he would still be guilty of gross irregularities.

The Additional Sessions Judge observes in para. 9 (1) with regard to the evidence of these witnesses that there are various discrepancies in it, but he thinks they are of a minor nature and attaches no importance to them as the events, the witnesses speak to, happened a year before and on important points they tell indentically the same tale. Exception is taken by the appellant's Pleader to this view of the evidence.

No doubt the witnesses agree in saying that the money was paid to Sambhu brother of the appellant at his shop but with regard to the circumstances immediately preceding the payment and the circumstances, under which they came to be present and the payment was made, the statements are discrepant and unconvincing. Further the story of the witnesses before the Additional Sessions Judge differs from their story before the Committing Magistrate, I need not refer to the discrepancies in detail but they appear to me to be too serious to be overlooked.

The reasons alleged by Narayan Prasad and Lachman Singh for their going to Nikalganj and thence to Sambhu's shop are not convincing.

Before the Committing Magistrate Narayan Prasad said that he actually went into the shop to see if Munshilal paid the full amount to Sambhu or not and that he saw him pay Rs. 300 in full. In fact he tried to make out that he and Munshilal both counted the money and made the payment. Before the Additional Sessions Judge he says that he remained standing outside the shop and Munshilal went inside and paid it.

All that Lachman Singh states as to the payment of the money is that he saw Narayan Prasad and Munshilal go into the shop to pay the money. He says he went to Nikalganj to see if the cashier Gourishankar was there as he wanted to ask him if he could find time to go to the Town Hall and receive some money. He found the cashier there and never asked him what he had come to ask him though he waited there for an hour. He enquired of Munshi-

lal what money he had with him and the latter said "Rs. 300."

Munshilal is the *chaprasi* who brought the money from the Treasury. He says that when he brought it he went to the office to Narayan Prasad to show him that he had got it but Narayan Prasad was not there. He then went to the Court and from there with the appellant to his (the appellant's) house about 4-30 P. M. The appellant did not take the money at his house but asked him to take it to Nikalganj where they stopped till 6-30 P. M. Then they went to Sambhu's shop and he paid the money to Sambhu in the presence of Narayan Prasad.

It seems somewhat curious that if the appellant wanted to misappropriate the money as, it is suggested, he wished to do from the very first, he should not have taken it from Munshilal at his own house when there would be no witnesses other than Munshilal but should have had it deposited in his shop as narrated by the witnesses. The appellant's shop is situated on the shortest way from his house to Nikalganj. If the money was to be deposited in the shop it would have been more natural to have it deposited when the appellant and Munshilal went to Nikalganj from the appellant's house. But this was not done and according to Munshilal a circuitous way was taken without any apparent reason.

The witnesses speak of Munshilal having Rs. 300 and of paying that amount to Sambhu. It is difficult to see how Munshilal could have got Rs. 300 from the Treasury as he says he did. The cheque was for Rs. 332-14. A sum of Rs. 43-13 had to be sent to the Treasury at the same time as the cheque was sent for being cashed. Apparently this sum would not be sent to the Treasury simply to be brought back as part of the amount of the cheque and according to Narayan Prasad it was not sent. The amount, therefore, which could have been brought from the Treasury by Munshilal could in no case have been more than Rs. 289-1. Narayan Prasad had before the Committing Magistrate said that only Rs. 257 had been from the Treasury after deducting Rs. 43 which were to be deposited. This statement he corrected before the Additional Sessions Judge by saying that only Rs. 32-14 were deducted at the Treasury. This corrected statement is no more true than the one before the Committing Magistrate.

The Counsel for the Crown admitted in this Court that no reliance can be placed in Narayan Prasad's oral evidence, nor did he rely on the evidence of Lachman Singh and Munshilal in the course of his argument.

In my opinion it is not safe to rely upon the evidence of these witnesses and the payment of the money to Sambhu at the appellant's shop is not proved thereby. This finding suffices to dispose of the case against the appellant.

The accused's explanation that the money drawn from the Treasury in the name of the Secretary or President used to remain with Narayan Prasad who disbursed it and that Narayan Prasad told him that he had paid the amount to Brindaban is not altogether improbable. In some instances Municipal money appears to have remained with Narayan Prasad or to have been brought to him and disbursed by him or under his directions. See the evidence of Munshilal (P. W. No. 9) page 102 of the Additional Sessions Judge's record, Lachman Singh (P. W. No. 10) page 103 reverse, Jugal Kishor Dixit (P. W. No. 11) page 105, Lalji (P. W. No. 13) page 113; see also the evidence of Gulam Ali (P. W. No. 5) a store keeper, who states that Narayan Prasad paid him for goods sold to the Municipal Committee by him and his uncle and took receipts for the payments, or Laxmi Narayan (D. W. No. 7) a Municipal member who says that he signed for the Secretary in his absence a cheque which was in the name of the Secretary but never saw the money or knew to whom it went and that the disbursement account on the back of the cheque was signed by Narayan Prasad. I see no sufficient reason to distrust these witnesses.

(Exhibit P-19) the auditor's report para. 4 shows that the accountant received amounts which the cashier should have received and delayed crediting them. Admittedly Narayan Prasad paid up certain amounts in respect of pension contribution alleged to have been received by him. He admits in (Ex. D-3) "it was my neglect that I did not deposit the pension contributions at the proper time." In Ex. D-4 he wishes it to be understood that the money remained with him for a long time.

(Exhibit D-15) is a note written by the appellant enquiring why the amount of

Rs. 300 was drawn in the Secretary's name and not in Brindaban's and in whose presence it was paid to the latter. (Exhibit D 1) is a reply to this note by Narayan Prasad wherein he says that the money was paid by the appellant in his presence and that of Munshilal. The enquiry and the answer were written on the same paper but in pursuance of some foolish tactics they were detached from each other and produced in Court at different times. The figure of Rs. 300 appears to be an interpolation in both exhibits. The Additional Sessions Judge suggests the explanation that they really referred to the amount of Rs. 350 admitted by Brindaban. But this cannot be correct for there was no need for the appellant to make any enquiry about that amount and it is not the explanation of Narayan Prasad who states that he wrote (Ex. D-1) because the appellant implored him to write it in order to save him. Though suspicion may not unreasonably be attached to these exhibits, they, like the entry against Brindaban's name in (Ex P-5), the advance ledger, tend to support the accused's explanation and in any case to assign to Narayan Prasad the character of an accomplice.

The Counsel for the Crown relied on certain circumstances appearing against the appellant and I will briefly refer to them.

An entry showing a credit of Rs. 216 in the appellant's name appears in the account book of his shop (Ex. P-8). It is suggested that this is the misappropriated money. The entry is not for Rs. 300. The appellant was not asked any explanation about it and no importance can be attached to it.

The account of the 8th June 1924 is written on two pages facing each other and some intervening pages are missing. But no definite conclusion can be drawn from them against the appellant. Pages have similarly been missing in other places in the account book. There is no evidence to show that it was in this book that the entry of the Rs. 300 said to have been paid by Munshilal was made.

The voucher (Ex. P-3A) would be prepared and other entries regarding the items which went to make up the total amount of the cheque would be made at the same time as the cheque was signed or before, and no inference of money having been actually received can be made from them.

No importance can be attached to the evidence of Brindaban or to the fact that no payment of Rs. 300 appears in his book (Ex. P 2). It is clear from the entry on the reverse of page 16 of this exhibit that Brindaban has been fabricating evidence against the appellant. An entry dated the 13th December 1924 mentions that on that day at a meeting of the Municipal Committee at which 8 members named in the entry were present the appellant admitted that he had spent the money on the work of the *ghat* and that he would account for it. The minutes of the proceedings of that meeting in (Ex. D-10) show that only four members were present and the meeting was adjourned for want of a quorum. Brindaban states that he presented the application (Ex. C-1) at that meeting and Girdharilal who, he says, was present at it has been examined to prove the presentation. The Additional Sessions Judge finds that Girdharilal was not present at the meeting but apparently thinks on the basis of an unjustified assumption that another application was presented at some previous meeting when Girdharilal was present, that these witnesses are mistaken and are not deliberately speaking an untruth.

It may be that the accused and Narayan Prasad in conspiracy acted dishonestly in which case the accused's guilt would not be any the less, but this had neither been the prosecution case nor proved by the evidence on the record. It may also be that the accused never realised the responsibility of his office and left all matters other than the prestige of it to Narayan Prasad, who was an old and experienced servant of the Municipal Committee.

I wish to draw the attention of the learned Additional Sessions Judge who tried this case to an error which has probably prejudiced the accused and detracts to some extent from the weight to which his judgment would be entitled. It is the examination by the Court on the 29th June 1925 of the investigating officer in which overruling a defence objection he brings out matters which the accused is alleged to have stated to the Police before his arrest. The objection was overruled on the strength of *Emperor* v *Buddhu* (1) and *Ganpati* v. *Emperor* (2). These cases were, however, decided before s. 162, Cr. P. C. was amended in 1923. Under the section as it now stands the statement was inadmissible.

(1) 3 N. L. R. 51; 5 Cr. L. J, 434.
(2) 8 Ind. Cas. 1181; 6 N. L. R. 180; 12 Cr. L. J, 60.

The appellant is acquitted. He and his sureties are discharged from their bonds from this date.

Z. K. *Appeal allowed.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATIONS FOR REVISION
NOS. 83 AND 84 OF 1925.
August 27, 1925.
Present:—Mr. Justice Fawcett and
Mr. Justice Madgavkar.
B. N. GAMADIA AND OTHERS—ACCUSED
versus
EMPEROR—OPPOSITE PARTY.

Factories Act (XII of 1911), ss. 20, 41 (a)—Partition between room containing feed-end of cotton-opener and press room, nature of—Door in partition, effect of—Offence—Interpretation of Statutes—Penal Statute—Criminal Procedure Code (Act V of 1898), s. 342—Summons case—Failure to examine accused, effect of—Illegality.

The omission in a summons case to comply with the provisions of s. 342 of the Cr. P. C. constitutes an illegality which vitiates the trial and not a mere irregularity. Such an illegality cannot be waived by the consent of the accused or his legal representative. [p. 950, col. 2.]

An occupier of a factory means a person who is in actual possession and control of the factory. [p. 951, col. 1.]

The intention of s. 20 of the Factories Act is that there should be a separation of women and children from the room in which the main body of the cotton-opener is and that there should not be a direct means of access to that room. The partition intended by the section is one which should prevent the access of a woman or a child from the room in which the feed-end of the cotton-opener is at work to the adjacent room in which the rest of the cotton-opener is. Where there is a door made in such a partition and that door is shown to open at a particular time or even although it is shut, yet it is not locked or other effective means taken to prevent its being opened by a woman or child wishing to get into the press room, then the partition is on the same footing as if it had a gap in it which would not effectively separate women and children from the press room; and there would be a contravention of the provisions of s. 20 of the Factories Act. [p. 952, cols 1 & 2.]

A penal Statute must be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip or that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, a penal enactment must be construed, like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument. [p. 951, col. 2.]

What the Legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication. [p. 952, col. 1.]

Per *Madgavkar, J.*—An owner of a factory who takes the risk of inserting a door in a partition which separates the room in which the feed-end of a cotton-opener is from the press room, must safeguard himself by so arranging it that the door would not enable women or children at their will or at the will of the person who supervises their working, to pass from the room where the feed-end is situated in the mixing room to the press room. [p. 953, col. 2.]

Criminal applications against convictions and sentences passed by the Magistrate, First Class, Jalgaon City, confirmed on appeal by Sessions Judge, Khandesh.

Messrs. *Velinkar* and *Vicaji*, (with him Mr. *K. N. Koyajee*), for Accused Nos. 1 to 3.

Mr. *Vicaji*, (with him Mr. *K. N. Koyajee*), for Accused No. 4.

Mr. *Kanga*, Advocate General, (with him Mr. *S. S. Patkar*), Government Pleader, for the Crown.

JUDGMENT.

Fawcett, J.—These two applications for revision, Nos. 83 and 84 of 1925, arise out of a fire which took place in the Gamadia Press Factory at Raverat 11 A. M. on January 31st 1924. The fire unfortunately resulted in the death of twelve women, and burns and other injuries to ten other women. The Chief Inspector of Factories, after an enquiry, sanctioned the prosecution of the three applicants in Application No. 84 as being the occupiers of the factory, and of the applicant Mehenti in No. 83 as being the manager of the same factory, on a charge under s. 51, cl. (*a*) of the Indian Factories Act, 1911, read with s. 20 of the same Act. Under these sections the occupier and manager are jointly and severally liable to fine, if convicted, for employing or allowing to work any person contrary to any of the provisions of the Act; and the allegation is that women were employed, or allowed to work, in contravention of s. 20, which prohibits the employment of women and children in the part of a factory where a cotton-opener is at work.

The trial took place before Mr. D'Souza, Magistrate, First Class, Jalgaon, and resulted on August 7th, 1924, in the conviction of all the accused under these sections.

The Gamadias, accused Nos. 1 to 3, were sentenced to pay a fine of Rs. 100 each, and Mehenti, accused No. 4, to pay one of Rs. 200. The Magistrate in his judgment held that the fire originated in what is called the "press room", that is the room in which the main part of the cotton-opener is contained, and that women were actually being employed there at the time of the fire. He also held that women were employed in a room adjacent to the press room, styled the 'mixing room' ; and that this was in contravention of s. 20, inasmuch as, although there was a partition separating this room from the press room, yet it had a door in it, which itself was opposed to the provisions of the section and which was open at the time of the fire. He further held that accused Nos. 1 to 3 were the occupiers of the factory liable under s. 41, as well as the manager Mehenti.

An appeal was made to the Sessions Judge, Khandesh, who on December 19th, 1924, gave judgment, agreeing with the Magistrate on the main facts and the points of law that I have referred to and confirming the convictions and sentences in the case of all the accused.

In this Court an objection has been taken that the trial of the accused is vitiated by the ommission of the Magistrate to examine the accused in accordance with s. 342 of the Cr. P. C. It appears from the record that the accused, who were represented, wished to put in written statements. The Public Prosecutor objected to this being done and this objection was upheld by the Magistrate. Unfortunately, however, the Magistrate did not then proceed to examine the accused under s. 342, and the defence of the accused was at once opened. The Advocate-General for the Crown has put in an affidavit made by the Public Prosecutor, Khandesh, to the effect that, when the Magistrate was going to take the statement of the accused under s. 342, Cr. P. C., Mr. Vicaji, Counsel for the first three accused, got up and said that he was going to put in written statements on their behalf as also did the Pleader for accused No. 4 ; that the Public Prosecutor having objected, Mr. Vicaji and the Pleader for accused No. 4 said that, if written statements were not allowed to go in, they would ask their clients to refuse to make any further statements ; and also that one of the accused was not present, as his attendance had been excused. Mr. Vicaji, who represents accused Nos. 1 to 3 here, denies the truth of the main allegation, and it is clear that, even if it is the case that they made the statements imputed to them, this would not prevent the trial being vitiated by the omission of the Magistrate. It has been held in many cases of which it is enough to refer to *Fernandez* v. *Empero* (1), dealing with a summons case as is this, and *Gulabjap* v. *Emperor* (2), as showing that the omission to act upon the provisions of s. 342 constitutes an illegality and not a mere irregularity. Such an illegality cannot be waived by the consent of the accused or their legal representatives. Both the learned Magistrate and the Sessions Judge have written long and careful judgments, and it is unfortunate that owing to an omission of this kind the time and trouble taken by them should largely be wasted. It is also open to comment that such an omission should have occurred though the Crown was represented by the Public Prosecutor of Khandesh and the accused by Counsel and Pleader. However, it is clear we have no option but to set aside the convictions, and the only question to be considered is whether we should order a re-trial and if so, whether the re-trial should be an entirely new one or merely from the stage from which the illegality crept in, as can be done under the view taken in *Gulabjap* v. *Emperor* (2), and as has been done by this Bench in several previous cases.

In regard to this question, Mr. Velinker and Mr. Vicaji for the applicants ask us to consider the various other points that they have raised at the hearing of these applications, and, therefore, although we must be careful to avoid anything which would in any way prejudice a re-trial, if ordered, we think that we should briefly indicate our views upon the other legal points that have been discussed before us. For instance, if we agree with Mr. Velinker and Mr. Vicaji that the Gamadias, accused Nos. 1 to 3, have wrongly been held to be " occupiers " within the meaning of the Indian Factories Act, then obviously there would be no adequate ground for our ordering them to be re-tried. On that particular point we are clearly of opinion, on the facts found by the two lower Courts in regard to the control exercised over this factory by the Gamadias, who admittedly are its owners,

(1) 59 Ind. Cas. 129; 45 B. 672; 22 Bom. L. R. 1040; 22 Cr. L. J. 17.

(2) 64 Ind. Cas. 669; 46 B. 441; 23 Bom. L. R. 1203; 23 Cr. L. J. 45; (1922) A. I. R. (B.) 290.

that the view taken by both the lower Courts is correct. It was strongly contended that they were only controlling the business side of the factory, and not the mechanical or other detailed working on the spot. That, however, is obviously insufficient to prevent their being occupiers. It is unnecessary to discuss the various cases in which the question has been considered by this Court. Mr. Velinker in particular referred to the ruling in *Emperor* v. *Dhanji* (3) and said that these accused could not be said to be in control of the work of the factory within the meaning of that ruling. Of course, if you regard "work" in the limited sense of the management of the machines and so on, that might be a good contention; but in our opinion it is clear that the word is used in general sense, and the word "working" would perhaps express its meaning a little more clearly. I find that in *Rex* v. *Gainsford* (4) it has been held by a Divisional Court in England that even a limited company can be "occupiers" under the corresponding English Factories Act, which contains no definition of the word "occupier." Here the definition in the Indian Factories Act is not an exhaustive definition, and merely says the word includes a representative of the "occupier." There is nothing in it which in any way limits the normal meaning of the word "occupier," as indicating a person who is in actual possession and control of a factory.

The second point, that was discussed, was in regard to the view taken by the lower Courts that in order to comply with s. 20 of the Act a partition must not have a door in it. The section runs as follows :—

"No woman or child shall be employed in the part of a factory for pressing cotton in which a cotton-opener is at work :

Provided that, if the feed-end of a cotton-opener is in a room separated from the delivery end by a partition extending from the floor to the roof, or to such height as the inspector may, in any particular case specify, women and children may be employed in the room in which the feed-end is situated."

The Sessions Judge has carefully considered the question and takes the view that the object of the partition is to prevent the spread of fire to a place where women may be working, and that a partition in which there is a door which can be opened at will by any one is not an effectual partition He has gone on to suggest various expedients by which a door can be provided, such as a lock chamber with a gap in it through which people could pass from one room to the other. Now it has been pointed out that this is a penal enactment and that consequently in a case where there is a doubt about the language the Court should lean in favour of the accused. The Privy Council in *Dyke* v. *Elliott* : "*The Gauntlet* (5)", have made some remarks showing how the Courts should construe such enactments. They say (page 191*) :—

"No doubt, all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal Statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

Then with regard to the question how far the intention and object of the Legislature is a legitimate aid to construction of a Statute, there is another useful case, *Salomon* v. *Salomon & Co.* (6) where Lord Watson thus indicated the nature and limits of the cannon (page 38†) :—

"'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In

(3) 29 Ind. Cas. 144; 15 Bom. L. R. 328; 14 Cr. L. J. 384.

(4) (1913) 29 T. L. R. 359.

(5) (1872) 4 P. C. 184; 41 L. J. Adm. 65; 26 L. T. 45; 20 W. R. 497.

(6) (189) A. C. 22; 66 L. J. Ch. 35; 75 L. T. 426; 45 W. R. 193; 4 Manson 89.

*Page of (1872) 4 P. C.—[*Ed.*]

†Page of (1897) A. C.—[*Ed.*]

a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

Applying these remarks to s. 20, it seems to me clear what the Legislature is shown to have intended is that there should be a separation of women and children from the room in which the main body of the cotton-opener is, and that there should not be a direct means of access to that room. The learned Sessions Judge may be correct in saying that the object is to prevent the spread of fire to a place where women may be working, but it is not necessary to speculate whether exactly that is the object or not. So far as the section goes, it merely enacts that women or children should either not be in the part of the factory where the cotton-opener is at work at all, or if a woman or child is so present they should be separated, that is to say, held back from being present in the part of the room where the main part of the cotton opener is at work. The fact that provision is made for the partition extending from the floor to the roof, or to a height allowed by the Inspector, without any corresponding provision as to the extent of the partition being possibly less than the whole breadth of the room from one side wall to the other is sufficient, in my opinion, to show without any straining of the language of the Legislature, that the partition intended is one which should prevent the access of a woman or child from the room in which is the feed-end of the cotton-opener at work, to the adjacent room in which the rest of the cotton-opener is. Therefore, while we do not think it necessary to go as far as the Sessions Judge and say that a partition can never have a door made in it (at any rate, so long as the section itself does not say that and no rule under s. 37 is made to that effect) yet we do agree with the view taken by the lower Court, so far as it held that, if there is a door made in such a partition and that door is shown to be open at a particular time, or even although it is shut, yet it is not locked or other effective means taken to prevent its being opened by a woman or child wishing to get into the press room, then the partition is on the same footing as if it had a gap in it, which would not effectively separate women and children from the press room, and there would be a contravention of the provisions of s. 20. The lower Court has held certain facts proved, which in that view clearly amount to an offence under s. 20 read with s. 41 (*a*), and the above remarks are in no way meant to cover the question whether those facts are or are not proved. But the view we take is certainly one which supports the prosecution rather than the defence, in so far as it goes against the contention that was put before us by Mr. Valinker on this particular point.

In regard to the finding of the learned Sessions Judge that women were actually employed in the press room objection is taken that his acceptance of the testimony of eye witnesses to the fact is based on a supposition as to what those women were doing, for which there is no support of any direct testimony, and amounts to mere conjecture, and also that in making that supposition he differed from the view which the Trying Magistrate took and made out a new case which the accused had not the opportunity of meaning at the trial. I am not satisfied that that objection, at any rate in this particular case, would justify our going into questions of fact, a thing which this Court will only do for very strong reasons. For although a deduction is necessarily on a better footing if it is based on oral testimony in a case, yet it is difficult to say that a deduction may not be based upon circumstantial evidence and probabilities; and if the supposition of the learned Sessions Judge is analysed, it can probably be brought under that category. But it is unnecessary for us to consider this question in detail, for if a re-trial is ordered, the accused will have ample opportunity of meeting the particular point, which is elaborately discussed in the Sessions Judge's judgment.

On the main question as to what our orders should be, we think that this case cannot be dealt with as a trivial one. The case is a serious one so far as it arises out of a fire actually resulting in several deaths, and it was treated as a test case at the request of the accused, and other similar charges against them have been held over pending its decision. The Advocate-General has also told us that there would be difficulties in the way of the prosecution getting all the witnesses who gave evidence at the trial, as some of them have disappeared. We think, therefore, that, under the circumstances of the case,

we should direct a re trial and that that re-trial should take place from the stage on May 26, 1924, when the Trying Magistrate omitted to examine the accused. This will however be, of course, subject to the right of the accused under s. 350, if the trial takes place before a Magistrate other than Mr. D'Souza, to demand that the prosecution witnesses should be re summoned and re-heard. We understand that Mr. D'Souza is no longer in service and, therefore, the re-trial must take place before the present First Class Magistrate, Jalgaon city, or such other First Class Magistrate as the District Magistrate, East Khandesh, may appoint.

The conviction and fine are set aside and we order that the fine, if paid, should be refunded to the several accused.

Madgavkar, J.—I agree with my learned brother and desire to add a few words. The view of this Court in *Fernandez* v. *Emperor* (1) and *Gulabjap* v *Emperor* (2) that s. 342 of the Cr. P. C. is mandatory and that in a summons case, the omission to examine the accused is an irregularity which vitiates the trial is affirmed by all the High Courts: *Gulzari Lal* v. *Emperor* (7), *Emperor* v. *Alimuddin Nikar* (8), *In re Varisai Rother* (9), *Raghu Bhumij* v. *Emperor* (10) and *Fatu Santal* v. *Emperor* (11). Accordingly I must also express my regret that apparently in the heat of the question raised before the Trying Magistrate as to the written statements which the accused are not as of right entitled to put in, this section and this ruling of 1921 were completely lost sight of by the Magistrate, and the Counsel and Pleaders on both sides failed to draw his attention to it. The result is still further delay in a proceeding already for too protracted.

Various other points of law have been raised, necessary to consider on the question of re-trial. The partition must extend the whole breadth of the room and its height up to the roof is expressly provided by the section. Beyond this s. 20 of the Indian Factories Act does not contain materials to enable the Courts to prescribe the quality or details of such a partition and in the absence of express words absolutely excluding a door the existence of a door *ipso facto* need not perhaps necessarily cause a partition to cease to be so. But, on the other hand, the partition may be of such materials or the door of such dimensions that for all practical purposes the safety of women and children, which is the paramount object of s. 20, may be seriously in danger, the partition but a nominal partition and the section rendered nugatory. To such a construction the Courts would not willingly lend themselves. It appears to me, therefore, that an owner who takes the risk of inserting a door must safeguard himself by so arranging it that the door would not enable women or children at their will or for the matter of that at the will of the person who supervises their working, to pass from the room where the feed-end is situated in the mixing room to the press room. In the present case, for instance, it is in evidence that until November 1923 the partition made was of bamboos and that the Factory Inspector drew the attention of the occupiers and suggested a corrugated iron-partition, which the latter accepted. If, at the same time, the manager had informed the Factory Inspector of the door that he designed to make and satisfied him that the existence of the door was not contrary to the spirit of the provisions of the section and had formally obtained his sanction, it would hardly have been open to the prosecution in this case to rely upon the existence of the door as a fact in the present case against the accused.

On the other findings of fact in the present case, namely, that the door was open, the fire originated and the women were in the press room, which sufficed for a conviction, the question of door in the partition was not material.

Whether accused Nos. 1, 2 and 3 are "occupiers" is a question of fact which the lower Courts were entitled to consider on the evidence and to prefer the forms and correspondence signed *ante litem motam* by accused No. 4 that accused Nos. 1, 2 and 3 were the occupiers in preference to his present position, that he was the occupier and not the other three accused.

(7) 71 Ind. Cas. 51; 49 C. 1075; 24 Cr. L. J. 3; (1923) A. I. R. (C.) 164; 39 C. L. J. 31.

(8) 85 Ind. Cas. 919; 52 C. 522; 29 C. W. N. 231; 41 C. L. J. 101; (1925) A. I. R. (C.) 361; 26 Cr. L. J. 631.

(9) 73 Ind. Cas 163; 46 M. 449; 44 M. L. J. 567; 17 L. W. 722; 32 M. L J. 385; (1923 M. W. N. 477; (1923) A. I. R. (M.) 609; 24 Cr. L. J. 547;

(10) 58 Ind. Cas. 49; 5 P. L. J. 430; 21 Cr. L. J 705; 1 P. L. T. 241.

(11) 61 Ind. Cas. 705; 6 P. L. J. 147; 2 P. L. T. 288; 22 Cr. L. J. 417.

On the question of law, the wordings of s. 2, cl. (6), that the occupier includes a managing agent, of s 33 (2), and of s. 41 that the occupier and manager shall be jointly and severally liable to a fine, are a sufficient basis for the ruling of this Court in *Emperor* v. *Rampratap* (12) that the manager is not necessarily an occupier. As has been laid down in *Emperor* v. *Taylor* (13) and in *Emperor* v. *Dhanji* (3) it is the right to regulate and control and the predominant possession, which determine the question as to who the occupier is. The lower Courts held that accused Nos. 1, 2 and 3 (owners) decided the seasons when the press was to run and controlled it. If so, they were rightly held to be the occupiers.

In this view of the law, I agree that the convictions must be set aside but a re-trial ordered from the point where the law rendered the examination of each accused under s. 342 of the Cr. P. C. necessary.

Re-trial ordered.

Z. K.

(12) 29 B. 423 at p. 424; 8 Bom. L. R. 451; 2 Cr. L. J. 428

(13) 10 Bom. L. R. 38; 7 Cr. L. J. 44.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 183 OF 1924.

June 5, 1925.

Present :—Mr. Justice Fforde and Mr. Justice Broadway.

LAL SINGH AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal trial—Evidence—Witness producing document as containing his evidence—Procedure—Identification parade, value of.

A Magistrate was called as a witness in a Sessions trial to prove the identification of the accused persons held in the Jail and the methods adopted for the purpose of identification. Instead of stating in Court the details and the results, he merely referred to certain documents which were described as exhibits and in which he stated that his evidence was to be found. These documents were put on the record as his evidence:

Held, that the procedure adopted was not merely contrary to the law, but violated the most elementary principles of evidence. [p. 957, col 2.]

The mere fact that a witness is able to pick out an accused person from amongst a crowd does not prove that he has identified that accused person as having taken part in the crime which is being investigated. It might merely mean that the witness happens to know that accused person. The principal evidence of identification is the evidence of the witness given in Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which that accused took in the crime in question. The statement made by such a witness at an identification parade might be used to corroborate his evidence given in Court, but, otherwise, the evidence of identification furnished by an identification parade can only be hearsay except as to the simple fact that the witness was in a position to show that he knew a certain accused person by sight. [p. 958, col. 1.]

Criminal appeal from an order of the Additional Sessions Judge, Montgomery at Lahore, dated the 21st January 1924.

Mr. *L. Saunders*, for the Appellant.

Mr. *Des Raj Sawhney*, for the Respondent.

JUDGMENT.

Fforde, J.—Four persons, Sundar Singh, Lal Singh, Gudar Singh and Arjan Singh, have been tried by the Additional Sessions Judge of Montgomery under s. 396, Indian Penal Code, for dacoity with murder. Sundar Singh and Lal Singh have been convicted, the former being sentenced to death and the latter to transportation for life. Gudar Singh and Arjan Singh have been acquitted. Sundar Singh and Lal Singh have appealed to this Court against their convictions and sentences.

The facts of the dacoity are shortly as follows:—On the night of the 7th or the early morning of the 8th March 1923, Moulvi Ghulam Nabi and his servant Samun were sleeping in a room of the former's house when about midnight, or shortly afterwards, Ghulam Nabi awoke hearing some one calling him by name from outside. He got up, lighted a lamp, and asked Samun to open the door to see who was calling. On the door being opened three men came inside and a fourth stood in the doorway. Two of the three men who came inside were armed with *chhavis* and *gandasas* and the third had a pistol in his hand and, according to Ghulam Nabi was also holding a lighted wax candle. The witness was told by the persons in the room that they would murder him unless he handed over to them a considerable sum of money. The witness thereupon opened his cash box and told them to take what was in it amounting to Rs. 400 in cash and jewelry worth about Rs. 1,800 or more. The dacoits were not satisfied with this booty and demanded more. The witness thereupon told them to dig in the ground which one of the dacoits who, the witness says, was Arjan Singh, proceeded

to do. While Arjan Singh was engaged in digging, the witness heard a sound of a gun-shot on the roof of his house, followed by two or three more shots. The witness then heard his wife crying out. The man on the roof came to the door of the room and shouted out to his companions to leave, saying that the house had been surrounded by many people. Upon this the dacoits decamped with the cash and the jewelry, chaining the door from the outside.

The other witnesses state that on hearing a noise of gun-shots and shouting they came out of their houses to find a man on the roof of the *Moulvi's* house in the act of firing a gun. This man is alleged to be the appellant Sundar Singh. The persons who were inside the room are stated to have been Gudar Singh, Arjan Singh and the appellant Lal Singh.

When the villagers came out of their houses a short fight took place with the dacoits, in the course of which a villager named Musa received a bullet in the right groin from which he died almost immediately. Another, Ramzan, was wounded by a bullet in the left thigh and a third, Buta, received a gun-shot wound in the left knee and on the right leg. The dacoits then made good their escape. In each of these cases the wound in front of the limb was larger than the wound at the back, which would lead to the natural inference that the wound in front was the exit and the other the entry wound. The medical evidence, curiously enough, is to the effect that the larger wound is in each case the wound of entry. This I find hard to believe, and I am inclined to think the wounded men were shot from behind while running away, and not as they describe.

The case for the prosecution as regards the present appellants consists of the evidence of witnesses who claim to have identified them at the time these incidents took place, the evidence of trackers, and the evidence of certain witnesses who claim to have seen them shortly after the occurrence. The main evidence upon which the Crown relies is, of course, the evidence of the eye witnesses who profess to have recognised the appellants at the scene of the occurrence.

The first of these witnesses is Abdul Nabi who made the First Information Report and in this report he does not mention the names of any of the dacoits, nor does he state whether they were Sikhs or Muhammadans, but he says that he can identify them. He also adds that the night was a moonlight one. In his evidence in Court he deposes that the man on the roof with a gun in his hand was the appellant Sunder Singh, and he adds that Lal Singh was also one of the dacoits. He further states that he identified both the appellants in Montgomery Jail in the presence of a Magistrate. In his cross-examination his answers are very unsatisfactory. He states that he told Ghulam Nabi that the dacoits were Sikhs but that he does not remember if he told the Police that the dacoits were Sikhs. He adds that he has got a very bad memory. He also states that he took no interest in the affair and cannot give any reason for the lack of interest displayed by him. He further states that Sundar Singh has got a scar mark on his forehead and Lal Singh a scar on his left cheek under the eye. He admits that he did not join the investigation of the case and gave no assistance to the Police, and he further admits that he did not give the Police any description of the dacoits. In view of the whole of his evidence it will be impossible to rely upon this witness to come to the conclusion that he had in fact recognised and was subsequently able to identify the two appellants.

Ghulam Nabi (P. W. No. 3) states that he identified the appellants on different occasions at the Jail in the presence of a Magistrate, but he does not appear to have given the Police any description of the dacoits after the occurrence took place. He says that Lal Singh, one of the persons in the room, had white clothes on him. Other witnesses, however, say that this man was dressed in *khaki*. This witness, in cross-examination added that during the journey to Montgomery made for the purpose of identification, the Sub-Inspector had told him that he had traced two of the dacoits and that they were Sikhs. One can only infer from this that the witness was not able to identify these persons as Sikhs at the time of the occurrence. He says that Sunder Singh has got a scar on his forehead but that he did not tell the Police that any of the dacoits have a scar mark on his forehead. The evidence of this witness leaves me in considerable doubt as to whether he was in fact able to recognise either of the appellants. I may add that according to Fazal Karim, Sub-Inspector, Ghulam Nabi described the appellant Lal

Singh to him as a man of "medium height, of wheat complexion. His body was not stout. His beard was four fingers (*chhapa*) in length and he had a *khaki* coat on his body." So far as this part of the description is concerned it is obvious that it is too general to be of any value as evidence of identification and as to the statement that this appellant had a *khaki* coat on his body, it is in contradiction to the evidence given in Court by the witness himself. He alleges that he had white clothes on and also a *khaddar chadar*.

Samun, prosecution witness No. 4, states that he identified Gudar Singh, Lal Singh and Arjan Singh as three of the dacoits. Lal Singh was wearing a *khaki* coat. He says further that Lal Singh had a big scar on the left cheek, but he did not mention this fact to the Police, nor did he tell the Police that he could give a description of any of the dacoits.

Ramzan, the fifth witness for the prosecution and one of the persons wounded in the fight, declares that Sunder Singh was the man who fired the gun at him, and he also purports to identify Arjan Singh. In his cross-examination he says that when he identified Sunder Singh before the Magistrate in the Montgomery Jail he first pushed up his turban to see if a scar mark was on his forehead, and that after seeing the scar mark he identified him. He further adds that Lal Singh has got a scar under his left eye and he concludes by saying that he was "tutored," that he had to identify the man with a scar on his forehead and under the eye. In view of this admission it is impossible to attach any weight to this man's evidence of identification.

Buta, another of the wounded villager, admits that he could not identify the dacoits and could not even identify the man who fired at him. He says that there was a large crowd and that that was the reason that he could not identify the dacoit standing on the roof. He further adds that when the Sub-Inspector asked him to give a description of the dacoits he told him that he could not do so as he could not identify any one and when he was brought to the Jail he first touched two wrong persons as he could not recognise the dacoits.

Jalal, the seventh witness for the prosecution, purports to identify Arjan Singh, Gudar Singh and Lal Singh, but in cross-examination he states that when asked by the *Thanedar* to give a description of the dacoits he told him that he could not describe them. He adds that the dacoits shouted "Ali! Ali!!" thereby suggesting that they were Muhammadans and not Sikhs.

Nasir Din, prosecution witness No. 8, states that Sunder Singh is the dacoit who was firing the gun from the roof, but he admitted in his examination-in-chief that he could not recognise Lal Singh. The reason he gives is that it was night time and so he may not have seen his face. This witness says that Sundar Singh was in handcuffs when he was brought under arrest and that he did not identify him in the Montogomery Jail. He further states that on the very first day he made a statement to Fazl Karim Sub-Inspector and that in the course of this statement he did not give the *hulia* or description of the dacoits and did not tell the Sub-Inspector that he had seen their faces. He further adds that he did not tell the Police on the first day that one of the dacoits was wearing a *khaki* coat. In cross-examination by Mr. Saunders he admitted that he could not see the face of Sunder Singh when he was standing on the roof.

Bukan, the ninth prosecution witness, purports to have identified Guder Singh, Arjan Singh and the appellant Sunder Singh. He does not claim to have identified the appellant Lal Singh. He also admits that he did not give any description of the dacoits to the Police and he gives a different version of the entry of the dacoits into Ghulam Nabi's house to that which is given by Ghulam Nabi himself. His version is that they entered through the window one by one and that they lighted a wax candle after entering through the window. Ghulam Nabi had stated that they had come through the door. Bukan, in cross-examination, states that Sunder Singh had a scar on his forehead and he admits that he had first seen the scar mark on his forehead and then identified him before the Magistrate, but he adds that he did not tell the Police that one of the dacoits had a scar mark. He also says that when he came out of his house he was frightened on seeing the man holding the gun and so crept back into his house out of fear. He says he ran away to the well informing people as to what was happening and that when he returned from the well

Musa was breathing his last. In other words, he only returned when the affair was practically over.

Ruhullah, P. W. No. 10, claims to identify Gudar Singh and the two appellants, but in cross-examination he states that the Police did not make any enquiry from him and that he did not furnish them any description of the dacoits, that he kept quiet and did not go before the *Thanedar* to state what he knew. He adds he met Nasir Din and Ghulam Nabi before going to Montgomery for the identification parade. He also states that Sunder Singh has got a scar mark on his forehead, Gudar Singh has a long beard and Lal Singh a scar under his left eye.

Ihsan, P. W. No. 11, claims to have identified three men, Gudar Singh, Arjan Singh and the appellant Sunder Singh. But he also admits that he did not give the Police any *hulia* of the dacoits whose faces he had seen, nor did he give any *hulia* to the Inspector, who subsequently took his statement. He admits that he was told by the *Moulvis* that Sunder Singh had been arrested, and he further admits that the *Moulvis* came with him and the other witnesses twice to Montgomery when they were brought there to identify the dacoits in Jail.

Ali Muhammad, prosecution witness No. 13, purports to have recognised Sunder Singh as the man who was on the roof firing a gun, but he admits that he had seen *Moulvi* Nasir Din and talked to him about the affair prior to his going to Montgomery for identification. He says that *Moulvi* Nasir Din told him and other witnesses that one of the dacoits arrested was the appellant Sunder Singh. This witness did not tell the Police that one of the dacoits had a scar mark on his forehead and at the conclusion of his cross examination he adds that the firing had frightened him and that he did not advance forward but remained behind in the crowd.

Ghulam, P. W. No. 14, purports to identify the appellant Sunder Singh but not the other appellant. He states in cross-examination that Sunder Singh has got a scar mark on his forehead and Lal Singh on the left eye but that he did not see these scars on the night of the occurrence but saw them at the time of identification in Jail. He has come to Montgomery with the *Moulvis* and other persons for the purpose of identifying the dacoits. He adds that he did not give to the Police any description of the dacoits when he purports to have recognised on the night of the occurrence.

Nizam Din, P. W. No. 15, states that he saw the face of one of the dacoits, namely, Gudar Singh and that he identified him in the Montgomery Jail. He does not claim to have recognised either of the appellants. This concludes all the material evidence of identification furnished by the eye-witnesses.

Mr. Phailbus, a Magistrate of Montgomery, was called to prove the identifications in the Montgomery Jail and the methods adopted. Instead, however, of stating in Court the details and the results, he merely refers to certain documents, which are described as exhibits, in which he states that his evidence is to be found. These documents are put on the record as his evidence. It is quite obvious that the procedure adopted in this matter offends against the most elementary principles of evidence, and Mr. Sawhnny can only attempt to justify it by saying that it was done to save time. This is obviously no excuse for an attempt to record the evidence of a witness in a manner which is not only contrary to law but which violates the first principles of evidence. There is no doubt that it would shorten the labours of a Trial Judge if he were to be permitted to record written statements of witnesses in the form of exhibits by the mere production of the witnesses and their testimony that the exhibits embody the details of their evidence. But any person with any knowledge of and regard for judicial procedure should know that such a method of recording testimony would, if applied to all the witnesses, reduce the trial to a mere travesty. I may add that these so-called exhibits were not even read out in Court. They are marked with the usual stamp certifying that they were "Read out admitted in evidence and added to Sessions file," but the words "Read out" have in each case been deleted, and upon the printed record the certificate is merely to the effect that the document has been "admitted in evidence and added to Sessions file."

The result of the mode adopted in the present case is that there is no evidence before us of the details of the identification parades held by Mr. Phailbus. But even if the exhibits in question were to be accepted as a proper record of his evidence it would not materially assist the Crown

case. The mere fact that a witness is able to pick out an accused person from amongst a crowd does not prove that he has identified that accused person as having taken part in the crime which is being investigated. It might merely mean that the witness happens to know that accused person. The principal evidence of identification is the evidence of a witness given in Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which that accused took in the crime in question. The statement made by such a witness at an identification parade might be used to corroborate his evidence given in Court, but otherwise the evidence of identification furnished by an identification parade can only be hearsay except as to the simple fact that a witness was in a position to show that he knew a certain accused person by sight.

As to the evidence of the trackers, it does not appear to me to be satisfactory. The principal track witness is Malla, P. W. No. 34. He says that he saw foot-prints of shod feet on the roof from which the shot was fired as well as in the lane. He says that there were two foot marks on the roof and six foot-prints in the lane. The tracks of the six foot-prints led out of the village to a distance of one *kos*, and there in a wheat field were found hoof marks of four horses and one camel. Of these animals the tracks of two mares were followed to the village Jagowal and the tracks got lost in the land of a square near the village. The owner of the squares turned out to be Bahal Singh and on being questioned he admitted the ownership of one of the horses and stated, after some hesitation, that he had lent it to Sunder Singh (about 9 or 10 months ago in *Phagan* or *Chet*) and he also added at the same time that Sunder Singh had borrowed a mare from Sajjan Singh. Sajjan Singh, however, stated at the trial that it was Bahal Singh, who had borrowed his mare for a relation of his. This evidence, in my opinion, is not sufficient to prove that Sunder Singh was in fact the man who rode this mare out of the village on the day of the dacoity. The identification of the foot marks is still less satisfactory. The witness Malla says that after over two months Sunder Singh was brought to Rukanpur with Gudar Singh where they were made to walk with 15 or 16 other men. He says that he and the other trackers picked out their foot-marks because they resembled the original tracks, by which I presume he means the foot-prints on the roof and in the lane. But this witness added in cross-examination that the "foot-marks on the roof were not distinct and visible as the floor of the roof was mud plastered." As to the foot-marks in the lane it seems to me that he is asking us too much to believe that the foot-prints of six could be singled out in view of the fact that according to a number of witnesses this lane had been trampled by a large crowd of villagers at the time in question.

The remaining evidence is that of persons known as *waj-takkar* witnesses, namely, Sewana, (P. W. No. 18), Gokal Chand, (P. W. No. 22), Dina (P. W. No. 25) and Isa (P. W. No. 28.) Counsel for the Crown, however, does not rely on these witnesses, and, I, therefore, need not analyse their evidence which, on the face of it, is worthless. The Sessions Judge himself says:—The evidence of Ismail and Sewana *waj-takkar* witnesses of village Khokhar, is unreliable because they contradict each other on all the material points. Dina's evidence carries little weight since Fazal Din, shop keeper himself has not been produced." I entirely agree with this criticism of the Sessions Judge but I do not agree that Gokal Chand's evidence is entitled to any more weight than that of the others whose testimony the Sessions Judge has rejected.

The learned Sessions Judge seems to have been influenced in coming to his decision as regards the appellant Sunder Singh by the evidence of Sub-Inspector, Fazal Karim. The Sessions Judge says "Sunder Singh himself brought out from the *niwar* fold of his bed a sum of Rs. 45 alleging that it was his share of the cash booty." This evidence was objected to at the trial by Counsel for the defence as is shown by the note on the record which is as follows:—

Objection by defence Counsel:—The portion of the witness's statement so far as it relates to the confession of Sunder Singh that the money produced by him was a portion of the booty, is inadmissible, *vide*, *Adu Shikdar* v. *Queen-Empress* (1). "Order:—Objection allowed S. M."

It appears, therefore, that this evidence having been ruled out, and quite properly

(1) 11 C. 635; 5 Ind. Dec. (N. S.) 1182.

so, was subsequently utilized by the Sessions Judge in coming to his decision.

On the whole of the evidence I am unable to come to the conclusion that the participation of the appellants in the crime in question has been established beyond a reasonable doubt. I think it is obvious that the witnesses as to identification were only able to pick out the appellants after their attention had been drawn to the scar marks on their faces and their evidence, in my opinion, is worthless. The remaining evidence though it raises a strong suspicion is not sufficient to ground a conviction. I would accordingly accept the appeals, set aside the convictions and direct that the appellants be released.

Broadway, J.—I agree.

R. L. *Appeal accepted.*

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 533 OF 1925.

September 15, 1925.

Present:—Mr. Justice Sulaiman.

DEBI DIN AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 408 (b)—Assistant Sessions Judge, trial by—Sentence of imprisonment exceeding four years inflicted on one accused—Smaller sentences inflicted on others—Appeal, forum of.

Where an accused person has been sentenced by an Assistant Sessions Judge to imprisonment for more than four years, all other accused persons convicted at the same trial must appeal against their convictions to the High Court even though they themselves have received sentences of less than four years and even if the accused who has been awarded more than four years does not choose to appeal.

Criminal appeal from an order of the Assistant Sessions Judge, Shahjahanpur, dated the 27th of May 1925.

The Government Pleader, for the Crown.

JUDGMENT.—(*August 31st, 1925.*)—Debi Din was arrested on the spot with three others, while his other companions fled away. The evidence of Nanhu has been rejected by the Judge, but the fact of his arrest cannot be doubted. His explanation of his presence is not probable. He is a previous convict. I have no doubt as to his having been a member of the gang. I uphold his conviction and sentence, and dismiss his appeal.

(*September 15, 1925.*)—The accused Mangli, Dina and Rup Singh have been convicted by an Assistant Sessions Judge under s. 402 of the Indian Penal Code and sentenced to four years' rigorous imprisonment each. Along with Debi Din who was sentenced to six years, they have appealed to the High Court. Under s. 408 (*b*) of the Cr. P. C. when *in any case* an Assistant Sessions Judge passes any sentence of imprisonment for a term exceeding four years or any sentence of transportation, the appeal lies to the High Court. The sentences passed on the first three accused do not exceed four years, but that on Debi Din does. The interpretation put on this section by several learned Judges of this High Court is that when one accused has been sentenced to more than four years, all other accused persons convicted at the same trial, have to appeal to the High Court even though they themselves have received smaller sentences, and that this is so even if the accused, who has got more than four years, does not choose to appeal.

In the case of *Har Dayal* v. *Emperor* (1), Chamier, J., stated that this was the view held by Tudball and Piggott, JJ., in which he concurred. Since then the invariable practice of this Court has been to entertain such appeals.

Coming to the merits of the appeal, the case of these three accused is hardly distinguishable from that of Debi Din previously disposed of by me. All the four persons were arrested on the spot. Their companions, who fled away, were armed and put up a fight. The Police had received previous information that men were about to collect for the purpose of committing a dacoity, went to the spot of which the clue had been supplied and found the accused there along with others who could not be arrested. The accused are not residents of the neighbourhood and had ostensibly no other business to be there. Their conviction is proper. The sentences are not severe. I dismiss their appeal.

M. A. A. *Appeal dismissed.*

Z. K.

(1) 30 Ind. Cas. 158; 37 A. 471; 13 A. L. J. 719; 16 Cr. L. J. 606.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 151 OF 1925.

August 19, 1925.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

In re VOLLAYAN AMBALAM AND OTHERS —APPELLANTS.

Criminal Procedure Code (Act V of 1898), ss. 297, 298, 423—Charge in favour of defence—Verdict of guilty—Misdirection—Defence case not adequately put—Evidence, inadmissible, admission of, effect of.

Where a charge is, as a whole, distinctly favourable to the defence, it is a matter of great difficulty to say that there was any misdirection which has misled the Jury into giving a verdict of guilty. It is not enough for the purpose of establishing a misdirection to show that the Judge might have laid much more stress than he has laid on the defects in the prosecution case.

Where, however, the defence case is not adequately put before the Jury and evidence is admitted which should have been excluded, the verdict of the Jury cannot be maintained.

Criminal appeal against the judgment of the Court of the Session of the Ramnad Division, in Case No. 50 of the Calendar of 1924.

Messrs. *V. L. Ethiraj* and *K. P. Ramakrishna Iyer*, for the Appellant.

The Public Prosecutor, for the Crown.

JUDGMENT.—Appellants have been convicted of dacoity by a Jury. The charge against them briefly is that they accused P. W. No. 1 of having stolen some timber and extorted from him and his two sons one of whom, strangely enough is a minor, a promissory-note for Rs. 200. The Sessions Judge summed upon the whole case in favour of the defence laying emphasis, though, as it turned out, insufficient emphasis, on the defects in the prosecution case which were both numerous and striking. The Jury, however, elected, while acquitting the 4th accused, to convict the five appellants. The acquittal of the 4th accused is perhaps the most inexplicable feature of a highly unsatisfactory case. The evidence against him was precisely as strong or as weak as that against the appellants. If he was innocent, so obviously were they. The Judge having agreed with the Jury that he was innocent and doubting as he evidently did, the truth of the prosecution case should certainly have referred the rest of the verdict as flagrantly perverse.

As a result, appellants are now driven to allege misdirection in the charge and irregularity in the selection of the Jury. We may say at once that the alleged irregularity has not been made out. No doubt, some sort of objection was taken to one of the Jurors and it is said that that objection was not waived, but the affidavit filed by the Counsel who appeared at the trial is studiously silent on the point. Where a charge is, as a whole distinctly favourable to the defence, it is a matter of great difficulty to say that there is any misdirection which has misled the Jury. It is not, we think, enough to say that the Judge might have laid much more stress than he has laid on the defects in the prosecution case. There are, however, two respects in which the Judges' charge is extremely defective. The defence really was that P. Ws Nos. 1 and 2 had executed a promissory-note in favour of the 4th appellant, 40 days before the occurrence and that the prosecution had been launched in order to avoid this note. The note in question was produced in Court and P. W. No. 1 denied having signed it. He had, of course, to deny, because it bears a date earlier than that of the alleged extortion is signed by himself and only one son and is differently attested from the extorted note. It is however very probable as Mr. Adam conceded that there really was one note and that Ex. V is the note that is alleged to have been extorted. However, Ex. V was an important feature of the case and the Judge, in our opinion, did not sufficiently impress the Jury with its importance. He should have asked the Jury to consider whether a note really had passed 40 days before the alleged extortation and whether the prosecution was not merely a device to defeat that note. The other matter is this. The evidence given by P. W. Nos. 4, 5 and 6 as to the statements alleged to have been made to them by P. W. No. 1 was relevent only if those statements were made at or about the time of the occurrence. The Judge should, we think, have told the Jury that the statements in question were not made under circumstances which justified proof of them being admitted in evidence.

We consider that the defence case was not adequately put before the Jury and that evidence was admitted which should have been excluded. The verdict must, therefore, be set aside. We see no reason to order a re-trial. The appellants are acquitted and discharged.

V. N. V

Z. K.

Accused acquitted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1708 OF 1922.

July 14, 1925.

Present:—Mr. Justice Phillips

MUTHU PILLAI—PLAINTIFF—APPELLANT

versus

ALAGARSAMI PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 11(a)—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 103—Mortgage decree—Sale of property including shares of persons other than mortgagor—Application for delivery of possession, dismissal of—Suit to recover possession—Limitation.

A mortgage-decree provided for the sale of the mortgagor's share in certain property. In execution of the decree, however, the whole of the property including the interest of the other co-sharers was sold, and was purchased by the decree-holder himself. The latter applied for delivery of possession but his application was dismissed More than a year after the date of the dismissal of his application he instituted a suit to recover possession of the mortgagor's share in the property sold after effecting a partition of the property :

Held, (1) that inasmuch as at the execution sale the mortgagor's share alone passed to the decree-holder, the decree-holder's application for delivery of possession of the whole of the property which he purported to purchase at the sale was bound to be dismissed and that, therefore, it was not necessary for the decree-holder to have the order dismissing his application set aside within a year from the date of the order; [p. 961, col. 2.]

(2) that the present suit was consequently not barred by the provisions of Art. 11(*a*) of Sch. I to the Limitation Act. [*ibid.*]

Second appeal against a decree of the District Court, Madura, in A. S. No. 28 of 1921, preferred against that of the Court of the District Munsif, Madura, in Ordinary Suit No. 411 of 1919.

Messrs. *K. Rajah Iyer* and *V. Ramaswami Iyer*, for the Appellant.

Mr. *P. S. Narayanaswami Iyer*, for the Respondents.

JUDGMENT.—The plaintiff in this suit obtained a mortgage-decree and in execution, certain property was sold. Under the decree, the share of the first defendant alone was made liable, but by some mistake or other the sale proclamation proclaimed the whole property for sale and the sale certificate certified that the whole property had been sold. In accordance with the sale certificate the plaintiff applied for delivery of possession. As there was some obstruction, his petition was dismissed. A subsequent petition to remove the obstruction was also dismissed as being out of time. Plaintiff now brings this suit, not to recover the whole property but to recover the half share of his mortgagor after effecting a partition.

The lower Courts have dismissed the suit on the ground that it is in effect a suit to obtain the same relief as that asked for by him in execution and, as the relief was refused and he has not brought the suit within one year of the date of refusal the suit is barred under Art. 11 (*a*) of the Limitation Act. Both the Courts rely on the decision of the Privy Council in *Baldeo* v. *Kanhaiyalal* (1) holding that the present suit is in effect for the same relief as that asked for in the execution petition. Athough there was a mistake in the sale proclamation and the sale certificate, the sale had the legal effect of passing only the first defendant's share in the property and plaintiff was not entitled to obtain delivery of the whole property. When, therefore his application for such delivery was refused, he knew that his application had been rightly refused and there was no necessity for him to get that order set aside provided that he could obtain the remedy to which he was legally entitled, namely, recovery of a half share in the property. In this view, it seems rather absurd to require the plaintiff to get an order set aside which he recognises to be a valid order and against which he can adduce no valid objection in order that he may obtain rights to which he is otherwise entitled; and I think that on this ground the decision in *Baldeo* v. *Kanhaiyalal* (1) is not applicable. In that case the plaintiff in effect asked for the same relief in his suit as he had asked for in his application for execution. I do not, therefore, think that the lower Courts were right in holding that the plaintiff is bound to set aside the order within one year and, not having done so, his suit to obtain his relief is barred by limitation. A further objection is taken for the respondent that this suit relates to purely a question of execution and no suit will lie. So far as I am concerned I am bound by the authority of the case reported in *Yelumalai Chetti* v. *Srinivasa Chetti* (2) in which it was held that a Court cannot, on a mere application for execution by a Court auction-purchaser, enforce his right by an order for partition. It is argued

(1) 58 Ind. Cas. 21; 12 L. W. 408; 16 N. L. R. 103; 24 C. W. N. 1001; (1920) M. W. N. 545; 2 P. L. T. 33 (P. C.).

(2) 29 M. 294.

that this case has been wrongly decided and reliance is placed on two cases, one reported in *Bhimappa* v. *Irappa* (3) and the other in *Ganpat Rai* v. *Husain Begum* (4).

The latter case, no doubt, is directly opposed to *Yelumalai Chetti* v. *Srinivasa Chetti* (2) but not only am I bound by *Yelumalal Chetti* v. *Srinivasa Chetti* (2) but with respect, I prefer to adopt that decision rather than that reported in an unauthorised report of the Allahabad High Court.

In *Bhimappa* v. *Irappa* (3) it would appear that although *prima facie* the decision is opposed to that of *Yelumalai Chetti* v. *Srinivasa Chetti* (2) yet on the facts it may be differentiated. Reference is made in the judgment to the decision reported in *Bhaguji* v. *Aniaba* (5) a decision which is not dissented from and from that fact it would appear that the Bombay High Court has not adopted a different principle to this Court. In any event, the decision of a Bench of this Court is binding upon me.

The decree of the District Judge must, therefore, be set aside and the suit remanded for fresh disposal.

I may add now that the respondent has taken a further objection that the facts mentioned above on which the lower Courts' judgments are based are incorrect. He now contends that his client, the second defendant, has lost all his right, title and interest in the property by virtue of the auction-sale which purported to sell the whole of the property and not merely the first defendant's half share. His argument is that his client was aware of the sale, was a party to the decree in execution of which the sale was held and took no objection to the sale and, therefore, the sale is binding on his share as well as on the first defendant's half share. This point has not been raised before and we have no evidence as to whether these facts are all correct, namely, whether the second defendant had notice of the sale and acquiesced in it and consequently has lost his rights. It will be open to the second defendant to put forward this plea at the re-trial of the suit.

The stamp fee on the appeal memorandum will be refunded. Costs in this Court will abide the result.

V. N. V.

Z. K. *Appeal allowed.*

(3) 26 B. 146; 3 Bom. L. R. 594.
(4) 60 Ind. Cas. 905; 19 A. L. J. 53.
(5) 5 B. 25; 3 Ind. Dec. (N. s) 18.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 295 OF 1924.

April 28, 1925.

Present:—Mr. Findlay, Officiating J. C.

SITARAM—APPLICANT

versus

KANIRAM—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 90, 91, 92, O. XLIII, r. 1 (j)—C. P. Land Revenue Act (II of 1917), s. 151—Execution of decree—Sale—Pre-emption, right of, whether can be enforced in execution—Order confirming sale—Appeal, whether lies—Revision, whether competent.

An Executing Court is bound to confirm an auction sale under r. 92 of O. XXI of the C. P. C., unless the conditions specified in rr. 89, 90 or 91 of the Order are fulfilled. [p. 963, col. 1.]

Where a sale is held under the provisions of O. XXI of the C. P. C. s 151 of the C. P. Land Revenue Act cannot be made applicable to such sale. [*ibid.*]

An order confirming an auction sale under r. 92 of O. XXI of the C. P. C. is open to appeal under O. XLIII, r. 1 *(j)* of the Code, and an application to revise such an order cannot, therefore, be entertained. [*ibid.*]

Civil revision against an order of the Subordinate Judge, First Class, Bhandara, dated the 28th of August 1924.

Mr. *P. A. Pandit*, for the Applicant.

Mr. *M. B. Kinkhede*, R. B., for Non-Applicant No. 1.

JUDGMENT.—This is an application for revision of an order of the Subordinate Judge First Class, Bhandara, passed in Execution Case No. 203 of 1924. In the said case, execution was being taken out of the decree, dated the 24th of October 1922, in Civil Suit No. 58 of 1922. That suit was on a bond, and a decree for an amount of Rs. 3,009 5 4 with interest and costs had been passed. Certain villages belonging to the judgment-debtor were sold in execution on 7th of April 1924, and the non-applicants purchased the village shares in question. The applicant, who is a co-sharer in the villages sold, applied to the Executing Court under s. 151 of the Land Revenue Act, claiming the right of pre-emption. The Subordinate Judge held that he could not decide in execution the right of the applicant to pre-empt and accordingly proceeded to confirm the sale. Against this order Sitaram has now filed the present application for revision.

Reliance is placed in this connection by the Pleader for the applicant on s. 151 of the C. P. Land Revenue Act of 1917. That provision appears in Ch. X of the said Act, which is entitled "Collection of Land Revenue." It is, no doubt,

true that under the previous procedure, when such sales were conducted by a Revenue Officer the applicant would have been entitled to come in under s. 151, but this contingency has, in my opinion, ceased to exist and the lower Court was proceeding under the provisions of O. XXI of the C. P. C when it confirmed the sale. Under that provision it was bound to confirm the sale under r. 92 unless the conditions specified in rr. 89, 90 or 91 were fulfilled. I do not think the provision under s. 151 of the Land Revenue Act can, so to speak, be translated from its surroundings and made automatically applicable to a Civil Court executing a decree under the provisions of the C. P. C. So to hold would be, in effect, to allow an Act of the Imperial Legislature like the C. P. C to be modified by a local Act like the C. P. Land Revenue Act of 1917. The powers of sale delegated to the Collector in the past have now been withdrawn and *ipso facto* it seems to me to follow that s 151 cannot be applied in the course of execution proceedings. The whole tenor of Ch. X suggests that it is entirely concerned with the procedure of Revenue Officers, and indeed under s. 220 of the Land Revenue Act the Civil Courts are explicitly barred from entertaining suits or applications in connection with matters which Revenue Officers under the Act were empowered to determine.

On the above grounds I think the present application must fail. I may point out, however, that in any event an appeal would have lain against an order under O. XXI, r. 92, C P. C., confirming the sale, and no such appeal was filed. In any event, therefore, I should not have been able to entertain the present application for revision.

I may further point out that the applicant is not, in reality, prejudiced by the refusing of the Executing Court to consider his claim to pre-emption. He still has the remedy by way of suit open to him. The application accordingly fails and is dismissed. The applicant must bear the non-applicants' costs.

Z. K. *Application dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 717 OF 1924.

December 23, 1924.

Present :—Justice Sir Henry Scott-Smith, KT.

THE FIRM GAURI MAL NARAIN DAS, THROUGH GAURI MAL—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE COLLECTOR, AMRITSAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), s. 72—Contract Act (IX of 1872), ss. 151, 152, 161—Goods consigned to Railway for carriage—Loss of goods—Suit to recover damages—Burden of proof.

Under s. 72 of the Railways Act the responsibility of a Railway Administration for the loss of goods delivered to it to be carried by Railway is, subject to the other provisions of the Act, that of a bailee under ss. 151, 152 and 161 of the Contract Act. [p. 964, col. 1.]

Under s. 151 of the Contract Act a bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. [*ibid.*]

When goods which have been consigned to a Railway Company for carriage are lost, the burden lies on the Railway Company to show that it has taken as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind and that the loss occurred notwithstanding such care. If the Company fails to satisfy the Court on that point, it is liable for the loss. [p. 964, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Amritsar, dated the 18th January 1924, affirming that of the Subordinate Judge, Third Class, Amritsar, dated the 28th May 1923.

Lala *Badri Das*, R. B., for the Appellants.

Kanwar *Dalip Singh*, Government Advocate, for the Respondents.

JUDGMENT.—In the suit out of which the present second appeal arises the plaintiff firm sued the Secretary of State, defendant No. 1 and N. S. Billimoria, defendant No. 2 for Rs. 654-10-9 on account of damages due to the loss by theft of a bale of cloth from the Railway Station godown at Amritsar. On the 2nd October 1920 the plaintiff purchased ten bales of cloth from defendant No. 2 for delivery at Amritsar. They were to be brought by defendant No. 2 and sent from Badnera. Nine bales were actually delivered and paid for at Amritsar. The dispute is about the 10th which is said to have been sent from Badnera on the 15th December 1920 and to

have arrived at Amritsar on the 7th January 1921. It was consigned by the Berar Manufacturing Company to themselves and the Railway receipt was endorsed in favour of the Chartered Bank of India. It was stolen from the goods shed at Amritsar on the 10th January 1921. On the 13th January 1921 the plaintiff paid Rs. 580 9-9 to the Chartered Bank and got the Railway receipt from it. This was arranged through defendant No. 2. When the plaintiff applied to the Railway for the goods it was found that they had been stolen, but before he was informed of this he had paid Rs. 14-13-0 to the Railway on account of demurrage. Adding to this Rs. 59-4-0 on account of interest and the sum paid to the Bank he claimed the sum mentioned above. The suit against the Railway was dismissed on the ground that they had taken all reasonable care of the goods and were not to blame for the loss. The suit against defendant No. 2 was dismissed on the ground that the vendor's risk ended as soon as the goods left the Mill's premises at Badnera.

In second appeal it is urged that the learned District Judge treated the case as if the onus of proving negligence on the part of the Railway lay upon the plaintiff. Counsel has cited *Trustees of the Habour, Madras* v. *Best and Co.* (1) and *Hirji Khetsey & Co.* v. *B B. & C. I. Ry Co.* (2) on the question of onus. Having regard to s. 72 of the Indian Railways Act it is clear that the responsibility of a Railway Administration for the loss of goods delivered thereto to be carried by Railway is, subject to the other provisions of the Act, that of a bailee under ss. 151, 152 and 161 of the Indian Contract Act, 1872. Section 151 of the Contract Act lays down that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. In *Trustees of the Habour, Madras* v. *Best and Co.* (1) it was held that "when goods which have been entrusted to bailees for hire are lost, it lies on the bailees to show that they have taken as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for the loss" The same rule was laid down in *Hirji Khetsey & Co.* v. *B. B. & C. I. Ry. Co.* (2) as follows:—

"When any one has entrusted goods to a Railway Company for carriage, and those goods are lost, damaged or destroyed while in the possession and under the control of the Railway Company, the fact of the loss, damage, or destruction is enough to cast upon the Company the burden of proving that that loss was not due to any negligence on its part."

These authorities are sufficient in support of the proposition that in this case the onus lay upon the Railway Company to prove that they took as much care of the bale of cloth as a man of ordinary prudence would have taken of his own property. The onus of the first issue which dealt with liability was put upon defendant No. 1. The Trial Court in disposing of this issue said that goods were stolen by thieves and that *chaukidars* had been appointed to watch the shed but that the thieves managed to get in somehow without notice of the *chaukidars* and that defendant No. 1 took as much care as was possible under the circumstances. The learned District Judge in disposing of this point said: "It has not been proved that Chanda Singh's dismissal had anything to do with the theft of the plaintiff's goods. And there is nothing to show that the Railway as bailee did not take all reasonable care of the goods as required by s. 151 and s. 152 of the Contract Act. I hold, then that the plaintiff has no case against the defendant No. 1." It certainly appears from this that the learned District Judge viewed the case as if the onus lay upon the plaintiff. Counsel for both sides are willing that this point should be decided upon the evidence on the record. They do not ask that any further evidence should be taken.

The contention of the Counsel for the appellant as against defendant No. 2 is that the property in the bale of cloth did not pass to the plaintiff until an appropriation thereof was made in his favour on the 13th January. It would, however, be inconvenient to decide the appeal as against him first and then to remand the case and thereafter to decide the appeal so far as defendant No. 1 was concerned. I, therefore, consider that the cases must be remanded to

(1) 22 M. 524; 8 Ind. Dec. (N. S.) 375.
(2) 25 Ind. Cas. 241; 39 B. 191; 16 Bom. L. R. 467.

the lower Appellate Court for re-decision on the question of liability of defendant No. 1 before any decision is given by this Court in regard to defendant No. 2. The issue to be decided by the lower Appellate Court is as follows:—

Whether defendant No. 1 took as much care of the bale of cloth in question as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed?

It will be necessary for the Court in deciding this issue to take into consideration the extent of the premises and the number of *chaukidars* who were appointed to guard them and also the manner in which the *chaukidars* were posted on different sides of the building. The remand is under O. XLI, r. 25 of the C. P. C, and return should be made in three months' time.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 160 OF 1924.

June 17, 1925.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Buckland.

BALDEODAS LOHEA —PLAINTIFF— APPELLANT

versus

SHUBCHURNDAS GOENKA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. V, r 17, O. IX, r. 13—Letters Patent (Cal.), cl. 15—Order setting aside ex parte *decree, whether judgment—Appeal, whether lies—Service of summons—Due and reasonable diligence, meaning of—Summons when may be affixed to house.*

The word "judgment" in cl. 15 of the Letters Patent of the Calcutta High Court does not include every order made or every decision given by a Judge, even though it may be accompanied by a statement of the reasons which actuated the Judge in arriving at the decision. Whenever the question arises whether a particular order is or is not a "judgment" within the meaning of cl. 15 of the Letters Patent, it must be decided with reference to the particular facts of the case and to the nature of the order. [p. 966, col. 1.]

An order setting aside an *ex parte* decree is not a "judgment" within the meaning of cl. 15 of the Letters Patent and is consequently not open to appeal. It is immaterial that the order further directs that all proceedings in execution taken in pursuance of the *ex parte* decree should be set aside and that the attachment should be withdrawn. [p. 966, col. 2.]

In an application to set aside an *ex parte* decree where it is found that the summons was served by affixing it to the outer door or some conspicuous part of the defendant's house, it is necessary for the Court to be satisfied that the provisions of the second part of r. 17 of O. V of the C. P. C. were really complied with. The Court must see whether in fact the serving officer had used all due and reasonable diligence with a view to finding the defendant before the process of affixing the summons to the outer door or some conspicuous part of the defendant's house was resorted to. [p. 968, col. 1.]

Per *Buckland, J.*—Where the fact of service of summons is contested it will be a matter for detailed consideration as to how service purports to have been effected, and in each case it will be necessary to show that the process-server was reasonably and duly diligent in his attempts to effect personal service due regard being had to the particular circumstances of the case [p. 970, col. 2.]

Provided the process-server goes to a place on a day and hour when he may expect to find the defendant there and does all that is required under r. 17 of O. V of the C. P. C., if he cannot find the defendant and could not find him whatever further steps he may have taken, by reason of the defendant's absence, it is not necessary for him to repeat his attempt to effect personal service. [*ibid.*]

Appeal from an order of Mr. Justice Page, dated the 22nd July 1924, passed in the the exercise of Original Civil Jurisdiction.

Mr. *N. Sinkar*, for the Appellant.

Mr. *A. K. Roy*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the plaintiff against an order made by my learned brother Mr. Justice Page on the 22nd of July 1924.

The facts which it is necessary for me to state are as follows:—

The plaintiff filed the plaint on the 28th of February 1924, and summary proceedings were taken under O. XXXVII of the C. P. C. On the 15th of April 1924, the plaintiff obtained a decree, which was made *ex parte*. The plaintiff, having obtained his decree, attached certain premises in Calcutta. On the 24th of June, notice of an application was issued on behalf of the defendants for an order that the *ex parte* decree of the 15th of April 1924 and the attachment effected in execution thereof on the interests of the defendants in the premises therein mentioned should be set aside and that the defendants should have unconditional leave to defend the suit.

The learned Judge heard the application and on the 22nd of July 1924 made an order that the decree and all proceedings in execution thereof be set aside and that the attachment issued in execution of the said decree be withdrawn. It is against that order that the plaintiff has appealed.

The learned Advocate, who appeared for the defendants, took a preliminary point that no appeal lies on the ground that the order, which the learned Judge made on the 22nd of July 1924, was not a "judgment" within the meaning of cl. 15 of the Letters Patent.

The main question before the learned Judge was whether the summons had been duly and properly served.

The learned Judge heard evidence in respect of this matter and delivered a judgment in which he dealt with the various points, which had been raised, at considerable length.

At first sight it may seem unreasonable to suggest that this is not a "judgment."

But the decisions of this Court go to show that the word "judgment" in cl. 15 of the Letters Patent does not include every order which a learned Judge makes or every decision given by a learned Judge, even though it may be accompanied by a statement of the reasons which actuated the learned Judge in arriving at his decision.

The decisions of this Court upon this point are numerous. Many of them have been based upon the definition which was given by the learned Chief Justice Sir Richard Couch in the case of *Justices of the Peace for Calcutta* v. *Oriental Gas Co.* (1), and, some of them, in my opinion, are difficult to reconcile with the judgment of the learned Chief Justice in that case.

On previous occasions I have expressed the opinion that, whenever this point arises, it is for the Court to decide whether the particular order in question is a judgment within the meaning of cl. 15 having regard to the particular facts of the case and to the nature of the order. If the learned Judge had refused the defendants' application to set aside the *ex parte* decree, it is not disputed that the defendants would have had a right of appeal.

The reason for that is, that there would have been a final decision as to the merits of the questions between the parties in the suit, and the liability of the defendants would have been finally established, so far as that Court was concerned.

That view of the matter is recognised in the C. P. C., because O. XLIII, r. 1 provides that "An appeal shall lie from the following orders under the provisions of s. 104, namely,..... (*d*) an order under r. 13 of O. IX rejecting an "application (in a case open to appeal) for an order to set aside a decree passed *ex parte*."

Though there is a right of appeal against an order rejecting an application to set aside a decree passed *ex parte*, it does not follow that there is a right of appeal when the learned Judge, instead of rejecting the application, accedes to it and sets aside the *ex parte* decree.

As far as I am aware, this is the first case in which it has been alleged that there is a right of appeal in such a case as this: and, no case has been brought to our attention in which the exact point has been decided.

There must have been many cases, in which an *ex parte* decree has been set aside by a learned Judge sitting on the Original Side, and it is significant that, as far as I am aware, there has been no appeal to this Court from such an order.

I have come to the conclusion that there is no right of appeal; and, I base my judgment upon the principle laid down in the case of *Justices of the Peace for Calcutta* v. *Oriental Gas Co.* (1) and upon the principle which I think underlies the decision in *Maharaj Kishore Khanna* v. *Kiran Shashi Dassi* (2).

The result of the learned Judge's order is, that the merits of the questions between the parties in the suit have not been decided. On the contrary the result is that the suit has been restored and the matters in dispute and the question whether the defendants are liable for the amount claimed have yet to be decided.

The learned Advocate, who appeared for the plaintiff appellant, submitted that the order in this case is not an order merely setting aside the *ex parte* decree, and he drew attention to the fact that it directed that all proceedings in execution should be set aside, and the attachment should be withdrawn: and, he argued that inasmuch as the order included that provision, it was an appealable order.

That submission was at one period of the argument attractive to my mind, but on further consideration I am of opinion that it is not sufficient to justify the Court in holding that this order is appealable.

The proceedings in execution were con-

(1) 8 B L. R. 433 at p. 452; 17 W. R. 364.

(2) 69 Ind. Cas. 820; 49 C. 616; (1922) A. I. R. (C.) 407.

sequential upon the decree, and if an order, which merely sets aside an *ex parte* decree, is not appealable, it seems to me impossible to hold that the decree is appealable simply because the plaintiff had the time and opportunity to attach property in execution of the decree, before the appeal was filed.

It was further argued that the learned Judge in this case had not exercised the jurisdiction vested in him by O. IX, r. 13 of the C. P. C. and that the application was in reality an application for a review of the judgment by which he made the *ex parte* decree on the 15th of April 1924.

I am unable to accept that argument; I think there is no doubt that the application was made by the defendants under O. IX, r. 13, and the learned Judge purported to exercise the jurisdiction vested in him by that rule. The Court might find itself in difficulties in future cases if we were to accede to the learned Advocate's argument in that respect

The conclusion, therefore, at which I have arrived is that no appeal lies. That is sufficient to, dispose of the appeal and, in my opinion, it must be dismissed.

The appeal, however, was heard upon its merits: and the learned Advocate invited us to express our opinion upon the merits.

The learned Judge dealt with the matter under the second part of O. V, r. 17. That rule provides:—"Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain . . . . . ."

The learned Judge came to the conclusion that one Madanlal was an authorised agent of the defendants to take charge of legal proceedings. I am not sure whether he meant by that finding to hold that Madanlal was an agent of the defendants empowered to accept service of the summons in this suit. If the learned Judge was of the opinion that Madanlal was an agent empowered to accept the summons on behalf of the defendants it seems to me that there was evidence which went to show that the summons was tendered to Madanlal and that he refused to accept it, and it might be argued with considerable force that the first part of r 17 applied to this case. But in the absence of an express finding upon that point, in my judgment, it would not be safe for this Court to rely upon it.

A further point was raised in the course of the argument, namely, that the application of the 24th of June 1924 was out of time: and, reliance was placed upon Art. 164 of the Limitation Act, which provides that for an application by a defendant for an order to set aside a decree passed *ex parte* the period of limitation is 30 days, to run from the date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree.

In this case, the learned Judge held that the summons was not duly served and there is no express finding when the defendants had knowledge of the decree. There are, however, findings, which go near to a conclusion that the defendants must have known of the decree on or about the date on which it was passed: and if it were open to us to decide this appeal upon the merits, I should have felt a strong inclination to have some further evidence or some further enquiry upon that point inasmuch as the application to set aside the decree was not made until the 24th of June 1924 though the decree was made on the 15th April 1924.

Finally it was argued by the learned Advocate that the learned Judge's conclusion, that those who were acting on behalf of the plaintiff in effecting service of the summons, had not used all reasonable and due diligence to find the defendants was wrong. It was argued that the learned Judge based his conclusion upon a finding that the serving peon, after discovering that the defendants, at the time when he attended at 12, Banstolla Gully, were not in the house, admittedly made no enquiries whatsoever of anybody as to their whereabouts.

That finding of the learned Judge was strenuously challenged: and, it seems to me on the evidence that there is considerable force in the argument which was presented to us in that respect.

I do not mean to detract in any way

from the principle involved in the learned Judge's judgment. I agree that it is necessary for the Court to be satisfied on such an application as this that the provisions of the second part of r. 17 of O. V have been really complied with. It is necessary in each case for the Court to see whether in fact the serving officer has used all due and reasonable diligence with a view to finding the defendant before the process of affixing the summons to the outer door or some conspicuous part of the house is resorted to.

It is not necessary, in my judgment, for me to say more as to the merits, in view of the fact that I have arrived at the conclusion that an appeal does not lie.

For these reasons, in my judgment, the appeal must be dismissed with costs.

Buckland, J.– It is with regret that I concur in the conclusion that this appeal must be dismissed on the ground that the order is not appealable : for, upon the findings of fact of the learned Judge, apart from my own view of the evidence generally, I would come to the opposite conclusion. It is, however, some satisfaction to know that if justice requires that a decree should be made in favour of the plaintiff he will have a further opportunity of obtaining it.

Before considering whether or not the order appealed against is a "judgment" within cl. 15 of the Letters Patent, I desire briefly to refer to one aspect of the question which was presented by the learned Counsel for the appellant. He submitted that the order was appealable inasmuch as it could only have been made by way of review under O. XLVII of the C. P. C., since as an application under O. IX, r. 13, it obviously was barred by limitation.

I may say that, speaking for myself, I should have been willing to accede to this argument, had there been the faintest indication in the record that the learned Judge purported to make the order by way of review. We have been referred to the petition upon which the order was based and the statements which it contains setting out matters beyond what is necessary for the purpose of an application under O. IX, r. 13. That may be and is no doubt the case, but it does not follow, particularly when the prolixity of petitions and pleadings in this Court is borne in mind, that the application was made by way of review or that the learned Judge so made the order. The C. P. C. provides that an application for review shall be made in a particular form. There is no pretence whatever that the petition in this case is in that form, but this is not a point of much cogency, as similar applications have been treated as applications for review on the Original Side of the Court. The learned Judge, however, says that the defendant brings the application by reason of the provisions of O. IX, r. 13 and had there been I repeat, any indication upon the record that he was proceeding by way of review, the position might have been different. As it is, the order must be regarded as having been made exclusively under that order and rule.

The order provides in the first place that the *ex parte* decree shall be set aside and the suit restored, and further that certain attachment proceedings incidental thereto shall be set aside. These are two separate and distinct matters.

The order restoring the suit is not appealable under the C. P. C. The intention of the Code would appear to be that in the circumstances to which O. IX is applicable —be it under r. 13 or under r. 9—where the result is that no further proceedings may take place, an appeal will lie, but where a party who has been deprived of his decree will have a further opportunity of obtaining it, if justice requires that he should do so, then no appeal lies. These principles would appear to be material in considering what is a "judgment," which has been the subject of many decisions of this Court.

The order restoring the suit does not affect the merits of the question between the parties by deciding some right or liability, for the right or liability is left open to be decided, and upon the further hearing, which necessarily follows from the order, it will be decided.

A further argument addressed to us is that the order restoring the suit is an order determining some right or liability because it also sets aside the attachment since obtained, and that, in consequence, the right of the plaintiff to have a certain property attached and sold at and from the date of the attachment is a right which has been determined and of which he has been deprived.

This argument appears to me to be fallacious. I apprehend that the definition of a "judgment" which is from *Oriental Gas*

S. N. Das
Advocate, High Court

Company's case (1) and has been cited in many decisions of this Court must be applicable in its entirety to the order actually appealed against, and that you cannot apply one part of it to the order under appeal and another part of it to some other order which is or may be affected if the order appealed against is reversed. It does not affect the matter that the order setting aside the attachment is also appealed against. If anything, that lessens the force of the argument, for the latter order may be dealt with separately.

No doubt that the judgment states the views of the learned Judge, but every judicial exposition of a Judge's opinion is not a "judgment" within the meaning of cl. 15 of the Letters Patent. There is also no doubt a decision. The decision is that the *ex parte* decree should be set aside That does not affect the merits of the dispute between the parties, still less, apart from the attachment, does it decide any right or liability. As regards the proceedings for attachment or the right to have the attachment set aside, independently of the right to have the suit restored, there has been no adjudication and it is impossible to say that the decision embodied in the judgment of the learned Judge affects the merits of any question upon which the attachment or the right to attach depends, or that any such adjudication determines any right of the plaintiff or liability of the defendant. The order setting aside the attachment is, in my opinion, dependent upon the order restoring the suit and consequential thereupon, and because it is affected as a consequence of the order restoring the suit it is not open to the appellant to contend that, therefore, the order restoring the suit, which is otherwise not appealable, becomes appealable. In my opinion, the order which we are asked to set aside is not appealable and the appeal will have to be dismissed upon that ground.

As regards the merits, I do not propose to examine the facts and circumstances in the manner which it would have been necessary to do were we allowing the appeal on that ground, but I have already generally stated my conclusion. It does, however, appear upon a perusal of the judgment that the learned Judge has not considered the effect of the presence of Madanlal as, to use his words, "the authorized agent of the defendants to take charge of legal proceedings," with reference to O. V, r. 17. The learned Judge clearly accepted the evidence adduced on behalf of the plaintiff in preference to that adduced on behalf of the defendant, and on a scrutiny of the evidence it would require no great effort to hold that Madanlal, whether or not the learned Judge so meant by the words which I have quoted, was "an agent empowered to accept service of summons on behalf of the defendant." I need not dwell upon this aspect of the matter or the effect of such a conclusion in relation to the other findings of the learned Judge or the evidence generally, for the learned Judge has not considered it and, moreover, it is unnecessary in view of the order to be made on the appeal.

The learned Judge has on several occasions used the expression "substituted service" which indicates some slight degree of misapprehension in his mind. No doubt if the circumstances are such that eventually the writ is affixed on the outer door of the house there is a substitution in the sense that the document is not left in the hands of the person on whom service should be effected, if possible, but that is not "substituted service" as recognised by the C. P. C. "Substituted service" is provided for by O. V, r. 20, but, as there is no question of the service being substituted service in this case, I need not refer to it further, beyond mentioning that before service may be so effected the Court has to be satisfied with regard to certain matters which do not arise where service is effected in the manner provided by O. V, r. 17.

Before concluding I desire to comment on certain general observations made by the learned Judge in the course of his judgment, as briefly as I may without referring to the evidence in detail. Order V, r. 17 provides that "where the serving officer after using all due and reasonable diligence, cannot find the defendant....." he shall do certain things for the purpose of effecting service. The words "all due and reasonable diligence" are general, as necessarily they must be, for they are applicable to every case where service has to be effected.

In *Cohen* v. *Nursingdas Auddy* (3), Petheram, C. J., sitting singly on the Original Side of the Court made certain observations with regard to this. He said: "It is true that you would go to a man's house and not find him, but that is not attempt-

(3) 19 C. 201 at p. 202; 9 Ind. Dec. (N. S.) 579.

ing to find him. You should go to his house, make enquiries, and if necessary follow him. You should make enquiries to find out when he is likely to be at home, and go to the house at a time when he can be found." These observations have been quoted by the learned Judge in the order under appeal. In *Rajendra Nath Sanyal* v. *Hadjee Syed Jan Meah* (4), Jenkins, J., delivered a judgment as to what is required to be proved as to service in undefended cases, and said: "For the purpose of establishing that the defendant cannot be found, it must be shown that proper efforts to find him were made, as for instance, that the serving officer went to the place or places and at the times at which it was reasonable to expect he would be found"—that is so far as I need quote, the remainder refers to other matters to be proved.

The words in these two judgments are in strong contrast, the earlier appears to prescribe a detailed procedure by way of a general rule as to what is "due and reasonable diligence," while the latter merely gives an instance.

It has been said more than once that each case must depend on its own circumstances, a proposition with which I fully agree, which makes it impossible by reference to details to say what is necessary by way of "reasonable and due diligence." What is due diligence in one case may not even be diligence in another case: and the words "due" and "reasonable" would be inapplicable to diligence which took the process-server repeatedly to the defendant's residence at an hour when he might be expected to be at his business office. What further attempts should be made to find the defendant elsewhere assuming, he has not been found at the place where he may be expected to be at a particular hour, must in a large measure depend upon the information available to the process-server. If in fact the defendant is absent from the locality it cannot be said to be necessary for the purpose of showing that he was reasonably and duly diligent for the process-server to go over and over again. This point was dealt with by Mookerjee and Carnduff, JJ., in *Sitaram Sami* v. *Kalandi Patra* (5). In that case the serving peon when he went to the house of the defendant was informed that the latter had gone to Vizagapatam. He thereupon affixed a copy of the notice on the outer door of the house and it appears that the defendant did not return from Vizagapatam till three months later. The learned Judges said: "It was consequently impossible for the peon to retain the summons in his custody till the return of the defendant, and as the defendant had left the jurisdiction of the Court, it was not possible for the peon to effect service upon him personally outside the jurisdiction." If that is the proper course for the peon to pursue in such circumstances, does it follow that diligence, which would have been such as is required by the section if the process-server had known that the defendant was absent, is no longer diligence if it so happens that he is not told that the defendant is absent and that subsequently transpires, when the effectiveness of the service is in question, to have been the fact? In my opinion, provided the process-server goes to a place on a day and hour when he may expect to find the defendant there and does all that is required under the section, if he cannot find the defendant and he could not find him whatever further steps he took by reason of his absence, then the position is such as we find it in this case, and I cannot perceive that it is necessary for the process server to repeat his attempts to effect personal service.

The learned Judge has used the word "perfunctory" but I find it quite impossible to take the view that what took place on the occasion when the summons eventually was affixed upon the outer door of the house and subsequently removed by Madarlal was perfunctory.

The practice of the Court as to proof of service and matters to be proved has obtained, possibly with modifications, for very many years and I have been led to make these observations lest by passing over the learned Judge's observations in silence I might be deemed to endorse his interpretation of the effect of the section. Where the fact of service is contested it will be a matter for detailed consideration as to how service purports to have been effected, and in each case it will be necessary to show that the process-server was reasonably and duly diligent in his attempts to effect personal service, due regard being had to the particular circumstances.

For reasons already given I agree that the appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

(4) 2 C. W. N. 574; 26 C. 101; 13 Ind. Dec. (N. S.) 669.

(5) 13 Ind. Cas. 127; 17 C. W. N. 999.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 467 OF 1924.

September 15, 1925.

Present:—Mr. Hallifax, A. J. C.

JAIRAM—PLAINTIFF—APPELLANT

versus

LAXMAN—DEFENDANT—RESPONDENT.

Landlord and tenant—Lease, evidence of—Acceptance of rent, effect of—Rent collector, acceptance of rent by, value of.

If an owner of land accepts money from a person who is in occupancy of that land as the rent of the land knowing that it is paid to him as the rent of such land, such acceptance is good evidence that he has already given the payer a lease of that land or gives it to him at that moment and agrees that he shall be considered to have held it during the period for which the rent is paid. The acceptance of rent, however, by a person who is employed merely to collect rents and has no power to grant a lease is no evidence of the granting of a lease which would be binding on the landlord. [p. 971, cols. 1 & 2.]

Second appeal against a decree of the District Judge, Wardha, dated the 22nd September 1924, arising out of the decision of the First Sub-Judge, Second Class, Wardha, dated the 24th April 1924.

Messrs. *V. Bose*, *C. B. Parekh*, and *P. N. Rudra*, for the Appellant.

Messrs. *M. B. Kinkhede*, R. B., and *G. S. Lule*, for the Respondent.

JUDGMENT.—The grant of tenancy has been held to be proved in this case by the acceptance of rent by one Balaji who is mistakenly called Dulichand in the judgment of the lower Appellate Court because he was "empowered to accept rent for the *malguzar*." The learned District Judge remarks: "It is true that mere acceptance of rent need not amount to recognition of tenancy. But whether it does or does not depend on the circumstances of each case." The principles which the learned Judge had in mind are like many others, ordinarily stated much too widely and then applied to the full width of the statement.

If an owner of land accepts money from a person who is in occupancy of that land as the rent of the land knowing that it is paid to him as the rent of it, that is good evidence that he has already given the payer a lease of that land, or gives it to him at that moment and agrees that he shall be considered to have held it during the period for which the rent is paid. That is, all there is in it. There is one matter over which the lower Courts have gone wrong in the consideration of the question of acceptance of rent by the defendants which happens to be of no great importance but only because they have also gone wrong on another.

That matter is that the *lambardar* of the *mahal* in which the land in dispute is situated is not the *lambardar* of the land in dispute. That land is itself a *patti* without a number or an appointed *lambardar* both being unnecessary because of its smallness. It is nonetheless a separate *patti* as any other similar separately owned portion is and the rest of the village is really what is ordinarily callad the *shamilat patti*. The person appointed *lambardar* of the *mahal* is really *lambardar* of that *shamilat patti* only. This has been vaguely recognised all through the case in acceptance of the fact that the whole rent was payable in the end to the defendants (and other matters) but it has never been clearly realised.

The fact loses some of its importance though not all because the man Balaji whom the *lambardar* of the *shamilat patti* authorised to collect rent for him was also authorised by the defendants to collect rents in their *patti* and to pay the money over to the *lambardar* of the *shamilat patti*. But it is very clearly proved that Balaji had no authority from either the *lambardar* or from the defendants to do anything beyond collecting the amount of money due to them as rent. He had no power to grant a lease and, therefore, the acceptance of rent by him cannot be evidence of the granting of a lease, that is to say, of a valid lease. It may prove and in this case I think it does prove, that by accepting rent or by saying he had accepted rent from the plaintiff he intended to create evidence of the grant of a lease by himself but he had no power to grant one.

The only question in the whole case is whether the defendants ever granted a lease to the plaintiff. The lower Appellate Court has found that they did but the only evidence on which this finding of fact is based is evidence that rent was accepted by Balaji which cannot prove more than that a lease was granted or purported to be granted by Balaji. It is necessary for this Court, therefore, to examine first the question whether rent was ever accepted by the defendants and then whether if it was accepted that fact proves that they granted a lease of the land to the plaintiff.

Now in the circumstances of this case to prove the first point that the rent of the land ever reached the hand of the defendants it would be necessary to prove that it was paid

to Balaji, handed over to the *lambardar* of the *mahal* who was managing the defendants' *patti* and handed over by him to the defendants which would ordinarily be done by credit in the accounts of the profits of the *shamilat patti*. The evidence that it was ever paid even to Balaji seems to me entirely insufficient but in this matter the finding of fact of the lower Appellate Court has to be accepted.

The only evidence of the fact is the signatures of Balaji in the plaintiff's *rasid bahi* the very significant fact mentioned in the judgment of the first Court that Balaji was summoned as a witness by the plaintiff but given up was not noticed in the lower Appellate Court. These signatures could be easily and safely made by Balaji in collusion with the plaintiff, it would not be necessary for any money to be paid to him and he could easily keep it for himself if it was.

But even if it is accepted that the money was paid to Balaji what evidence is there that it ever reached the *lambardar*. The rent payable by the plaintiff for his other land in the village was Rs. 60 and for this land, as he alleges was Rs. 9-12-0. The very least that would be required to show that Balaji paid over Rs. 69-12-0 to the *lambardar* and not only Rs. 60 is a statement to that effect by Balaji himself and even that the plaintiff has not dared to ask Balaji to make or at least he has not been able to induce Balaji to dare to make it. The inference that Balaji never paid the Rs. 9-12-0 to the *lambardar* but kept it himself, if he ever had it, is inevitable.

But of this there is further evidence. The *lambardar* has himself stated as a witness that he debited the defendants every year in the village accounts with the rent of the land. That could not of course be strictly called rent payable by them to him, but it is the expression commonly though loosely used, and it is not inconvenient provided the real character of the payment is kept in mind. It is only by debit in these accounts that the defendants could pay that "rent" to the *lambardar*, a fact of which the learned District Judge lost sight in refusing to believe that they had paid it because they had no receipt for it. It is also only by credit in those accounts that the *lambardar* could hand over to them the rent of the land collected by Balaji and paid to him, and his perfectly credible statement that he did debit them with the "rent" necessarily includes the statement that he never credited them with any rent of that land collected by Balaji, that is that he never received it from Balaji.

But even if it were proved that Balaji had paid the *lambardar* the Rs. 9-12-0 he collected each year in addition to the Rs. 60 due by the plaintiff for his other land, it would have to be proved further that the *lambardar* handed over the Rs. 9-12-0 as well as the Rs. 60 to the defendants and that they accepted it as rent for this land, that is that they knew it was paid as the rent of this particular piece of land and were willing to take it as such. Now the deposition of the *lambardar* himself proves, as has been explained, that he never paid this money to the defendants by credit in the accounts, so that even if he received it from Balaji he misplaced or misappropriated it; and the defendants never received or accepted it at all, whether as rent or otherwise.

But even if one more disproved fact is admitted and we assume that the payments of Rs. 9-12-0 were credited to the defendants in the village accounts and they knew of it, the plaintiff's case is not improved. He first alleged that he was given an express lease in May 1919. His evidence was to the effect that it was given in May 1920, and it was rightly held that he was never given any such lease at all. In the course of the suit three different sums have been stated as the rent on which this lease was given, but the sum of Rs. 9-12-0 appears not to be among them. In the year ending in May 1919 and the following year the plaintiff is recorded in the *jamabandi* as holding 70 of the disputed land in addition to the 4.67 leased to his son Mahadeo. (Calling that area 4.50 is only one of the very large number of inaccuracies in this case). For each of the following three years the plaintiff is recorded as holding all the land in dispute.

The amounts which are for the moment assumed to have been proved as paid to Balaji and handed over by him to the *lambardar* and credited by him to the defendants in addition to the Rs. 60 otherwise payable are Rs 3 6-0 in the year ending in May 1920, and again Rs. 3 6 0 in the year ending in May 1921, Rs. 16-2-0 (which was Rs. 9-12 0 for that year and the balance of Rs. 9-12-0 for the previous year) in the year ending in May 1922 and Rs. 9-12-0 in the year ending in May 1923.

The plaintiff admits that he was dispossessed by the defendants in July 1923 and he filed this suit in August of that year. It appears then that the earliest time at which the defendants could have known of the payment of Rs. 9-12-0 by the plaintiff was when the village accounts were made up for the year ending in May 1922. The facts assumed, therefore, only prove that the defendants turned the plaintiff out of the land at the end of the year in which it first came to their knowledge that he was paying rent for it to them through Balaji and the *lambardar*. There could hardly be better proof that they refused to accept him as a tenant.

The decree of the lower Appellate Court will be set aside and that of the first Court dismissing the suit will be restored. The plaintiff will pay all the costs of both parties in all three Courts.

Z. K. *Decree set aside.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 113 OF 1924.

September 8, 1925.

Present:—Mr. Justice Phillips and Mr. Justice Ramesam.

SANKARANARAYANA REDDI, MINOR BY HIS FATHER AND GUARDIAN PERIA VENKATA REDDIAR—PLAINTIFF—APPELLANT

versus

KOPPAYYA REDDI *alias* GOPALA REDDI AND OTHERS—DEFENDANTS NOS. 1 TO 29, 31 TO 35 AND 37 TO 55—RESPONDENTS.

Hindu Law—Settlement deed, construction of—Gift in favour of daughter—Nature of estate taken—Intention, vague expression of, whether can control clear dispositive words.

Clear and unambiguous dispositive words used in a Will or deed are not to be controlled or qualified by any general expression of intention and technical words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense. [p. 974, cols. 1 & 2.]

Lalit Mohun Singh Roy v. *Chukkun Lal Roy*, 24 C. 834; 24 I. A. 76; 1 C. W. N. 387; 7 Sar. P. C. J. 155; 12 Ind. Dec. (N. S.) 1224 (P. C.), relied on.

A deed of settlement by a Hindu recited "I have no male issue. I have only a daughter and my wife. I hereby make the following provisions so that my properties may not pass to the control of others after my lifetime and that they may go to my lawful heirs. The properties mentioned in Sch. I hereof are to be enjoyed by myself and my wife during our lifetime, and after our lifetime my daughter and her husband who is also my sister's son are to perform my funeral, etc., ceremonies and enjoy the aforesaid properties with absolute rights. The properties mentioned in Sch. II hereof are to be enjoyed by my daughter and my son-in-law from this date with absolute rights and with heritable rights in favour of son, grandson, etc.":

Held, that the daughter and her husband took an absolute estate in the properties gifted inasmuch as the clear dispositive words used could not be controlled by the somewhat vague expression of the settlor's intention occurring in the earlier portion of the document that the property should go to his lawful heirs. [p. 974, col. 1.]

Appeal against a decree of the Court of the Additional Subordinate Judge, Ramnad, at Madura, in O. S. No. 14 of 1921, (O. S. No. 2 of 1921 on the file of the Court of the Subordinate Judge, Ramnad).

Mr. *C. V. Anantakrishna Iyer*, for the Appellant.

Mr. *K. Rajah Iyer*, and the Advocate-General, for the Respondents.

JUDGMENT.—The sole question that arises in this appeal is the interpretation of the deed of settlement executed by one Alagiri Reddi on the 3rd November 1884. This document contains the following provisions:—

"I have no male issue; I have only a daughter named Avudiyammal *alias* Mukkayi Ammal and my wife Avudaiyammal. As I am now, on account of old age very weak in body, I hereby make the provisions mentioned below so that my properties, etc., may not pass to the control of others after my lifetime and that they may go to my lawful heirs...The *punja* land and house site, etc., mentioned in Sch. I hereof are to be enjoyed by myself and my wife Avudaiyammal during our lifetime, and after our lifetime my daughter Avudaiyammal and her husband Ramalinga Reddiar who is also my sister's son are to perform my funeral, etc., ceremonies and enjoy the aforesaid properties with absolute rights. The properties mentioned in Sch. II hereof are to be enjoyed by my daughter Avudaiyammal and my son-in-law Ramalinga Reddiar from this date with absolute rights and with heritable rights in favour of son, grandson, etc." The actual words of gift in this document seem undoubtedly to confer an absolute estate, the words used being, with reference to Sch. II "with absolute rights and with heritable rights in favour of son, grandson, etc." In considering this gift, the Subordinate Judge has formed his opinion with reference to the preliminary sentence in which the

settlor stated that his intention was "that my properties may not pass to the control of others after my lifetime and that they may go to my lawful heirs". This intention he has held to govern the whole of the document and consequently to modify the words which purport to confer absolute rights, and he has held that the gift to the daughter was one merely to be enjoyed by her for her lifetime so that it might pass to her son after her death. This is the contention put forward by the learned Advocate General for the respondent. We are unable to agree with this view of the document, for although the testator does express an intention that the property should go to his lawful heirs he does not specify what particular heirs he actually had in his mind. There are really no words that raise a presumption that he meant his daughter's son and his daughter's son only, for a grandson would not be his only lawful heir.

Several cases have been cited in support of the proposition that the absolute gift is controlled by this expression of opinion. I may refer to two cases *Nanda Gopal* v. *Pareshmoni Debi* (1) and *Surendra Nath Chatterjee* v. *Saroj Bandhu Bhattacharjee* (2) cited for respondent but in both these cases after the words which in a technical sense imply the gift of an absolute estate there are very stringent limitations imposed to restrain alienation, and in the latter case to regulate the conduct of the donee, and in these particular circumstances it was held that these restrictions were such that the testator cannot have intended to use the technical words in their technical sense but only intended to convey a life-estate. Here we have no restrictions after the words of gift, the words used being "*Saravaswathantharam, putra pouthra parampariyam.*" We do not think that they can be controlled by the somewhat vague expression of the settlor as to his intention occurring in the earlier portion of the document. In this connection we may refer to *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy* (3), where it was observed at page 846*.

"There are two cardinal principles in the construction of Wills, deeds and other documents, which their Lordships think are applicable to the decision of this case. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is that technical word or words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense".

Applying these principles, it is clear that the settlor's general expression of intention cannot control or qualify the very unambiguous words in which he conveys an absolute estate. In this case the settlor used words which have the legal effect of granting the absolute estate and there are no inconsistent words of such a nature as to make it clear that the testator did not mean those words to have their ordinary legal meaning. We must hold, therefore, that the words used must bear their proper meaning.

Another case relied on for the respondents is *Seshayya* v. *Narasamma* (4). The decision in that case was apparently based largely on the then prevailing opinion that the estate granted to a widow must ordinarily be construed as a life-estate unless the words of gift put it beyond all doubt that the estate intended to be conveyed was absolute; apart from that, that decision must, we think, be confined to the facts of that case which are not fully before us, for it appears that although there was a gift to the widow and her son jointly, the effect of the decision in that case was to deprive the widow not only of the absolute estate claimed by her but even of the life-estate which it would appear had been granted. Unless there were facts in that case which showed that the life estate was relinquished the decision hardly seems to be in accordance with the language of the document which purported to give some estate to the widow.

For all these reasons we think that the view taken by the Subordinate Judge is wrong and hold that Ex. I conveyed the absolute estate both in Sch. I and in Sch. II to the daughter Avudaiyammal and her husband Ramalinga Reddiar, which they would hold as tenants-in-common. As a result of this decision the decree will have to be set aside

(1) 6 Ind. Cas. 354.
(2) 70 Ind. Cas. 923; 26 C. W. N. 893.
(3) 24 C. 834; 24 I. A. 76; 1 C. W. N. 387; 7 Sar. P. C. J. 155; 12 Ind. Dec. (N. S.) 1224 (P. C.).
*Page of 34 C.—[*Ed.*]

(4) 22 M. 357; 8 Ind. Dec. (N. S.) 255.

and the suit remanded for disposal on the other points which arise.

Costs in this Court will abide the result and the stamp duty on the appeal memorandum will be refunded.

V. N. V.

Z. K. *Decree set aside.*

CALCUTTA HIGH COURT.

INSOLVENCY JURISDICTION APPEAL NO. 88 OF 1925.

June 23, 1925.

Present:—Mr Justice Pearson.

In the matter of GOPAL DASS AUROBA—INSOLVENT.

Presidency Towns Insolvency Act (III of 1909), ss. 25, 36—Protection order, refusal of, for failure of insolvent to produce books of account—Appeal—Interference by Appellate Court—Books in possession of Receiver appointed by Court—Duty of insolvent.

Where the Registrar has refused to pass a protection order in favour of an insolvent on the ground that he has failed to produce the books relating to his business before the Official Assignee, the High Court will not interfere with the discretion exercised by the Registrar, unless it is convinced that the insolvent has himself taken all steps that were in his power to effect the production of the books before the Official Assignee. The mere fact that the books are in the possession of a Receiver appointed by the Court and that the Official Assignee himself or one of the creditors can apply to the Court under the provisions of s. 36 of the Presidency Towns Insolvency Act for an order that the books should be made over by the Receiver to the Official Assignee would not absolve the insolvent from taking proper steps to have the books produced before the Official Assignee. [p. 975, col. 2.]

Appeal against an order of the Registrar in Insolvency, dated the 5th June 1925.

Mr. *S. N. Banerjee*, for the Insolvent.

JUDGMENT.—This is an appeal against an order made by the Registrar in insolvency, dated the 5th June 1925, by which he refused to pass a protection order in favour of the insolvent. He has set out the grounds on which he relies in his order, and the broad ground upon which his action has been taken is that the insolvent is a trader, carried on a joint family business of which family he was the *karta*, and that the books have not yet been produced before the Official Assignee. It appears that at the time the adjudication order was applied for, the Registrar in insolvency refused the application on the same ground. The order, however, was made by this Court on the 23rd April, and the schedule was filed. It appears from the order of the Registrar that the insolvent filed a list of the books at the time of his application for adjudication. It appears that they are in the possession of two Receivers who were appointed in a partition suit between the insolvent and the infant members of his family. It was instituted in December last year. An order of this Court has been made directing the Receivers to deal with the insolvent's share in the property. The list of books filed by the insolvent was signed by the Receivers and he asked that he might be exempted from producing the books stating that they would be produced by the Receivers. That statement has not been borne out by what has subsequently happened, and at the time of application for protection order before the Registrar it was stated by the Attorney of the insolvent that he intended to apply to the Court for an order on the Receivers to deliver the books to the Official Assignee.

The main ground argued in the present application before me is that it is not possible for the insolvent himself to take any further steps than he has done to obtain the production of these books because not only are they in the possession of the Receivers but the books themselves are not the books of the insolvent's own business but of the joint family business, of which he is one of the co-parceners. It is urged that the Official Assignee himself could apply to this Court under the provisions of s. 36 for an order that the books should be made over by the Receivers, or if not the Official Assignee, then a creditor might make the application. It is perfectly true that that procedure is open in this case. At the same time, *prima facie*, it is for the insolvent to produce his books, and before interfering with the discretion that has been exercised by the Registrar in this case I should require to be convinced that the insolvent had himself taken all steps that were in his power to effect the production of the books before the Official Assignee. Consequently I think I ought not to interfere with the order that has been made at present. I find it hard to believe that if the insolvent had taken proper steps even by approaching the Receivers unofficially or asking the Official Assignee for a letter on his behalf or by writing a letter of his own to the Receivers stating what the facts were, the Receivers as officers of this Court would have refused to assist the Official Assignee who is also an officer of this Court, by producing the books in his office. It may be that the terms of the order under which they are in

possession of the books might technically prevent them from parting with the actual possession. If so, that is a matter which can easily be remedied by an application made to this Court. But so far as the actual production goes, I can see no reason to think that if proper steps had been taken they might not have been by now effective.

With these remarks I dismiss the application. It will, of course, be open to the insolvent to renew his application for protection order on obtaining the books to be produced to the satisfaction of the Official Assignee.

Z. K. *Application dismissed.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 15 OF 1924.

November 3, 1925.

Present :—Mr. Justice Hasan and Mr. Justice Misra.

ABHAIDAT SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAGHOENDAR PARTAB SAHAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Property acquired, nature of—Presumption—Property purchased by joint family—Mortgage of purchased and ancestral property to purchaser—Suit by purchaser to enforce mortgage—Suit by members of family for declaration that mortgage shall not affect ancestral property—Subsequent suit challenging validity of mortgage of purchased property, whether maintainable—Civil Procedure Code (Act V of 1908), O. II, r. 2.

Where it is found that a joint Hindu family was possessed of a nucleus, the burden of proving that a certain item of property subsequently acquired was the self-acquired property of a particular member of the family, lies upon the person who makes the assertion. [p. 977, col. 2.]

Certain property was purchased by a joint Hindu family and the consideration for the sale was paid by the execution of a mortgage in respect of the property purchased as well as of a certain portion of ancestral property belonging to the family. The vendor subsequently obtained a decree for sale on foot of his mortgage, but before the property could be brought to sale some members of the family brought a suit for a declaration that the mortgage and the decree obtained on its basis were not binding on them so far as they affected the portion of the ancestral property of the family included in the mortgage. This suit was decreed and the purchased property was sold in execution of the mortgage-decree. The plaintiffs thereupon brought another suit for a declaration that the purchased property was joint family property and that the mortgage and sale in execution of the mortgage-decree were invalid and were not binding upon the plaintiffs:

Held, (1) that in view of the fact that the plaintiffs wanted a declaration that the property purchased, in consideration for which the mortgage was granted, was joint family property, the mortgage was binding on them; [p. 978, col. 1.]

(2) that the plaintiffs having failed in the previous suit to ask for any relief concerning the mortgage so far as it affected the purchased property, their present suit was barred by the provisions of r. 2 of O. II of the C. P. C. [*ibid.*]

Appeal against a judgment and decree of the Additional Subordinate Judge, Sultanpur, dated the 7th January 1924.

Mr. *Moti Lal Saksena*, for the Appellants.

Messrs. *Bhagwati Nath Srivastava* and *Bishambharnath Srivastava*, for Respondent No. 1.

JUDGMENT.—This is the plaintiffs' appeal from the decree of the Subordinate Judge of Sultanpur, dated the 7th January 1924. The plaintiffs prayed for the relief that a declaratory decree be passed in their favour against the defendants to the effect that the property in suit specified in paragraph one of the plaint was the joint family property of the plaintiffs and the defendants Nos. 2 and 3 and that the defendant No. 1 acquired no right therein by purchase at an auction-sale.

The facts of the case are few and simple. A short pedigree may be given at the outset of the judgment.

SARJU SINGH

Dwarka Singh, defendant No. 2	Kunj Behari Singh, defendant No. 3	Abhaidat Singh, plaintiff No. 1.
	Jai Nath Singh, plaintiff No. 5.	Rap Ram Singh, plaintiff No. 4.
		Ram Dwar Singh, plaintiff No. 6.
Mahashar Singh, plaintiff No. 2.		Dhaneshar Singh, plaintiff No. 3.

As the pedigree will show, Sarju Singh was father of three sons. Two of his sons are defendants in the case. The remaining, Abhaidat Singh, is one of the plaintiffs. The other plaintiffs are the two sons of Dwarka Singh and the three sons of Kunj Behari Singh. The property in question is situate in village Mirpur Saraiyan, *Pargana* Baraunsa, in the District of Sultanpur. The plaintiffs'

is that they and the defendants Nos. 2 and 3, that is Dawarka Singh and Kunj Behari Singh, constitute a joint Hindu family, that the property in suit was acquired with the funds of the family and that consequently it was joint family property.

It appears that this property was purchased by the father of the defendant No. 1, Ragho Inder Partab Sahai, from certain persons under a sale-deed dated the 4th February 1914. That sale was challenged in a suit for pre-emption by the defendants Dwarka Singh and Kunj Behari Singh. The claim for pre-emption was decreed and the decree of the Court specified that the money should be deposited by the 31st August 1915. The money was not so deposited and the result was that the claim for pre-emption eventually failed. Eleven days after the expiry of the period fixed in the decree for depositing the pre-emption money, Dwarka Singh and Kunj Behari Singh obtained a re sale, of the property for which they had instituted their suit for pre-emption from the father of the defendant No. 1. The sale-deed bears the date 11th September 1915 and the ostensible consideration stated therein was Rs. 7,500. The defendants Nos. 2 and 3, Dawrka Singh and Kunj Behari Singh, had no money to pay the sale consideration except a small portion of Rs. 1,300 6. This last-mentioned amount was paid to the vendee in cash The payment of the rest of the purchase money was secured by a deed of simple mortgage executed by the defendants Nos. 2 and 3 in favour of the vendee. The deed of mortgage was of the same date as the deed of sale.

It may now be mentioned that the mortgage, to which we have made reference in the preceding paragraph of this judgment, covered not only the property which was acquired under the earlier sale-deed but also some ancestral property of the family represented by 2 *biswas* share in village Mirpur Saraiyan. The object of the present suit is to impeach the validity of the mortgage of the 11th September 1915 on the grounds already stated by us. The defence was that there was no joint family, that the property in suit was the self-acquired property of the defendants Nos. 2 and 3 and that even if it was joint family property the mortgage in question was beneficial to the family as a whole and, therefore, was not liable to be challenged by the plaintiffs. With these questions of fact a plea in bar of the present suit undar O. II, r. 2 of the C. P. C. was also raised.

The Trial Court has found that the plaintiffs and the defendants Nos. 2 and 3 constitute a joint Hindu family governed by the law of the Mitakshara. On the second question, it has found that the property in suit was the self-acquired property of the defendants Nos. 2 and 3. It has further found that the mortgage in question being beneficial to the family as a whole was binding on the plaintiffs and on the question of law that Court is of opinion that the suit is barred.

On the question of fact as to whether the property in suit is the self-acquired property of the defendants Nos. 2 and 3 as found by the Trial Court, we find ourselves in disagreement with the finding of that Court. It is proved, indeed it is admitted, that the family was possessed of a nucleus. It is also proved that Abhaidat Singh plaintiff No. 1 was the only member of the family who earned some income in service at some place in Calcutta. The defendants have failed to establish that they had any other source of income independent of the nucleus and of the con ributions which Abhaidat Singh made to the family funds. The criticism of the learned Judge of the Trial Court that it was not proved precisely as to what sums of money Abhaidat Singh used to remit the family from time to time by producing receipts of money orders and so forth does not commend to us as of any weighty significance. We can safely rest our finding on the admitted fact that there was a nucleus of the family. To support the view which we are taking we may refer to the decision of their Lordships of the Privy Council in the case of *Lal Bahadur* v. *Kanhaiya Lal* (1). We, therefore, hold that the property in suit was the joint family property of the plaintiffs and the defendants Nos. 2 and 3.

This finding, however, is not sufficient to entitle the plaintiffs to a decree because we find ourselves in entire agreement with the view which the Trial Court has taken both on the remaining question of fact and on the plea of bar, under O. II, r. 2 of the C. P. C. The plaintiffs challenge the validity of the mortgage but the consideration of the mortgage or the bulk of that consideration was admittedly utilized towards the price paid for the acquisition of this

(1) 29 A. 244; 11 C. W. N. 417; 9 Bom. L. R. 597; 4 A. L. J. 227; 34 I. A. 65 (P. C.).

property which the plaintiffs now desire to be characterised as the joint family property. They cannot eat and also have the cake. If they wish to retain this property they must pay for it and the payment has been made not by any other means except the execution of the deed of mortgage in question. In the circumstances of the case and in agreement with the Trial Court, we hold that the mortgage in question is binding on the plaintiffs. This concurrent finding is enough to dispose of his appeal: but we think it proper to deliver our opinion on the question of law as well.

These plaintiffs brought a previous suit in respect of the mortgage now in question. At the date of that suit the defendant No. 1 had obtained a decree on that mortgage and was proceeding to sell the property under the decree which he had obtained. The plaintiffs then brought the previous suit for a declaration that the mortgage and the decree consequent thereon were not binding on them. In the course of the pleadings they limited their claim to the two *biswas* ancestral property and abandoned the attack in respect of the rest of the property included in the mortgage under question. They won that suit. The present suit is now brought to challenge the validity of the mortgage and of the sale which has since taken place of the property which was acquired for the benefit of the family as we have already found. The lower Court is of opinion that the present suit is barred by O. II, r. 2, of the C. P. C. It is argued in appeal that the cause of action for the present suit is different from the cause of action on which the previous suit was founded. The difference is made to rest on the fact that the previous suit was brought before the property had been sold while the present suit has been instituted after the auction-sale under the decree obtained by the defendant No. 1. We think that that is a distinction without any difference. The mortgage was one and entire. That transaction gave cause of action to the plaintiffs and if they chose to attack it only in piece in a previous suit they cannot be permitted to attack it with respect to another piece covered by the same transaction.

The appeal fails and is dismissed with costs.

Z K. *Appeal dismissed.*

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 22 OF 1924.

August 3, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Madgavkar.

MAYASHANKAR MULSHANKAR—APPELLANT

versus

BURJORJI MERWANJI BATLIVALA—RESPONDENT.

Mortgage—Redemption—Mortgagee releasing portion of mortgaged property from mortgage-debt—Owner of portion of equity of redemption, whether can sue for partial redemption—Equity—High Court, power of.

The Transfer of Property Act is not exhaustive and a High Court, as a Court of Equity, is entitled to administer the principles of equity, as laid down in decided cases, which are not distinctly prohibited by Statute. [p. 979, col. 2.]

Where a mortgagee has acted in such a way as to release a portion of the mortgaged property from the mortgage-debt, a mortgagor who is the owner of a part of the equity of redemption is entitled to redeem that portion of the property in which he is interested. [*ibid.*]

Appeal from an order passed by the Joint Judge, Thana, in Appeal No. 218 of 1922, reversing the decree passed by, and remanding the suit to, the First Class Subordinate Judge, Thana, in Suit No. 7 of 1921.

Mr. *G. N. Thakor*, (with him Mr. *P. G. Bapat*), for the Appellant.

Mr. *R. W. Desai*, for Respondent No. 1.

JUDGMENT.—This suit was one for part redemption by an assignee of a part of the mortgaged property. On July 22, 1914, defendant No. 3 executed a mortgage in favour of defendants Nos. 1 and 2 for a principal sum of Rs. 17,500 and interest. The properties mentioned in the mortgage deed were: (1) four parcels of Bhandup land; (2) 3116 square yards of Kanjur land; and (3) some interest of the mortgagor in certain property at Parel.

On October 27, 1915, defendant No. 3 by a registered deed gave the four parcels of Bhandup land included in the above mortgage to the plaintiff in exchange for certain other lands of Bhandup received from him.

On October 20, 1918, the first and second defendants, the mortgagees, brought a suit on their mortgage against defendant No. 3 alone, and on July 8, 1918, obtained a preliminary decree for Rs. 19,462-9-3 together with interest. In that suit they included as mortgaged properties five parcels of Bhandup land, four being those mentioned in the deed and since transferred to the plaintiff, the fifth being a wholly different one which the plaintiff alleged had belonged to him in an independent right. In-

stead of 3116 square yards of Kanjur land they included another piece of 5951 square yards which also the plaintiff alleged belonged to him in an independent right, and they mentioned also the Parel property.

It does not appear that anything further was done after the preliminary decree. The plaintiff then claimed that as he was the owner of the equity of redemption of a portion of the mortgaged property, he was entitled to redeem that portion on paying a proportion of the amount of the mortgage-money, because the mortgagee by his own action had released some of the mortgaged property from the mortgage. The Trial Court ordered that the plaintiff should within seven days amend the plaint by making it a general suit for redemption of the whole property on payment of the whole mortgage amount that might be found due.

On appeal the Joint Judge held that a certain principle of equity must be applied which acts in favour of a mortgagor owner of a part of the equity of redemption of mortgaged properties when the mortgagee has acted in such a way as to release a portion of the property from the mortgage deed. This principle has been laid down in *Imam Ali* v. *Baij Nath Ram Sahu* (1). At p. 622* the judgment proceeds:—

"It appears to be clear that a mortgagee cannot release from his claim a portion of the properties comprised in his security so as to prejudice the rights of others, who might have already acquired an interest in the unreleased portion. As pointed out by this Court in the cases of *Surjiram Marwari* v. *Barhamdeo Persad* (2) and *Surjiram Marwari* v. *Barhamdeo Persad* (3) it is not open to a mortgagee to throw the burden of the entire debt upon a portion only of the mortgaged property and release the remainder....The purchasers of the properties not released are entitled to insist that not more than a proportionate share of the mortgage debt shall be levied upon the properties in their hands."

That case was followed by this Court in *Budhmal Kevalchand* v. *Rama Yesu Sangle* (4). There the property in suit was mortgaged to plaintiff. Subsequent to the date of the mortgage, the equity of redemption was purchased in equal half shares by two out of the three parties. The plaintiff sued to recover the entire mortgage-debt by sale of half of the mortgaged property in the hands of one of them without adding the other as a party. It was held that it was contrary to the principles of equity that the plaintiff who by his own negligence had lost his remedy against the owner of half of the equity of redemption, should seek to throw the whole burden of the mortgage on the owner of the other half.

In this case if the plaintiff could only redeem the property of which he is now the mortgagor by payment of the whole of the mortgage-debt in satisfaction of the mortgage-decree, he would only recover from the mortgagee a part of the properties mortgaged and not the whole, because by virtue of his decree the mortgagee could only execute his decree against the properties mentioned therein. It makes no difference whether that mistake was deliberate or intentional, and it makes no difference that the present case is not contemplated by any of the provisions of the Transfer of Property Act. That Act is not exhaustive and this Court as a Court of Equity is entitled to administer the principles of equity as laid down in decided cases which are not distinctly prohibited by Statute.

We think the Joint Judge was right in his conclusion, and we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 33 C. 613; 3 C. L. J. 576; 10 C. W. N. 551.
(2) 1 C. L. J. 337
(3) 2 C. L. J. 202.
(4) 55 Ind. Cas. 327; 44 Bom. 223.

*Page of 33 C.—[*Ed.*]

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND EXECUTION OF DECREE APPEAL No. 44 OF 1925.

October 30, 1925.

Present:—Mr. Ashworth, A. J. C.

KEDAR NATH—DECREE-HOLDER—APPELLANT

versus

CHANDIKA PRASAD—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (3)—Execution of decree—Payment not certified within time prescribed, whether can be recognized—Evidence to prove payment, whether admissible.

A payment made by the judgment-debtor to the decree-holder which is not certified within the time allowed by law cannot be recognized by the Execution Court, and evidence is not admissible to prove the fact of such payment.

Surji Narain Misra v. *Uland Singh*, 78 Ind. Cas.

776; 27 O. C. 277; 10 O. & A. L. R. 375 and *Trimbak Ramkrishna Ranade* v. *Hari Laxaman Ranade*, 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 686, dissented from.

Harihar Prasad v. *Shankar Dayal*, 77 Ind. Cas. 337; 10 O. L. J. 351; 10 O. & A. L. R. 119; (1924) A. I. R. (O.) 208, followed.

Second execution of decree appeal against an order of the Subordinate Judge, Unao, dated the 15th April 1925, upholding that of the Munsif, Purwa at Unao, dated 6th February 1925.

Mr *D. C. Chandra*, for the Appellant.

Mr. *Raj Narain Shukla*, for the Respondent.

JUDGMENT.--This is a second execution of decree appeal. The appellant held a decree against the respondent and applied for execution. The first two Courts relying on *Surji Narain Misra* v. *Uland Singh* (1), permitted the respondent to prove a payment which had not been certified under O. XXI, r. 2 (3). In this appeal it is urged that the ruling relied on, which was by a Single Judge of this Court, is not good law and should not be followed.

It has been urged before me that I should postpone this case for decision by a Bench of two Judges when the Oudh Chief Court comes into existence within a few days. I am not prepared to take this course, because I find there is a Bench decision of this Court, namely, *Harihar Prasad* v. *Shankar Dayal* (2), which takes a contrary view to that of *Surji Narain Misra* v. *Uland Singh* (1).

Surji Narain Misra v. *Uland Singh* (1), followed a Single Judge ruling of the Bombay High Court, namely, *Trimbak Ramkrishna Ranade* v. *Hari Laxaman Ranade* (3). That ruling expressed the opinion that the effect of cl. (3) of O. XXI, r. 2 was merely to create a presumption, but a rebuttable one, in favour of a non-certified payment not having been made. This decision purported to be based on a consideration of the scheme of the C. P. C. as a whole, and not on the particular clause in question. Reference was made to s. 244 of the old C. P. C. which is now s. 47. It was suggested that, inasmuch as an Execution Court had power to decide all questions between the parties to an execution case, it had power to decide the question of a payment notwithstanding O. XXI, r. 2 (3). I am unable to concur with this reasoning. A general power to a Court to consider questions arising between the parties to a decree, will not override a specific provision of the Code, that a plea of payment cannot be made, when it has not been previously certified, or rather not certified within the time allowed by law.

The view that I am bound to take as a Single Judge is the view of the Bench decision of this Court, and I also think that that decision was correct. Accordingly I allow this appeal with costs.

Z. K. *Appeal allowed.*

(1) 78 Ind. Cas. 776; 27 O. C. 277; 10 O. & A. L. R. 375.

(2) 77 Ind. Cas. 337; 10 O. L. J. 351; 10 O. & A. L. R. 119; (1924) A. I. R. (O.) 208.

(3) 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 686.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 234 OF 1924.

April 27, 1925.

Present:—Mr. Findlay, Officiating J. C., and Mr. Wadegaonkar, A. J. C.

Pandit PANDURANG RAMCHANDRA PANDE—APPLICANT

versus

COMMISSIONER OF INCOME-TAX, C. P.—NON-APPLICANT.

Income Tax Act (XI of 1922), ss. 13, 66—Income, what is—Accounts, method of—Entries in books of account, value of—Interpretation of entries, whether question of law—Reference to High Court.

For the purpose of calculating the profits of a business under the Income Tax Act, mere entries in books of account are not by themselves conclusive. [p. 982, col. 1.]

The word "income" signifies what comes in and includes sums which though not actually realized have become due in such a manner that the assessee could at his will and pleasure receive them for reinvestment or otherwise. [p. 982, col. 2; p. 983, col. 1.]

The method of accounting regularly employed by an assessee for the purpose of his business should reflect his true income, profits and gains. If it does not, the Taxing Officer must find out the true income of the assessee as income-tax is leviable on income, profits and gains and not on imaginary sums which do not represent the true income of the assessee. [p. 983, col 1.]

What constitutes receipts for the purposes of the Income Tax Act is a question of law and not a question of fact. The question whether particular entries on the credit side in a profit and loss account constitute income or not, when there is no dispute in regard to the meaning of the entries and the circumstances under which they were made, is, therefore, a question of law within the meaning of s. 66 of the Income Tax Act. [p. 982, col. 2.]

The proper legal effect of a proved fact is a question of law. [p. 983, col. 2.]

Civil revision against an order of the Commissioner of Income Tax, Central Provinces and Berar, Nagpur, dated the 30th May 1924.

Mr. *M. Gupta*, (with him Mr. *A. V. Zinzarde*), for the Applicant.

Mr. *G. P. Dick*, Government Advocate, (with him Mr. *B. B. Kekre*, Assistant Commissioner of Income Tax), for the Non-Applicant.

ORDER.—Applicant Pandurang Ramchandra Pande of Kuhi, Tahsil Umrer returned an income of Rs. 300 from house property and Rs. 3,783-2-8 from business for assessment during the year 1923-24. His return was not accepted by the Income Tax Officer, who sent for his account books and found his taxable income to be Rs. 300 from house property and Rs. 26,199 from business and made assessment on this income. On appeal the Assistant Commissioner of Income Tax allowed a deduction of Rs. 128-14-3 on account of *amad rafti* only from the business income of the applicant and ordered that for purposes of assessment, the income of the applicant from business should be taken to be Rs. 26,070-1-9. He was accordingly taxed on a total income of Rs. 26,370-1-9 for the year 1923-24. He then applied to the Commissioner of Income Tax under s. 66 of the Income Tax Act of 1922 for a reference to the High Court. His contention was that he was not liable to pay income-tax on *sewai* or prospective interest which had neither been actually realised by him nor had become payable during the period for which assessment had been made. The Commissioner of Income Tax overruled his contention and declined to make a reference to the High Court on the ground that no question of law arose in the case. In doing so, he observed as follows:—

"The applicant has been maintaining his books of accounts on what is called the book profit system and as such the book profits are very clearly ascertainable from his books. For calculating the taxable income in such accounts a new provision has been made in the present Act under s. 13. Such a provision did not exist in the Act of 1918. Under this section it is ordered that income, profits and gains shall be computed for the purposes of ss. 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee. It has been admitted by the agent of the applicant that he had been applying this method of accountancy in the past and that he had even been taxed on this system of accountancy up till now. It seems to me that when the profits could be clearly ascertained from the method of accounting regularly employed by the assessee the Income Tax Officer was justified in computing the income that way. Hence the reference on point (1) to the High Court is unnecessary in the face of the specific provision of law for it. The main question in this case is a question of fact whether a particular system of accountancy is regularly employed and whether it gives the total income, profits or gains of the assessee. It has been said above that such is the case. . . . . The sum and substance of the applicant's contention is that he refuses to pay tax on what is called 'book-profits,' but s. 13 specially provides for such book-profits when that is the system of accountancy with any particular assessee. I think no point of law is involved in this case and I do not see any object to be gained in referring the matter to the High Court."

The applicant has now moved this Court under s. 66 (3) of the Act to call upon the Commissioner of Income Tax to state the case and refer it for the orders of this Court.

The facts of this case are not disputed before us and the only question, which we have to decide at this stage, is whether on the facts as admitted by both the parties a question of law arises justifying an order by us calling upon the Commissioner of Income Tax to make a reference to this Court. It is admitted by both the parties that the applicant makes advances of grain and cash on *sewai* to his debtors and takes instalment bonds from them for the cash or grain advanced plus *sewai* on it. For example, if he advances Rs 100 to his debtor, he adds Rs. 25 on account of *sewai* to Rs. 100 and takes a bond for Rs. 125 from the debtor payable by certain instalments and debits Rs. 125 to his debtor's *khata* and credits Rs. 25 to the *kasar khata*. Similarly, if he advances 2 *khandis* grain to his debtor, he debits him with $2\frac{1}{2}$ *khandis* and credits $\frac{1}{2}$ *khandi* to the *kasar khata*. These credit entries in respect of *sewai* are made by him on the very day of the advance of the loan, *i. e.*, before the *sewai* becomes payable. He says that the amount of *sewai* so credited to the *kasar khata* does not represent his income and that he makes

credit entries in respect of *sewai* in the *kasar khata* with the sole object that the debit and credit entries in his account books may tally and not with the object of showing his profits. It is urged on behalf of the Commissioner of Income Tax that as these credit entries are made in the *kasar khata* which he treats as a profit and loss account, they must be regarded as entries in respect of income derived from business. We need hardly point out that for the purposes of calculating the profits of a business, mere entries in books of account are not by themselves conclusive, and the question, as to what constitutes receipts for the purposes of the Income Tax Act, is, in our opinion, a question of law and not a question of fact. In *Gresham Life Assurance Society* v. *Bishop* (1), Lord Lindley has observed at page 296* as follows:—

"My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, *e. g.*, by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the Statute which your Lordships have to interpret. But to constitute a receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth."

Similarly in *In re Aurangabad Mills Ltd.* (2), Shah, J., has observed: "It is clear that the mere fact that the entries being made for the purpose of proper account keeping would not entitle the Collector to treat the profits as having been received in British India within the meaning of s. 3 (1) of the Act (VII of 1918)." Again in *Board of Revenue, Madras* v *Pydah Venkatachalapathy Guru* (3), it has been held that where compound interest is payable by a debtor to a creditor with yearly rests and the creditor makes entries in his books of account adding to the principal amount the interest which has accrued due at the end of the year, but does not receive payment either in cash or by counter credit in the debtor's accounts, a mere entry of such interest in his books of account does not make such interest taxable income within the purview of the Income Tax Act.

It is significant to observe that the word 'income' has nowhere been defined in the Income Tax Act, 1922. Probably, the Legislature deliberately omitted to define that word and left it to the taxing authorities and Civil Courts to determine in each case what was income for purposes of taxation under the Act. Consequently, it seems to us that the question whether particular entries on the credit side in the *kasar khata* constitute income or not when there is no dispute in regard to the meaning of those entries and the circumstances under which they were made is a question of law.

In this connection, we should like to observe that the Income Tax Act of 1922 applies to all *income, profits or gains* as described or comprised in s. 6 of that Act, from whatever source derived, accruing or arising or received in British India (*vide* s. 4 of the Act). Section 6 mentions the several heads of taxable income one of which is "Business" with which we are concerned in the present case and s 10 describes the way in which income derived from business should be calculated. That section enacts that income tax shall be payable by an assessee under the head "Business" in respect of the *profits or gains* of any business carried on by him. The profits or gains of a business are, generally speaking, the difference between the receipts and the expenses incurred in earning them. In *Russell* v. *Town and County Bank* (4), Lord Herschell has observed at page 424*

"The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts."

Can credit entries in regard to *sewai* which has neither been realized nor has accrued due be regarded as income, profits or gains from business? The word "income" signifies what comes in and includes sums

(1) (1902) A. C. 287; 71 L. J. K. B. 618; 63 J. P. 755; 50 W. R. 593; 86 L. T. 693; 18 T. L. R. 626.

(2) 64 Ind. Cas. 9; 45 B. 1286; 23 Bom. L. R. 570.

(3) 69 Ind. Cas. 405; 16 L. W. 174; (1922) M. W. N. 80; 31 M. L. T. 255; (1922) A. I. R. (M.) 426.

*Page of (1902) A. C.—[*Ed.*]

(4) (1888) 13 A. C. 418; 58 L. J. P. C. 8, 59 L. T. 481; 53 J. P. 244.

*Page of (1888) 13 A. C.—[*Ed.*]

which though not actually realized have become due in such a manner that the assessee could at his will and pleasure receive them for re-investment or otherwise: per Sadasiva Ayyar, J., in *Secretary to the Board of Revenue, Income-Tax, Madras* v. *Arunachalam Chettiar* (5). But in the present case, the *sewai* credit to the *kasar khata* had admittedly not become payable. It was credited to the *khata* on the very day of the advance of the loan. It would become due after several years and when it becomes due, the applicant may not succeed in realizing it at all or may succeed in realizing only a small portion of it. Under these circumstances, is it just, legal and equitable to treat the entire *sewai* as income taxable under the Income Tax Act? This, in our opinion, raises a question of law.

In a very recent case decided by the Privy Council, *St. Lucia Usines and Estates Co.* v. *Colonial Treasurer of St. Lucia* (6), Lord Wrenbury has observed:—

"The words 'income arising or accruing' are not equivalent to the words 'debts arising or accruing'. To give them that meaning is to ignore the word 'income'. The words mean 'money arising or accruing by way of income'. There must be a coming in to satisfy the word 'income'. . . . . If the taxpayer be the holder of a stock of a Foreign Government carrying say 5 per cent. interest, and the Government is that of a defaulting state which does not pay the interest, the taxpayer has neither received nor has there accrued to him any income in respect of that stock. *A debt has accrued to him but income has not.* It does not follow that income is confined to that which the taxpayer actually receives. Where income-tax is deducted at the source the taxpayer never receives the sum deducted but it accrues to him".

In this view of the legal aspect of the case, it is in our opinion idle to contend that the question raised in the petition of the applicant is not a question of law.

Section 13 of the Income Tax Act, 1922, on which reliance has been placed on behalf of the Commissioner of Income-Tax does not, in our opinion, affect this case. That section says that income, profits and gains shall be computed for the purposes of ss. 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee. It is clear from the proviso to this section that the method of accounting regularly employed by an assessee for the purpose of his business should reflect his true income, profits and gains. If it does not, the taxing authorities must find out the true income of the assessee as, after all, income-tax is leviable on income, profits and gains and not on imaginary sums which do not represent the true income of the assessee. The applicant contends that the credit entries in regard to *sewai* made in the *kasar khata* do not represent his income as no portion of the *sewai* so credited was either received by him or had become payable to him. On the other hand, it is contended on behalf of the Income Tax Commissioner that as *sewai* was credited in the *kasar khata*, it was rightly taken into account in determining the applicant's income. In other words, while there is no dispute between the parties in regard to the facts of the case, each wishes to draw his own inference from those facts and to interpret the entries in the *kasar khata* to suit his own case. This raises a question as to which of the two inferences is the correct inference and which is the proper mode of construing *sewai* entries in the *kasar khata*, such a question is a question of law.

It has been held by their Lordships of the Privy Council that the proper legal effect of a proved fact is a question of law: *Nafar Chandra Pal* v. *Shukur Sheikh* (7). In *Ramgopal* v. *Shamskhaton* (8), Sir Richard Crouch has observed. "The facts found need not be questioned. It is the soundness of the conclusions from them that is in question, and this is as matter of law." Similarly, in *Kristnaswami Iyengar* v. *Subramania Ganapathigal* (9), Phillips, J., has held that the interpretation of a document is a question of law. We are accordingly of opinion that a question of law does arise in the case and that the Income Tax Commissioner was bound to make a reference to this Court as desired by the applicant. We, therefore, call upon him under s. 66 (3) of the Income Tax Act, to state the case in terms of the applicant's petition presented to him on 12th April

(5) 59 Ind. Cas. 482; 41 M. 65 at p. 79; 39 M. L. J. 649; (1920) M. W. N. 789; 29 M. L. T. 16; 13 L. W. 336.

(6) (1924) A. C. 503 at p. 512; 93 L. J. P. C. 212; 131 L. T. 267; 68 S. J. 456.

(7) 51 Ind. Cas. 760; 46 C. 189; 23 C. W. N. 345; 9 L. W. 552; 45 I. A. 183 (P. C.).

(8) 20 C. 93 at p. 99; 19 I. A. 228; 6 Sar. P. C. J. 247; 17 Ind Jur. 38; 10 Ind. Dec. (N. S.) 63 (P. C.).

(9) 44 Ind Cas. 523; 35 M. L. J. 304; 23 M. L. T. 85; 7 L. W. 210; (1918) M. W. N. 231.

1924 and refer it to this Court. Costs of this application will be borne by the Income Tax Commissioner. Pleader's fee Rs. 50.

Z. K. *Revision allowed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No 259 OF 1922.

August 6, 1925.

Present:—Sir Norman Maclead, KT., Chief Justice, and Mr. Justice Coyajee.

S. F. DE SOUZA—DEFENDANT—APPELLANT

versus

WAMANRAO BHAI THAKUR—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Debt incurred by father—Decree—Sale of family property—Interest of sons, whether passes.

In the case of a joint Hindu family which consists of a father and his sons, a sale of family property in execution of a simple money-decree obtained against the father in respect of a debt not incurred for immoral purposes, passes the interest of the sons in the property to the purchaser by virtue of the pious obligation on the part of the sons to pay off their father's debts.

First appeal from a decision of the First Class Subordinate Judge, Thana, in Suit No. 241 of 1918.

Mr. *R. W. Desai*, for the Appellant.

Mr. *W. B. Pradhan*, for Respondent No. 3.

JUDGMENT.—The only question in this appeal is what was purchased by Mathuraprased in 1908, when the right, title and interest of defendant No. 1, Moreshwar, in the properties Sonbhatwadi and Devakiwadi was sold in execution of the Bombay Small Cause Court decree passed against defendant No. 1 and another party.

It is contended that because the decree was against the defendant alone, and not against him as the manager or head of the joint family, therefore, only the right, title and interest of defendant No. 1 was sold, and that the interest of his son at that date would not pass by the sale. The certificate of sale clearly shows that it was intended that the defendant's share passed to the purchaser, and that the defendant had a half share in the property. That by itself would not preclude other persons entitled to shares in the property contending against the purchaser that their interest did not pass. But the liability of the sons for the debts of their father being joint with them (provided that the debts are not incurred for immoral purposes) has now been finally decided by the Full Bench of the Privy Council in *Brij Narain Rai* v. *Mangla Prasad Rai* (1) and certain propositions are laid down at page 508*. There is first a distinction made between mortgage-debts and simple debts, and again as regards simple debts, a distinction is made between the debts incurred by a manager or co-parcener of joint and undivided estate, and the debts incurred by a father when the joint family consists of a father and his sons. A manager cannot partition or alienate the estates *qua* manager except for purposes of necessity. A father may lay the estate open to be taken in execution proceedings upon a decree for payment of a debt incurred by him, so long as it is not incurred for an immoral purpose.

In this case it is not suggested that the debt incurred by defendant No. 1 was incurred for immoral purposes. There is a pious obligation on the part of the sons to pay that debt even during their father's life time. That was stated to be the law by Mr. Justice Chandavarkar in *Govind* v. *Sakharam* (2) and the relevant passage in the judgment is cited with approval in *Brij Narain* v. *Mangla Prasad Rai* (1). The second proposition at p. 508 * seems to give effect to the proposition laid down by Mr. Justice Chandavarkar.

It follows that the sons of defendant No. 1 cannot dispute the sale of their interest in the family property in execution of the decree for the debt incurred by their father.

The appeal then must be dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 77 Ind. Cas. 689; 26 Bom. L. R. 500; 21 A. L. J. 931; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.).

(2) 28 B. 383; 6 Bom. L. R. 344.

*Page of 26 Bom. L. R.—[*Ed.*]

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 83 OF 1925.

October 2, 1925.

Present:—Mr. Wazir Hasan, J. C.

BISHESHAR—PLAINTIFF—APPELLANT

versus

SHADI LAL AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 32—Khewat, entry in, value of—Presumption.

Neither mutation of names nor an entry in the *khewat* confers title on the person in whose favour the entry is made, but the entry furnishes *prima facie* proof of the matters to which it relates by virtue of the provisions of s. 32 of the U. P. Land Revenue Act.

Second civil appeal against a decree and judgment passed by the Additional Sub-Judge, Rai Bareli, dated the 8th November 1924, upholding that of the Munsif, Dalmau, dated the 23rd April 1924.

Mr. *Radhe Krishna*, for the Appellant.

Mr. *Ali Zaheer*, for the Respondents.

JUDGMENT.—This is the plantiff's appeal in a suit for pre-emption. At the hearing of the appeal the learned Pleader for the appellant abandoned all grounds except one which was stated in an additional memorandum of appeal. This last mentioned ground raises the question as to whether the defendants vendees were co-sharers in the sub-division of the *mahal* in which the property in suit is situate. Both the Courts below have answered this question in favour of the defendants and the result has been that the plaintiff's suit was dismissed.

The finding that the defendants are such co-sharers is supported by two pieces of evidence. The one is the entry of the defendants' names in the *khewat* as deposed to by the village *patwari* (P. W. No. 3). The other is the order of mutation of names in favour of the defendants passed on the 24th September 1922. It is argued in second appeal that neither the order of mutation of names nor the entry in the *khewat* proves the defendants' status of co-sharers in the sub-division in which the property in suit lies. In support of the contention reliance is placed upon a decision of a learned Judge of this Court in the case of *Ram Pratap Misra* v. *Brij Prasad* (1). I agree that neither mutation of names nor the entry in the *khewat* confers title on the person in whose favour it is made; but I am unable to hold that it is no evidence of proprietary title. The order of mutation of names, with which I am concerned, clearly refers to a title under a purchase and the entry in the *khewat* merely follows the order of mutation. The *khewat* is a Record of Right prepared under the provision of law contained in s. 32 of the U. P. Land Revenue Act, 1901 and it has always been held in this Court that the entries in *khewat* furnish *prima facie* proof of the matters to which they relate. It is not contended that in the present case this *prima facie* proof is in any manner rebutted by any evidence. I am, therefore, of opinion that the Court below were right in their decision.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

G. H.

(1) 18 Ind. Cas. 386.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 207 OF 1925.

August 28, 1925.

Present :—Mr. Justice Jackson.

R. M. N. MUTHURAMAN CHETTI AND ANOTHER—PETITIONERS

versus

UPPALURN SEETHARAMAYYA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 58—Execution of decree—Claim proceedings—Petition for sale subject to mortgage and for stay of sale pending disposal of petition—Order directing sale with notice of mortgage, whether refusal to investigate—Procedure.

During the course of an execution proceeding petitioner made an application under O. XXI, r. 58 of the C. P. C., to declare his mortgage right over the properties sought to be sold and to sell them subject to his rights and to stop the sale pending disposal of the petition. The Court in its order stated that the decree-holder opposed the petition as having been made too late and directed the sale to take place with notice of the mortgage and that the decree-holder disputed it :

Held, (1) that the order did not itself amount to a refusal to investigate within the meaning of the proviso to r. 58 of O. XXI, of the C. P. C. ; [p. 986, col. 1.]

(2) that the order was simply a refusal to stop the sale and did not relieve the Court of the necessity of either investigating the claim or of refusing an investigation under the proviso ; [*ibid.*]

Venkataratnam v. *Ranganayakamma*, 48 Ind. Cas. 270;41 M. 985; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W 292; 35 M. L. J. 335, and *Abdul Kadir Sahib* v. *Somasundaram Chettiar*, 70 Ind. Cas. 648; 45 M. 827; 16 L. W. 485; 43 M. L. J. 467; 31 M. L. T. 441; (1923) A. I. R. (M.) 76, referred to.

(3) that the petition must, therefore, be disposed of according to law. [p. 987, col. 1.]

The practice of Courts selling property with notice of unascertained claims deprecated. [*ibid.*]

Parambil Saharabi v. *Ali*, 72 Ind. Cas. 857; 44 M. L. J. 141; 17 L. W. 182; (1923) A. I. R. (M.) 295, relied on.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Bezwada, dated the 17th March 1925, in C. M. P. No. 492 of 1925, in O. S. No. 38 of 1922.

Mr. *N. Sivaramakrishna Iyer*, for the Petitioners.

Mr. *G. Lakshmanna*, for the Respondents.

JUDGMENT.—The petitioners seek to revise an order passed by the Subordinate Judge of Bezwada in a claim petition preferred by them under O. XXI, r. 58, C. P. C. This petition contains two specific prayers: "(*a*) to declare the mortgage right of the petitioners over the properties set out in the schedule annexed hereto and have them sold subject to the mortgage amount; and (*b*) to stop the sale pending disposal of the petition." The learned Subordinate Judge passed the following order :—

"Counter-filed. The mortgage is registered and in the ordinary course should have found a place in the encumbrance certificate. Decree-holder, however, opposes this petition as it is filed too late. Sale to take place with notice of this mortgage and that decree-holder disputes it."

The petitioner complains that the Court below failed to exercise its jurisdiction and states that it should either have investigated their claim or it should have refused to make such investigation after finding that their claim was designedly or unnecessarily delayed. Of course the present order is no investigation of the claim and there is no finding that the claim was filed with designed or unnecessary delay. The claim is so far admitted that the sale is ordered to take place with notice of this mortgage which to some extent might be taken as allowing prayer (*a*) and the sale is not stopped which is a denial of prayer (*b*). I should take the order as being simply a refusal to stop the sale and it does not relieve the Court of the necessity of either investigating the claim or of refusing an investigation under the proviso. It may be described as an *interim* order and no final decision. However, the counter-petitioners strenuously contend that this order must be construed as an order under the proviso in the light of the Full Bench ruling in *Venkataratnam* v. *Ranganayakamma* (1). The principal question agitated in that case was whether a refusal to investigate under the proviso of O. XXI, r. 58, could be taken as an order against the party within the mischief of O. XXI, r. 63, C. P. C., and Art. 11 of the Limitation Act. But incidentally the Court held that the order in the case amounted to an order under the proviso to r. 58, and the counter-petitioners contend that that order is on all fours with the one in question in the present case. As a matter of fact the order as printed in *Venkataratnam* v. *Ranganayakamma* (1) is rather deceptive because it gives the impression that the whole order has been transcribed whereas only one sentence has been extracted. This was first noticed by Sir Walter Schwabe, C.J., in *Abdul Kadir Sahib* v. *Somasundaram Chettiar* (2) and he recalled the original order to which I also have referred. It runs from the second paragraph: "As this (the *zemindarni's*) petition was filed late this claim was ordered to be notified to the intending bidders. The *zemindarni* has not obtained a decree against judgment-debtor for the *cist*, nor has she apparently filed a suit within (*sic*) in this Court or before the Revenue Court, nor has any suit been filed about the land not being saleable. The fact (*sic*) fresh petition has been filed for an enquiry being made as to the claim of the land not being saleable nor was an enquiry sought on the strength of that petition, though nearly 10 months have elapsed since then. Decree-holder's prayer that the sale should be held subject to this claim for *cist* which has not yet been proved inadmissible. The allegations of the *zemindarni* will be notified to the bidders with the remark that the *zemindarni* did not take steps for her claim being enquired into during the last 10 months."

As Sir Walter Schwabe, C. J., observes, the Full Bench treated that order as a refusal of the application on the ground that there had been laches or delay which brought the matter under the proviso to O. XXI, r. 58. The order in the present case is very different. The Subordinate Judge begins by finding that the mortgage is registered and one which in the ordinary course should have found a place in the encumbrance certificate. He evidently thinks that the encumbrance certificate is in error, for, he proceeds to order that the sale shall take place with notice of this mortgage. He does not find as is now suggested on behalf of the counter petitioners that the mortgage was in respect of property not affected by the sale. He mentions that the decree-holder opposes the petition as it is filed too late, but he gives no opinion himself as to whether

(1) 48 Ind. Cas. 270; 41 M. 985; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 335.

(2) 70 Ind. Cas. 648; 45 M. 827; 16 L. W. 485; 43 M. L. J. 467; 31 M. L. T. 441; (1923) A. I. R. (M.) 76.

there has been any delay. I cannot hold that such an order is one where in the words of Napier, J., in the reference to the Full Bench in *Venkataratnam* v. *Ranganayakamma* (1) a Court purports to make an order under the proviso to O. XXI, r. 58, that is to say, an order refusing to investigate. The learned Subordinate Judge has not refused to investigate and has not suggested any reasons why he should refuse to investigate. I find that so far all that he has done has been to refuse to stop the sale, and to give to the bidders notice of this mortgage and of the decree-holder's objection, and I direct that he proceed to dispose of the petition according to law. Until he does so it cannot be treated as decided. Accordingly the petition is allowed with costs. Pending the decision of this petition, the sale which was stayed by an *interim* order of this Court is stayed. I observe that this Court has already deprecated the practice of selling property with notice of the unascertained claims. [*Vide Venkataratnam* v. *Ranganayakamma* (1) and *Parambil Saharafi* v. *Ali* (3)]

Petition allowed.

N. V N.

Z. K.

(3) 72 Ind. Cas. 857; 44 M. L. J. 141; 17 L. W. 182; (1923) A. I. R. (M.) 295.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 232 OF 1925.

October 20, 1925.

Present:—Mr. Wazir Hasan, J. C.

MAJID HUSAIN—DEFENDANT—APPELLANT

versus

FAIYAZ HUSAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easement—User as of right—Long user—Presumption—Rebuttal.

Where a question of easement arises the nature and character of the servient land, the friendship or relationship between the servient and dominant owners, and the circumstances under which the user had taken place, may induce the Court to hold that the enjoyment was not "as of right," although there is no direct proof that the enjoyment was had with the permission of the servient owner. [p. 988, col. 1.]

The presumption of right from long user is not a presumption "*de jures et de jure*". It only starts a party with a presumption in his favour which can be rebutted by proof of facts which are inconsistent with or which militate against the inference. [p. 988, col. 2.]

Appeal against the judgment and decree of the Additional Subordinate Judge, Fyzabad, dated the 9th March 1925, setting aside the judgment and decree of the Munsif, Akbarpur, dated the 31st July 1924.

Messrs. *G. N. Misra* and *K. P. Misra*, for the Appellant.

Messrs. *Niamatullah* and *M. Wasim*, for the Respondents.

JUDGMENT.—This is the defendant's appeal. There were eight plaintiffs in the suit, out of which this appeal has arisen. They prayed for a declaratory relief to the effect that the females of the plaintiffs' houses have a right to pass over the defendant's land in going from one house to another and also for a permanent injunction forbidding the defendant from stopping the females in the exercise of that right. The land over which this right was claimed was shown in yellow colour in a plan filed with the plaint. There were several defences raised to this suit, but only two of which were urged in support of the appeal in this Court. They will be stated later in this judgment.

The Trial Court appointed a Commissioner to prepare a plan, showing the situation of the houses which had the right of the dominant tenement and also of the defendant's land which was claimed to be the servient tenement. It dismissed the suit. On appeal the Court below reversed the decree of the Court of first instance and decreed the plaintiffs' suit.

Two lines of arguments were adopted by the learned Advocate for the appellant against the decision of the lower Appellate Court. One was that that Court was wrong in drawing the inference from the facts proved that the easement was enjoyed by the plaintiffs "as of right" and the second was that the lower Court had erred in holding that the enjoyment was "without interruption" for 20 years. Under the first line of argument it was urged that there were certain circumstances upon which the Trial Court had relied but the lower Appellate Court had not taken them into consideration. Such circumstances were stated to be as follows :—

(1) The way was used by the females only on occasions of marriages, *majlises*, festivals and friendly visits.

(2) The defendant and his family were interested in maintaining the *parda* of the females living in the neighbouring houses.

(3) More than 13 years ago at the northern end of the land in question the

defendant had put up a *dalan* and about 7 years ago he had erected a similar *dalan* at the southern end and no objection was raised by the plaintiffs to these structures.

(4) After the construction of the *dalan* the ladies of the plaintiffs' houses always used to knock at the door which was fastened from inside to obtain admission over the ground in question.

The circumstances Nos. 3 and 4 have been specifically noticed in the judgment of the lower Appellate Court. As to the other two circumstances, there is nothing on the record to justify the inference that they were not taken into consideration by the learned Judge of the Court of Appeal informing his own judgment on the issue which he had to decide. Under the same argument it was urged that the facts found by the lower Appellate Court did not justify the inference that the easement was enjoyed "as of right." Now on the evidence produced by the plaintiffs the user dates back to about 50 years and the finding of the lower Court as to facts is this: "The way has been used for such a long time by the *pardanashin* ladies of the plaintiffs' families without any body's permission and without any interference." It is urged that this finding is not sufficient to lead to the conclusion that the user was "as of right." In support of the contention reliance was placed upon the decision of the Calcutta High Court in the case of *Shaikh Khoda Buksh* v. *Shaikh Tajuddin* (1). The learned Judge quoted with approval the following *dictum* of Mitra in his book on Limitation :—

"The nature and character of the servient land, the friendship or relationship between the servient and dominant owners, and the circumstances under which the user had taken place, may induce the Court to hold that the enjoyment was not 'as of right' although there is no direct proof that the enjoyment was had with the permission of the servient owner." If I may say so with respect I entirely agree with the opinion expressed in the quotation given above. But in the present case it is not merely the long user and of the absence of permission on the part of the servient owner that the inference of the enjoyment being as of right rests. There is evidence on the record, and that evidence has been accepted by the lower Appellate Court as reliable, to the effect that when the construction of the *dalans* was in progress protest was made on behalf of the plaintiffs as to the obstruction which the construction might make in the user of the way and the defendant assured them that the construction would not in any manner obstruct the enjoyment of the way which the plaintiffs had had till then. Further the defendant gave evidence that the ladies of the plaintiffs' houses passed through with the permission of the defendant's mother. The lower Appellant Court has rejected that evidence as unworthy of credence. There was, therefore, evidence in support of the inference that the enjoyment of the easement was "as of right." The legal aspect of the question was discussed in a recent judgment of the High Court at Madras in the case of *Kunjammal* v. *Rathnam Pillai* (2). The learned Judges held that "the presumption of right from long user is not in this country a presumption *de jures et de jure*. It only starts a party with a presumption in his favour which can be rebutted by proof of facts which are inconsistent with or which militate against the inference which in the absence of evidence by the defendant would entitle plaintiff to a decree." In the present case I have already pointed out that the defendant gave rebutting evidence but it was not accepted as reliable by the lower Appellate Court. The rebuttal thus failed. The presumption must, therefore, prevail. The first line of argument consequently fails.

As to the interruption, it was proved to the satisfaction of the lower Appellate Court that the construction of the *dalans* did not create any interference in the enjoyment of the easement. There was a door left at both ends in the *dalans* and through those doors the plaintiffs had the user of the way as before.

On the above grounds, the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 8 C. W. N. 359.

(2) 66 Ind. Cas. 11; 45 M. 633: 15 L. W. 266; (1922) M. W. N. 143; (1922) A. I. R. (M.) 5; 31 M. L. T. 150; 42 M. L. J. 417.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 87-B OF 1923.

August 9, 1924.

Present :—Mr. Kotval, A. J. C.

NARAIN—DEFENDANT—APPELLANT

versus

HAMRAJI—PLAINTIFF—RESPONDENT.

Hindu Law—Mitakshara—Succession—Spindas—*Whole blood, whether excludes half blood.*

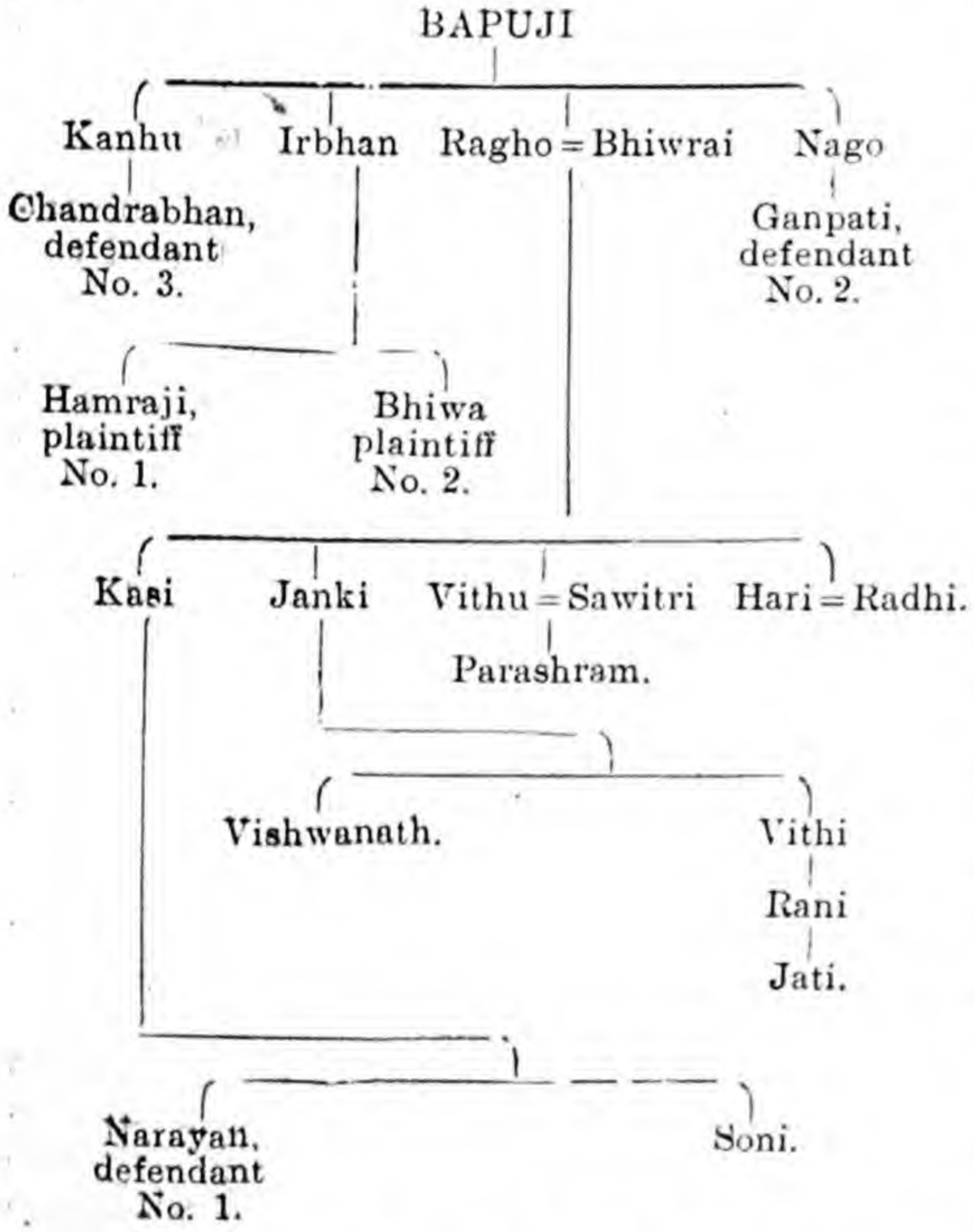
Under the Mitakshara among *spindas* who are members of the same class the whole blood excludes the half blood, and this preference of the whole blood over the half blood is not confined to the case of brothers and their sons. [p. 990, col. 1.]

Appeal against a decree of the Second Additional District Judge, Amraoti, dated the 22nd November 1922, reversing that of the Munsif, Darwha, dated the 31st of August 1922.

Mr. *Atmaram Bhagwant*, for the Appellant.

Mr. *D. W. Kathale*, for the Respondents.

JUDGMENT.—The following genealogical table shows the relationship of the parties :—



It may be noted that Kanhu is a step-brother of Irbhan, Ragho and Nago.

Parashram died in 1913. His mother Sawitri having re-married, his grandmother Bhiwrai succeeded him. Bhiwrai died in 1920 leaving the property inherited by her from Parashram to defendant No. 1 by a Will. The plaintiffs claim two-thirds of the property stating that they and defendant No. 2 Ganpati are each entitled to a third share therein. Defendant No. 2 is in possession of a part of the property. Chandrabhan defendant No. 3 was added as a party by order of the Court. The lower Appellate Court has held that Bhiwrai had no power to dispose of the property by Will and has awarded two-thirds of it to the plaintiffs. It is here contended on behalf of defendant No. 1 that the plaintiffs are entitled only to a half as Chandrabhan is also entitled to succeed. The only point for consideration in second appeal is whether the plaintiffs and Ganpati defendant No. 2 who are the sons of the full brothers of Ragho are entitled to preference over Chandrabhan who is the son of a step-brother of Ragho. On behalf of defendant No. 1 reliance is placed on *Vithalrao* v. *Ramrao* (1), and it is contended that preference of the whole blood to the half blood is confined to brothers and brothers' sons alone. The plaintiffs rely on *Ganga Sahai* v. *Kesri* (2).

It is admitted that the parties are governed by the Mayukha, and also that so far as the point now under consideration is concerned the Mayukha does not differ from the Mitakshara The case has, therefore, to be decided on an interpretation of the Mitakshara alone. *Vithalrao* v. *Ramrao* (1), which follows *Samat* v. *Amra* (3), decided that the preference of the whole blood to the half blood is according to the Mitakshara confined to brothers and brothers' sons and does not extend to other relations. It was held that it does not extend to uncles and that uncles of the whole and the half blood are entitled to succeed in equal shares. But the ruling of the Privy Council in *Ganga Sahai* v. *Kesri* (2), must be taken to have overruled the Bombay cases. The Privy Council seems to accept what is laid down as a general principle based on an interpretation of the Mitakshara in *Suba Singh* v. *Sarafaraz Kunwar* (4), which dissents

(1) 21 B. 317; 2 Bom. L. R. 139; 12 Ind. Dec. (N. S.) 746.

(2) 30 Ind. Cas. 265; 37 A. 545; 19 C. W. N. 1175; 18 M. L. T. 203; 29 M. L J. 329; 2 L. W. 837; 13 A. L. J. 999; 17 Bom. L. R 998; 22 C. L. J. 508; (1915) M. W. N. 713; 42 I. A. 177 (P. C.).

(3) 6 B. 394; 6 Ind. Jur. 537; 3 Ind. Dec. (N. S.) 718.

(4) 19 A. 215; A. W. N. (1897) 53; 9 Ind. Dec. (N. S.) 142 (F. B.).

from *Samat* v. *Amra* (3), and holds that the distinction of whole and half blood applies to *sapinda* relations other than the brother and his sons. The question in the Privy Council case was whether an uncle of the half blood succeeded in preference to the son of an uncle of the whole blood and it was decided that he did, it being held that the preference of the whole blood to the half blood is confined to members of the same class or to use the language of the Judges of the High Court in *Suba Singh* v. *Sarfraz Kunwar* (4), to "*sapindas* of the same degrees of descent from the common ancestor." The question here is different but the heirs with regard to whom the question of preference was decided were *sapinda* relations other than brothers and brothers' sons, and I think the interpretation of the Mitakshara in *Vithalrao* v. *Ramrao* (1) cannot hold good any longer. It must be held that the preference extends to *sapinda* relations other than brothers and their sons, and that the plaintiffs and Ganpati are entitled to succeed to the exclusion of Chandrabhan. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 333 OF 1924.

August 6, 1925.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

NARAYAN BAPUJI KSHIRSAGAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAJIMAL MOTIRAM MARWADI—PLAINTIFF—RESPONDENT.

Consent decree—Instalments—Forfeiture in case of default—Power of Court to relieve against forfeiture—Equitable jurisdiction.

It is the privilege of a High Court to administer equity and, in following the principles of equity, to relieve against forfeiture, if it considers the nature of the case requires it. In the exercise of its equitable jurisdiction the Court may depart from the terms of a consent decree when justice and equity demand it. [p. 991, col. 1.]

Plaintiff obtained a compromise decree which provided for the payment of the decretal amount by certain instalments and directed that in case of default in the payment of two instalments the plaintiff would be entitled to take possession of certain property belonging to the defendant. Defendant made default in the payment of two instalments but subsequently paid up the amount of the instalments which was accepted by the plaintiff. Thereafter the plaintiff took out an application for execution of the decree on the ground that the defendant had committed default in the payment of two instalments:

Held, that the plaintiff having accepted the payments after the due dates the default was merely technical and that the Court had power to relieve the defendant against the consequences of his default and that this was a fit case in which that power ought to be exercised. [*ibid.*]

Second appeal from the decision of the First Class Subordinate Judge, A. P., at Sholapur, in Appeal No. 81 of 1922, reversing a decree of the Subordinate Judge, Madha, in Application No. 275 of 1921.

Mr. *P. B Shingne*, for the Appellants.

Mr. *O'Gorman* (with him Mr. *K. N. Koyajee*), for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff in this case obtained a compromise decree by which it was provided that the defendant should pay Rs. 500 within the period limited in the decree against the decretal amount of Rs. 4,500, and thereafter he was to pay yearly instalments of Rs. 200 with interest at six per cent. On the balance of the principal due. In case of two defaults the plaintiff was to be entitled to take into his possession the plaint property in consideration for Rs. 3,500.

On May 7, 1921, the defendant was in arrears of two instalments. One of the instalments was paid on May 9, 1921, and the second one on August 30, 1921.

On November 4, the plaintiff took out a *darkhast* for execution of the decree. The Trial Judge looked upon the decree as a mortgage-decree, and relying upon the rulings of this Court in *Narsinha Gopal* v. *Balvant Madhav Vadgaonkar* (1) *Supdu Dhodu* v. *Madhavrao Jivram* (2) relieved the defendants of the consequences of technical defaults, holding that there would be no injustice in putting the plaintiff in exactly the same position in which he would have been had no default of a few days been made by the defendants. He considered that the plaintiff had waived his rights by accepting the instalments after a few days' delay.

The plaintiff appealed and the appellate Judge misreading the terms of the decree seems to have thought that the decree was payable by instalments of Rs. 500 a year. As a matter of fact the first instal-

(1) 64 Ind. Cas. 570; 23 Bom. L. R. 1238; 46 B. 463; (1922) A. I. R. (B.) 170.
(2) 57 Ind. Cas. 534; 22 Bom. L. R. 780; 44 B. 511.
(3) 27 Ind. Cas. 830; 16 Bom. L. R. 663.

ment after the first payment of Rs. 50 would be Rs. 440, and the instalments would decrease as the interest on the balance became less and less. The Judge was wrong then in saying that the defendant had not paid the subsequent instalments in full. That entirely vitiated his judgment because he thought that three defaults had been made, and, therefore, he considered the decisions I have referred to would not apply without much straining.

Reference has been made by the respondent to the decision in *Lachiram* v. *Jana Yesu* (3). That decision, I have always thought with all due respect, did not enunciate a correct principle and I have always been opposed to the suggestion that one Court can bind all Courts in future by deciding that no consent-decree can possibly be departed from even when justice and equity demand it. It is the privilege of this Court to administer equity and, in following the principles of equity to relieve against forfeiture if, it consider the nature of the case requires it.

In this case we see no reason why the appellants who have now paid all the instalments due should be not relieved. As the Trial Judge remarks the defendants are agriculturists, and the loss of their property would mean a very great deal to them.

The appeal will be allowed and the default excused. Appellants will be entitled to their costs in this Court and in the Court below.

Coyajee, J.—I concur.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 929 OF 1924.

April 27, 1925.

Present:—Mr. Justice Krishnan.

MARAPPA GOUNDAN—RESPONDENT No. 2—DEFENDANT No. 3—PETITIONER

versus

V. SUBRAMANIA IYER AND OTHERS—PETITIONERS AND RESPONDENT No. 1—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Death of defendant--Legal representatives not brought on record—Abatement, extent of—Decree against several defendants—Application after decree to bring legal representatives of deceased defendant on record--Procedure.

Where one of several defendants in a suit dies during the pendency of the suit and his legal representatives are not brought on the record within the prescribed period, the determination of the question whether the suit abates *in toto* or only to the extent of the interest of the deceased defendant depends upon the question whether the deceased defendant was such a necessary party to the suit that the suit cannot proceed owing to his absence from the record. [p. 992, col. 1.]

Plaintiff brought a suit for recovery of possession of certain property and for mesne profits against three defendants. Defendant No. 1 had sold the property in dispute to defendants Nos. 2 and 3 long prior to the suit. Defendant No. 3 alone contested the suit and a decree in favour of the plaintiff was eventually passed against the defendants, the decree for mesne profits purporting to be against all the defendants. Defendant No. 3 filed an appeal against the decree and during the pendency of that appeal the plaintiff discovered that defendant No. 1 had died a few days before the passing of the decree by the Trial Court. Thereupon he made an application that the legal representatives of defendant No. 1 may be brought upon the record, and that the case may be re-opened. The Trial Court set aside the whole decree and re-opened the case against all the defendants. Defendant No. 3 applied to the High Court in revision on the ground that he was content to seek his remedy against the decree of the Trial Court in the appeal which he had filed and that the Trial Court should not have re-opened the case as against him and defendant No. 2.

Held, that in the circumstances of the case the re-opening of the case should be confined to the legal representatives of defendant No. 1 and that the order of the Trial Court so far as it affected the defendants Nos. 2 and 3 should be set aside. [p. 992, col. 2.]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the District Munsif, Gobichettipalyam, in I. A. No. 486 of 1924, in O. S. No. 1162 of 1922, dated the 28th of August 1924.

Mr. *T. M. Krishnaswami Iyer*, for the Appellant.

Mr. *S. S. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—This is an application to revise an order passed by the District Munsif of Gobichettipalayam in O. S. No. 1162 of 1922. The suit was brought by the plaintiffs for the recovery of a half share of the suit property on payment of Rs. 30 their share of the mortgage amount, with mesne profits from the defendants. There were originally three defendants. The property had been sold by the 1st defendant to defendants Nos. 2 and 3 long prior to suit. The 1st and 2nd defendants remained *ex parte* and the 3rd defendant appeared and pleaded that the 1st defendant was entitled to sell and that the plaintiffs had no share and that the suit ought

to be dismissed. At the trial the Munsif held that the plaintiffs' claim for a half share in the property was well-founded and gave a decree against all the defendants for partition of the property into two equal shares and for plaintiffs being put into possession of one of such shares on their paying Rs. 30. It was also decreed that defendants do pay plaintiffs past mesne profits and future mesne profits for a period of three years. Against this decree, the 3rd defendant put in an appeal to the District Judge. But, sometime after the decree was passed, plaintiffs discovered that the 1st defendant had died five days prior to the date of the decree. Apprehending, therefore, that some difficulty might arise so far as the claim against the 1st defendant was concerned in the case, they put in an application to have the legal representative brought on record and the case re-opened by the Munsif. The District Munsif accepting the plaintiff's explanation for not being aware of the death of the 1st defendant allowed their petition and set aside the whole decree and re-opened the case not only as against 1st defendant's legal representatives but also against defendants Nos. 2 and 3. The 1st and 2nd defendants were originally *ex parte* in the case. The 3rd defendant was alone contesting the case and it is he who has come up here in revision and objects to the case being re-opened as against him for the purposes to get what relief he can by his appeal to the District Judge. If the order as to re-opening the case against all the defendants were to stand, he will have to wait till after the case is disposed of again and file a fresh appeal. It seems to me that the Munsif's order setting aside the decree against all the defendants cannot be supported. The property had passed to defendants Nos. 2 and 3 by the sale by 1st defendant. That being so, the 1st defendant was not interested at all in the suit so far as the claim for possession of the half share in the property is concerned. The only claim in which he might have been interested is the claim for mesne profits, for the Munsif has passed a decree against all the defendants jointly for mesne profits. That is a matter in which it cannot be said that the defendants are so jointly interested that the absolving of one of them from liability to pay mesne profits would necessarily absolve the other defendants also. There is no connection between the case of the 2nd and 3rd defendants and that of the 1st defendant. I am of opinion, that the order of the Munsif setting aside the decree originally passed against defendants Nos. 2 and 3 as well as against 1st defendant cannot stand, that he ought not to have set aside the decree against defendants Nos. 2 and 3 at all and that he ought to have done so only against 1st defendant. There is no fear of any conflicting decision in this case. There are circumstances where such conflicts cannot be avoided. But those circumstances do not justify the re-opening of a case against all the defendants. Some cases have been cited before me from the Indian Cases, namely, *Balaram Pal* v. *Kanysha Majhi* (1), *Kali Dayal* v. *Nagendra Nath* (2) and *Sheikh Dendoo* v. *Sheikh Sachoo* (3). The decision in *Kali Dayal* v. *Nagendra Nath* (2), I think, puts the matter correctly and I am prepared to adopt the view taken there. I am not prepared to agree with the ruling in *Sheikh Dendoo* v. *Sheikh Sachoo* (3) which seems to imply that in every appeal if a respondent dies and no legal representative is brought on record, the appeal abates. I think the abatement of the whole appeal would depend upon the question whether the deceased person was such a necessary party that his absence from the record should lead to the dismissal of the appeal itself. In these circumstances I must set aside the order of the District Munsif so far as he allows the case to be re-opened against defendants Nos. 2 and 3 and direct him to proceed with a fresh trial only as regards the legal representative of the 1st defendant.

The petitioner will have his costs in the High Court against the plaintiffs but I do not interfere with the order passed in the lower Court as to costs.

V. N. V.

Z. K. *Order set aside.*

(1) 53 Ind. Cas. 548.

(2) 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44.

(3) 72 Ind. Cas. 2; (1924) A. I. R. (C.) 399.

CALCUTTA HIGH COURT.

ORIGINAL CRIMINAL.

May 15, 1925.

Present:—Mr. Justice Page.

EMPEROR—PROSECUTOR

versus

MOHIT KUMAR MUKERJEE AND OTHERS —ACCUSED.

Penal Code (Act XLV of 1860), s. 471—Fraudulently using forged document as genuine—Ingredients of offence—User, what amounts to—Document produced in compliance with order of Court, effect of.

Whenever a person fraudulently or dishonestly presents a document to another person as being what it purports to be, or causes the same to be so presented, knowing or having reason to believe that the document is a forged document, the document is "used as genuine" within the meaning of s. 471 of the Penal Code. It is immaterial whether the document was presented by the accused himself or by his agent expressly authorized in that behalf or whether it was produced by the accused of his own motion or pursuant to the order of the Court, if in the event he uses it as genuine. Whether there has been a user or not must depend upon the circumstances of each case. If all that the accused has done is to swear that a forged document is a genuine document he has not "used" the document within the meaning of s. 471, but if the evidence discloses that the accused, when called upon to produce a document which he knew or had reason to believe was a forged document, fraudulently or dishonestly presented that document as being a genuine document, he cannot claim absolution for the fraudulent or dishonest use which he has made of the document merely because he has been served with a summons to produce the document. Such a summons neither compels nor entitles the person served to be a party to a fraud and if the person who has been served with the summons fails to disclose that he believes that the document has been forged, and fraudulently or dishonestly puts forward the document as being a genuine document, he is not acting involuntarily but is deliberately using the document for a criminal purpose. [p. 994, cols. 1 & 2.]

Neither the acquisition nor the deprivation of property is an essential ingredient of an intent in an offence under s. 471 of the Penal Code. An offence is committed under s. 471 of the Penal Code whenever a document known or believed by the accused to have been forged is used as genuine with the intention that some person thereby should be deceived, and that by means of such deception either an advantage should accrue to the person so using the document, or injury should befall some other person or persons. [p. 995, col. 2; p. 996, col. 2.]

Messrs. *J. Sen Gupta*, *S. Sen*, *Abany C. Banerjee*, *S. K. Sen* and *N. Das Gupta*, for the Accused.

JUDGMENT.—At the Fifth Criminal Sessions of the High Court for 1924, Mohit Kumar Mukerjee, Bankim Chandra Ghose and Surendra Nath Shaha were tried before me under ss. 120B and 471 of the Indian Penal Code on a charge of conspiring dishonestly or fraudulently to use as genuine a certain receipt for Rs. 50,000, when they knew or had reason to believe that the receipt was a forged document, in consequence of which conspiracy the said document was so used as aforesaid. The receipt in question purported to acknowledge the payment of a sum of Rs. 50,000 as *salami* in respect of a sub-lease of certain mining rights in lands of which the firm of Dickie & Co. were the lessees. Dickie and Co. became insolvent, and in the course of the insolvency proceedings the Official Assignee became aware of a claim which had been preferred by the accused Bankim and Suren that the accused Mohit, as one of the partners of Dickie & Co., had executed in their favour a sub-lease of the said mining rights. An order was obtained by the Official Assignee, therefore, to examine the three accused under s. 36 of the Insolvency Act (III of 1909). The accused were served with a summons to produce *inter alia* "any books and documents in connection with the said alleged payment by them or either of them of Rs. 50,000 to any member or members of the said insolvent firm for the purpose of obtaining the above lease". In the course of the examination of Suren, who stated that the receipt in question was given by Mohit to Bankim and afterwards was retained by the witness, the receipt was tendered by the Official Assignee and admitted as an exhibit in the insolvency proceedings. In his examination on the same day Bankim stated that "it was arranged that Suren and I should advance monies in equal shares. Mohit told me that he would not execute a registered lease in our favour as the lease in his favour had not been registered. He said that he would not give us a receipt for Rs. 50,000.

Q. That is all that you hold now? Yes, at that time. A copy of the lease from Mr. Creet to Mohit was sent to us in May 1921. I had the lease drawn up in favour of Suren and myself on the same lines as Mr. Creet's lease, and sent it to Mohit for approval.

Q. What happened after that? We pressed Mohit to return the draft approved, and he returned it to us approved on the 11th August.

Q. What document did you get on the 25th February 1920? This receipt (produced) and when we paid Rs. 15,000 a second receipt was written out on the same paper."

At the close of the case for the Crown, Counsel for the accused contended that

there was no evidence that the accused or any of them had "used" the said receipt fraudulently, dishonestly or otherwise, within the meaning of that term in s. 471 of the Indian Penal Code, and that there was no evidence upon which the Jury would be entitled to find the accused guilty. I overruled the objection, and the Jury found all the accused guilty of having dishonestly and fraudulently "used as genuine" the said receipt in consequence of the said conspiracy. In view of the conflicting decisions on the subject I was invited by Counsel to deliver a considered ruling as to the meaning which is to be attributed to the words "fraudulently or dishonestly uses as genuine" in s. 471 of the Indian Penal Code. In my opinion, whenever a person fraudulently or dishonestly presents a document to another person as being what it purports to be, or causes the same to be so presented, knowing or having reason to believe that the said document is a forged document, the document is "used as genuine" within s. 471. As I construe the section, it matters not whether the document was presented by the accused himself, or by his agent expressly authorized in that behalf, see *Lala Ojha* v. *Queen-Empress* (1), or whether it was produced by the accused of his own motion or pursuant to the order of the Court, if in the event he uses it as genuine in the sense that I have indicated. Whether there has been an user or not must depend upon the circumstances of each case. If all that the accused has done is to swear that a forged document is a genuine document, no doubt, he has not "used" the document within s. 471, but, in my opinion, if the evidence discloses that the accused, when called upon to produce a document which he knows or has reason to believe is a forged document, fraudulently or dishonestly presents that document as being a genuine document, he cannot claim absolution for the fraudulent or dishonest use which he has made of the documeut merely because he has been served with a *subpœna duces tecum*. For a summons to produce a document neither compels nor entitles the person served to be a party to a fraud, and if the person who has been served with the summons fails to disclose that he believes that the document has been forged, and fraudulently or dishonestly puts forward the document as being a genuine document, in my opinion, he is not acting involuntarily, but is deliberately using the document for a criminal purpose. To hold otherwise would be to afford a ready method by which the provisions of s. 471 could be evaded. For these reasons, with great respect, I am unable to acquiesce in the reasoning upon which the decisions of the Madras High Court were based in *Assistant Sessions Judge of North Arcot* v. *Ramammal* (2) and *In re Muthiah Chetty* (3).

Since the issue as to whether there has been a fraudulent or dishonest user is one of fact, it is, I think, neither possible nor advisable to do more than lay down a criterion by which the facts of any particular case may be tested. It is, however, desirable that I should refer to *Ambika Prasad Singh* v. *Emperor* (4) in which case the accused handed certain forged receipts to his *mukhtear*, and the receipts were filed in Court by the *mukhtear* with a list of documents. The receipts, having been denounced as forgeries, were retained in the custody of the Court, and subsequently the accused was charged with an offence under s. 471 of the Indian Penal Code. In the course of the judgment of Stephen and Holmwood, JJ., their Lordships observed: "It appears from the evidence of the accused's *mukhtear* and of his *mukhtear's muharrir*, that what happened was that he with another party to the case produced the receipts in question, and they were entered in a list, which was filed with the statement made on behalf of the third party. They were at once denounced as forgeries, and they were never tendered in evidence. In the first place it appears to us that this does not on the facts before us constitute any user. There was no attempt to use these documents as evidence, and we are not at all satisfied that there was any fraudulent intention on behalf of the accused so to use them. There was certainly no attempt made to assert their genuine character, after they had once been impugned, and under these circumstances we cannot hold that there has been any user." As this case is widely reported it is well to bear in mind that, although the actual deci-

(1) 26 C. 863; 3 C. W. N. 653; 13 Ind. Dec. (N. S.) 1153.

(2) 13 Ind. Cas. 275; 36 M. 387; 10 M. L. T. 563; (1912) M. W. N. 3; 22 M. L. J. 141; 13 Cr. L. J. 35.

(3) 13 Ind. Cas. 286; 36 M. 392; 11 M. L. T. 21; 22 M. L. J. 181; (1912) M. W. N. 455; 13 Cr. L. J. 46.

(4) 35 C. 820; 8 Cr. L. J. 398.

sion may be supported upon the ground that the evidence that the accused intended to file the document was exiguous, the observations in the judgment to which I have referred have been dissented from in *Krishna Prosad Mandal* v. *Rabindra Nath Dinda* (5), and were subsequently explained by Holmwood, J., in *Mobarak Ali* v. *Emperor* (6). His Lordship there stated, "what we did hold was that there was no evidence that these receipts had been used fraudulently or dishonestly by the accused. They were produced by a third party in the case under s. 144 of the Cr. P. C....The case obviously depended upon its own facts as most criminal cases do. But the filing of a document as the basis of a plaint or as a necessary sequel to the pleas in the plaint is, in our opinion, itself an user, and it then becomes incumbent upon the person using it to show that he filed the document in all good faith believing it to be genuine": see also *Rati Jha* v. *Emperor* (7). In my opinion, the above observations of Stephen and Holmwood, JJ., in *Ambika Prasad Singh* v. *Emperor* (4) ought not now to be followed. Again, in *Asimuddi Sheikh* v. *King-Emperor* (8), it was held by Rampini and Gupta JJ., "that the use of a forged document which is contemplated by s. 471 of the Indian Penal Code is such use as causes wrongful gain or wrongful loss; that is to say that section applies to the case of a person who appears before some other person or before a Court, with a document and endeavours to induce that person or Court to do some act which he or it would not do if it was known to be a forgery." The above definition of the nature of the "user" appears to me to be too narrow, for it gives no effect to the word 'fraudulently' which is found in the section. The definition of 'dishonestly' in s. 24, and 'wrongful gain' and 'wrongful loss' in s. 23, makes it clear that these terms are used in the Indian Penal Code with reference to the acquisition or the deprivation of property. Now, in s. 25 'fraudulently' is defined as meaning 'with intent to defraud' and *In re London and Globe Finance Corporation Ltd.* (9) Buckley, J., observed that "to deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action". This definition was followed by the Court of Criminal Appeal in *R.* v. *Newton* (10). But neither the acquisition nor the deprivation of property is an essential ingredient of the intent in an offence under s. 471 of the Indian Penal Code. In *Queen-Empress* v. *Soshi Bhushan* (11), Edge, C.J., in delivering the judgment of the Court, observed that "we can see no difference in principle between the case of a man making a false certificate in order to obtain employment, and the case of a man making a false certificate in order to obtain admission to a law class. In each case the intention is to deceive another person, and thereby to obtain an advantage or a privilege, which without such deception could not have been obtained. We cannot agree with Norris, J., in *Queen-Empress* v. *Haradhan* (12) that the claim in that section is limited to a claim to property. There does not appear to us to be anything in the section to so limit the application of that word. In our opinion the claim may be a claim to anything, as, for instance, a claim to a woman as the claimant's wife, a claim to the custody of a child as being the claimant's child, or a claim to be admitted to...a University or other examination, or a claim to the possession of immoveable or any other kind of property. Why should the making of a false document to support a claim to an old coat, not worth Rs. 5, be a forgery, and the making of a false document to support a claim to the custody of a child not be a forgery"? In *Queen-Empress* v. *Abbas Ali* (13), Maclean, C. J., in delivering the judgment of the Court which included O'Kinealy, Macpherson, Trevelyan and Jenkins, JJ.,

(5) 13 Ind. Cas. 99; 13 Cr. L. J. 6.
(6) 15 Ind. Cas. 81; 17 C. W. N. 94; 13 Cr. L. J. 449.
(7) 14 Ind. Cas. 201; 39 C. 463; 15 C. L. J. 509; 16 C. W. N. 623; 13 Cr. L. J. 201.
(8) 11 C. W. N. 838; 5 C. L. J. 454; 5 Cr. L. J. 351.
(9) (1903) 1 Ch. 728 at p. 732; 72 L. J. Ch. 368; 51 W. R. 651; 88 L. T. 194; 19 T. L. R. 314 & 375; 10 Manson 198.
(10) (1914) 23 Cox C. C. 609; 109 L. T. 747.
(11) 15 A. 210; A. W. N. (1893) 96; 7 Ind. Dec. (N. S.) 853.
(12) 19 C. 380; 9 Ind. Dec. (N. S.) 698.
(13) 25 C. 512; 1 C. W. N. 255; 13 Ind. Dec. (N. S.) 340.

observed: "'Fraudulently' is defined by s. 25 in the following words—'a person is said to do a thing fraudulently' if he does that thing 'with intent to defraud, but not otherwise.' As a definition this provision is obviously imperfect, and perhaps introduces an element of doubt, which did not previously exist; for it leaves it to be determined....whether the word 'defraud' as used in s. 25 implies the deprivation or intended deprivation of property as a part of result of the fraud. The word 'defraud' is of double meaning in the sense that it either may or may not imply deprivation, and as it is not defined in the Code and is not, so far as we are aware, to be found in the Code except in s. 25, its meaning must be sought by a consideration of the context in which the word 'fraudulently' is found in ss. 471 and 464 together with the word 'dishonestly,' and presumably in a sense not covered by the latter word. If, however, it be held that 'fraudulently' implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word 'dishonestly',and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part". In *Queen-Empress* v. *Muhammad Saeed Khan* (14), Mr. Justice Banerjee observed: "Where, therefore, there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud, and if a document is fabricated with such intent, it is a forgery." This was held by this Court in *Queen-Empress* v. *Soshi Bhushan* (11). A somewhat wider interpretation has been placed on the word "fraud" by the Bombay High Court in *Queen-Empress* v. *Vithal Narayan* (15) which was followed by the Calcutta High Court in *Lolit Mohan Sarkar* v. *Queen-Empress* (16). In the case of the Bombay High Court, the learned Judges accepted the interpretation of Le Blanc, J., in *Haycraft* v. *Creasy* (17), that "by fraud is meant an intention to deceive; whether it be from any expectation of advantage to the party himself or from ill-will towards the other, is immaterial": see also per White, C.J., in *Kotamaraju Venkatarayudu* v. *Emperor* (18).

In *Emperor* v. *Surendra Nath Ghosh* (19), Mookerjee, J., stated that "the expression 'intent to defraud' implies conduct coupled with intention to deceive and thereby to injure; in other words 'defraud' involves two conceptions, namely, deceit, and injury to the person deceived, that is infringement of some legal right possessed by him but not necessarily deprivation of property." With great respect I am unable to accept the view that the term "fraudulently" in s. 471 of the Indian Penal Code, necessarily connotes deceit and injury to the person deceived. It may, but it need not, do so. In point of fact more often than not it happens that the intention of the accused is to deceive one person in order to injure or defraud another. Further, it is well-settled that it is not incumbent upon the Crown to prove that any particular person was defrauded, *R.* v. *Crooke* (20), or indeed, that in the circumstances of the case it was possible that any person could have been defrauded: *R.* v. *Nash* (21). In my opinion, the law was correctly laid down by Banerjee, J., in *Queen-Empress* v. *Muhammad Saeed Khan* (14), and that an offence is committed under s. 471 whenever a document known or believed by the accused to have been forged is used as genuine with the intention that some person thereby should be deceived, and by means of such deception that either an advantage should accrue to the person so using the document, or injury should befall some other person or persons. In practice the question tends to become merely academic, for "the practical test as to the fraudulent character of deception for criminal purposes is this; did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that the advantage should not have had the equivalent of any loss or risk of loss of someone else. If so, there was fraud". (Stephen's History of the Criminal Law of England, Vol, II, page 121). The ramifications of fraud, and the varied garbs

(14) 21 A. 113; A. W. N. (1898) 197; 9 Ind. Dec. (N. S.) 781.
(15) 13 B. 515*n*; 7 Ind. Dec. (N. S.) 342.
(16) 22 C. 313; 11 Ind. Dec. (N. S.) 210.
(17) 1801) 2 East 92; 102 E. R. 303; 6 R. R. 380.
(18) 28 M. 90; 1 Weir 538.
(19) 7 Ind. Cas. 629; 14 C. W. N. 1076 at p. 1085; 12 C. L. J. 277; 11 Cr. L. J. 505; 38 C. 75.
(20) (1795) 2 Str. 901; 93 E. R. 928.
(21) (1852) 2 Den. C. C. 493; 21 L. J. M. C. 147; 16 Jur. 553.

in which it appears, make it undesirable to attempt to find an exhaustive definition of the term "fraudulently", or "intent to defraud"; and to do so is unnecessary, for each case must turn on its own facts, and when the facts are known it is seldom difficult to draw a conclusion as to whether at the material time a fraudulent intention was present in the mind of the accused. In this case, the user, in my opinion, was both dishonest and fraudulent, and there was ample evidence to support the finding of guilty.

Z. K. *Order accordingly.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 109-B OF 1925.

August 28, 1925.

Present:—Mr. Findlay, Officiating J. C.

WASUDEO—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898 as amended by Act XVIII of 1923), ss. 195, 342—Examination of accused—General question, whether sufficient—Sanction for prosecution—Prosecution begun under old Code—Proceedings after introduction of new Code, validity of.

A formal question in general terms is a sufficient compliance with the mandatory provisions of s. 342, Cr. P. C., relating to the examination of the accused after the cross-examination of the prosecution witnesses, although in a particular case, it may be open to and advisable for the Court, in the exercise of its discretion, to put more specific questions. [p. 997, col. 2.]

Emperor v. *Alimaddin Naskar*, 85 Ind. Cas. 919; 52 C. 522; 29 C. W. N. 231; 41 C. L. J. 101; (1925) A. I. R. (C.) 361; 26 Cr. L. J. 731, followed.

The alteration in s. 195, Cr. P. C., as to the procedure relating to the grant of sanction for prosecution introduced by Act XVIII of 1923 cannot invalidate proceedings validly begun under the old procedure. [p. 998, col. 1.]

In re Appaswamy Iyer, 91 Ind. Cas. 388; 49 M. L. J. 276; (1925) M. W. N. 668; 22 L. W. 554; (1925) A. I. R. (M.) 1122, relied on.

Application for revision of a judgment of the Sessions Judge, Amraoti, dated the 9th November 1925, in Criminal Application No. 82 of 1925.

Mr. *V. V. Chitale*, for the Applicant.

Mr. *G. P. Dick*, Government Advocate, for the Crown.

ORDER.—The applicant Wasudeo was convicted by the Magistrate, with s. 30 powers, of the Yeotmal District, of offences punishable under ss. 467 and 471 read with s. 109, Indian Penal Code, and sentenced to two years' rigorous imprisonment for each offence, the sentences to run consecutively. The Sessions Judge, Amraoti, allowed the appeal as regards the conviction under s. 467/109, but upheld the conviction under s. 471, Indian Penal Code.

The facts of the case have been fully stated in the judgment of the Sessions Judge and it is unnecessary to repeat them here. No attempt has been made on behalf of the applicant to attack the findings of fact which have been arrived at by the Sessions Judge. Certain technical questions have, however, been raised and I now proceed to deal with them.

The second ground which appears in the application is that the provisions of s. 342, Cr. P. C., have not been sufficiently complied with. This refers to the further examination of the accused on 1st October 1924, after Sita (P. W. No. 1) and Ganpatt (P. W. No. 3) had been cross-examined. It has been suggested that it was insufficient to merely ask the applicant whether he had anything more to say with reference to the cross-examination of these witnesses, which had been concluded. I find it impossible, in the circumstances of the present case, to hold that there was any necessity for the Court to have put more specific questions to the applicant in this connection. For my own part, I concur with the observations of Newbould, J., in *Emperor* v. *Alimuddin Naskar*(1) that a formal question in general terms is a sufficient compliance with the mandatory provisions of s. 342 although, of course, in a particular case it may be open to, and advisable for, the Court, in the exercise of its discretion to put more specific questions. No reason whatever for presuming that the applicant has been prejudiced in this connection, has been made out in this Court.

It was also mentioned in the course of argument that the previous examination of the applicant was of a somewhat inquisitorial nature, but the terms thereof seem to me to have left him ample opportunity of explaining instances in the evidence which appeared to be against him

A new legal point, which I allowed to be added in the application on the day of hearing was also raised, *e. g.*, that the provisions of s. 195, Cr. P. C., as recently

(1) 85 Ind. Cas. 919; 52 C. 522; 29 C. W. N. 231; 41 C. L. J. 101; (1925) A. I. R. (C.) 361; 26 Cr. L. J. 631.

amended, have not been complied with in this case. It has been argued that it is true that the sanction was granted before the amending Act to the Cr. P. C. came into force, but it has been urged, that cognizance was only taken of the case thereafter, *viz.*, on 23rd January 1924. It is clear, however, that cognizance of the case was really taken long before, *viz.*, on 6th June 1923. I am in full agreement with the decision of Wallace and Nair, JJ., in *In re Appaswamy Iyer* (2) on this question. The alteration in the law of procedure relating to the grant of sanction can obviously not invalidate proceedings validly begun under the old procedure. Had this been the intention of the Legislature, it would have been translated into appropriate language in the piece of the legislation concerned. I see no cause, therefore, for entertaining this ground of revision.

The third ground of revision, *viz.*, that three Court witnesses had been examined even prior to the prosecution evidence, was not pressed and had obviously no chance of success.

On the merits all that has been urged is that Wasudeo was only an agent and that there has been no positive proof that he had knowledge that the documents were forged. The circumstances in *In re Ranchhoddas Nagardas* (3) relied upon by the Pleader for the applicant, where wholly different from those of the present case. It seems to be utterly impossible, on any reasonable view of the evidence, to assume that Wasudeo took an innocent part in the matter. The considerations advanced by the Sessions Judge and by the Magistrate seem to me absolutely conclusive in this connection. The whole civil case was in the hands of the applicant and it was very clearly he who was the ringleader and carried out the crime. There is no possible ground for interference on revision in this connection, and for the same reason I am unable to hold that the Magistrate has erred in making the differentiation of punishment he has between Wasudeo on the one hand and Gangu, the so-called principal, on the other. As remarked by the Sessions Judge, it is perfectly obvious that Gangu was a mere cat's paw in the hands of the others and the circumstances were such as to entitle her only to some measure of leniency.

The application for revision is accordingly dismissed.

N. H. *Application dismissed.*

(2) 91 Ind. Cas. 388; 49 M. L. J. 276; (1925) M. W. N. 668; 22 L. W. 554; (1925) A. I. R. (M.) 1122.
(3) 22 B. 217; 11 Ind. Dec. (N. S.) 793.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 318 OF 1925.
July 17, 1925.
Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

BIRENDRA NATH CHATTERJEE—PETITIONER
versus
UMANANDA MUKHERJEE—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 197—Government Savings Banks Act (V of 1873), rules made under—Certificate within s. 197—Certificate by agent of female depositor that depositor alive and sane, whether covered.

A certificate given under the Post Office rules in the case of a female depositor withdrawing a deposit by her authorized agent to the effect that the depositor is alive and sane, is not a certificate either prescribed by the Government Savings Banks Act or by statutory rules made thereunder, and is not, therefore, a certificate which falls within the purview of s. 197 of the Penal Code. [p. 999, col. 1.]

Per *Suhrawardy, J., Obiter dictum.*—The certificate contemplated in s. 197 of the Penal Code is a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of the administration of justice. [p. 999, col. 2.]

Rule against an order of the Deputy Magistrate, Berhampur, dated the 26th February 1925, confirmed by the District Magistrate, Berhampur, on the 24th March 1925.

Mr. *S. K. Sen* and Babus *Hira Lal Ganguli* and *Harendra Nath Mukerji*, for the Petitioner.

Mr. *B. C. Chatterji* and Babus *Devendra Narayan Bhattacharjee, Probodh Chandra Chatterji, Satindra Nath Mukerji, Mrityunjoy Chatterji, Biraj Mohan Roy* and *Nirmal Chandra Chakravarty*, for the Opposite Party.

JUDGMENT.

Duval, J.—In this case a Rule has been obtained against an order of discharge of one Umananda Mukherjee who was placed on his trial under ss. 197, 420 and 404, Indian Penal Code. The charge against him was that he, knowing of the death of one Bhaba Sundari Debi, who died on the 3rd January 1923, as her agent in respect of her Savings Bank account at Berhampur, withdrew on

the 5th and 9th January 1923 in all Rs. 1,550 by signing two certificates to the effect that she was alive on those days. The Deputy Magistrate discharged the accused holding that ss. 420 and 404 did not apply because, as a matter of fact, the accused was entitled to the money on the lady's death and s. 197 did not apply on the ground that the certificates given that the lady was alive and sane were not such certificates as were contemplated by s. 197, Indian Penal Code.

After the discharge by the Deputy Magistrate the case came up before the District Magistrate who agreed with the Deputy Magistrate and refused to order a further enquiry.

Now, the point for decision to my mind appears to be whether these certificates which undoubtedly the accused gave on the 5th and 9th January 1923, that the depositor Bhaba Sundari was alive and sane when she was already dead, are certificates which came within s. 197. Under the Government Savings Banks Act (V of 1873) under which the Post Office Savings Bank is conducted the Governor-General in Council may make certain statutory rules. But these rules as to payment only apply in the case of payment of deposits to minors or guardians, in the case of payment of deposits belonging to lunatics and in the case of payment of deposits by or on behalf of married women. Bhaba Sundari comes under none of these three classes. She was a widow and the accused was her brother by adoption. The certificate given under the rule that in the case of female depositors withdrawing by their authorised agents under r. 18 the agent must sign a certificate on the application for withdrawal to the effect "Certified that the depositor is on this day alive and sane" does not appear to be a certificate either prescribed by the Government Savings Banks Act or by statutory rules made thereunder. The rule appears to be made for the general conduct of the Post Office business. Therefore it appears to me that the certificates given by Umananda cannot be certificates such as are covered by s. 197, Indian Penal Code. The question whether they can come under any other section of the Code which requires sanction under s. 195, Cr. P. C., is not at present before us. This is purely a private prosecution and not on the complaint of any of the officer of the Post Office.

In this view I agree with the finding of the Deputy Magistrate and the District Magistrate that s. 197 does not apply. Therefore this Rule must, in my opinion, be discharged.

Suhrawardy, J.—I agree with the interpretation put by my learned brother on the rule or rather the note to the rule framed under the Government Savings Banks Act. I should, however, like to base my opinion on the general policy which should guide us in interfering with the order of the Trial Court when discharging an accused under s. 253, Cr. P. C. This is a private prosecution by a person who has been found by both the Courts below to have no interest in the money which was withdrawn by the accused. It has been found that the accused was the person who was entitled to this money. He is the heir to the deceased and the money would have come to him as heir. In the circumstances it is not desirable that this prosecution should proceed.

With regard to s. 197, I have great doubt if it applies to certificates contemplated by note 2 to s. 25 of general rules and orders framed under Government Savings Banks Act (V of 1873). That note says: "In the case of withdrawals made from the account of female depositors by their authorised agents under r. 18 the agent must sign the following certificate on the application for withdrawal 'Certified that the depositor is on this day alive and sane'." My learned brother has pointed out that this rule is not one of the rules which the Governor-General in Council is authorised to make under s. 14 of Act V of 1873. But assuming that such a rule was framed under legal authority I am afraid that s. 197 is not applicable to a certificate granted under such rule. The use of the word "certificate" in the rule has no doubt led to this confusion. In the note the word "certificate" might have been replaced by the word "declaration" or "statement". The certificate contemplated in s. 197 to my mind, as at present advised, is a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of administration of justice. That section is one of the sections in the Chapter headed "Of False Evidence and Offences against Pubic Justice." Section 198 which follows it makes its meaning clear. Section 198 runs thus: "Whoever corruptly uses or attempts to use any such certificate (namely, certificate contemplated by s. 197) as a true certificate

knowing the same to be false in any material point shall be punished in the same manner as if he gave false evidence." This section indicates that the offence of issuing or signing a false certificate is one which is intimately connected with the administration of justice. The only thing which goes against the view is that it is not a section which requires any special sanction of a Court of Justice or of a public officer for the initiation of the proceedings. It is, however, unnecessary to go into greater details in this matter as I think that on the other grounds this Rule ought to be discharged.

Z. K. *Rule discharged.*

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 151 OF 1925.

August 10, 1925.

Present:—Mr. Justice Srinivasa Iyengar.

In re ARUMUGA PADAYACHI AND OTHERS—ACCUSED NOS. 1, 2, 5 AND 7 TO 11—APPELLANTS.

Criminal Procedure Code (Act V of 1898), s. 369—Judgment, what is—Criminal appeal, dismissal of, for default—Fresh appeal, maintainability of—Review, power of.

Once a criminal appeal has been dismissed, another appeal cannot be heard at the instance of the same appellant on the ground that on the previous occasion owing to some mistake, Counsel did not appear for the appellant. [p. 1000, col. 2.]

In re Tadisoma Naidu, 84 Ind. Cas. 850; 47 M. 428; 46 M. L. J. 456; 34 M. L. T. 218; 20 L. W. 18; (1924) A. I. R. (M.) 640; 26 Cr. L. J. 370, relied on.

The word "judgment" in s. 369, Cr. P. C., means and refers to the judicial act of the Court in finally disposing of the case and indicates the order of the Court when it is read out and signed by the Judge and not the formal order on the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officer of the Court. When the Court delivers and signs the judgment it becomes final and it has no power thereafter to review its order or alter the judgment in any manner or to any extent. [p. 1001, col. 1.]

Appeal against an order of the Court of Session of the Trichinopoly Division in Case No. 7 of the Calendar for 1925.

Messers. *V. L. Ethiraj* and *N. S. Srinivasa Iyer*, for the Accused.

JUDGMENT.—In this case I ordered originally that the matter might be posted before a Bench constituted by Venkatasubba Rao, J., and myself, because I was under the impression that the order made by the learned Judge directing notice to the Public Prosecutor amounted, as generally it is understood in criminal matters, to an order admitting the appeal. But I have since ascertained that the learned Judge never intended those words to convey that significance and that, as a matter of fact, the learned Judge did not admit the appeal and all that he directed notice about was whether once a criminal appeal had been dismissed by one Judge, another appeal could be heard at the instance of the same appellant on the ground that on the previous occasion owing to some mistake, Counsel did not appear for the appellant. In view, therefore, of there being no order of Venkatasubba Rao, J., admitting the appeal it has become unnecessary for any matter being heard by a Bench of Judges.

The only question before me, therefore, is whether the learned Counsel for the appellant is entitled to be heard with regard to the appeal, that is to say, practically by way of reviewing the judgment previously delivered by me. Section 369 of the Cr. P. C. is decisive of the point and there is also the judgment of this Court in *In re Tadisoma Naidu* (1) in which Odgers and Wallace, JJ., held that as soon as the judgment of the Court in a criminal matter is signed, it becomes final and the Court is *functus officio*. The learned Counsel for the appellant wished to put it ingeniously in the following way. There was an order by Venkatasubba Rao, J., to the effect that the order of this Court dismissing the appeal should not be communicated to the lower Court until further orders are made by me. But by some inadvertence and in spite of the order of Venkatasubba Rao, J., the order would appear to have been communicated to the lower Court. Mr. Ethiraj argues that this was against the order of this Court and, therefore, must be treated as a nullity. Assuming it to be so, it comes to this; have I the power to review my own judgment on the ground that there has been no formal order issued by this Court or communicated by this Court to the lower Court? For this purpose he referred me to the cases *Queen-Empress* v. *Lalit Tawari* (2) where it was held in a criminal matter that the judgment or order of the High Court is not

(1) 84 Ind. Cas. 850; 47 M. 428; 46 M. L. J. 456; 34 M. L. T. 218; 20 L. W. 18; (1924) A. I. R. (M.) 640; 26 Cr. L. J. 370.

(2) 21 A. 177; A. W. N. (1899) 15; 9 Ind. Dec. (N. S.) 822.

complete until it is sealed in accordance with r. 83 of the Rules of Court and that upto that time may be altered by the Judge or Judges concerned therewith without any formal procedure by way of review of judgment being taken. This decision was in 1899 and before the amendment of s. 369. It is, therefore, very doubtful whether after the present amendment the same Court would have altered the conclusion or decision set out in that case. Further it appears to me that that decision is based upon a rule of the Allahabad High Court about the sealing of orders. I have not been referred to any such rule in this Court. In the absence of any such rule, the words of s. 369 of the Cr. P. C. are clear and binding. According to that section, a judgment when it is signed becomes final. In the absence of any definition to indicate anything to the contrary, the judgment must be taken to mean and refer to the judicial act of the Court in finally disposing of the case and must, therefore, indicate only the order of the Court when it is read out and signed by the Judge and cannot be meant to refer to the formal order on the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officer of the Court. I must, therefore, hold that when I delivered and signed the judgment it became final and that I have no power now to review my order or alter my judgment in any manner or to any extent.

This appeal petition is, therefore, rejected.

Petition dismissed.

V. N. V.
Z. K.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION No. 58 OF 1924.

August 9, 1924.

Present:—Mr. Kotval, A. J. C.

HANMANTRAO—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 439, 498—Revision disposed of by High Court—Bail pending application for leave to appeal to Privy Council.

After the High Court has disposed of an application for revision under s. 439 of the Cr. P. C. an accused person who is undergoing a sentence of imprisonment cannot be let out on bail under s. 498 of the Cr. P. C. on the ground that he intends to apply to the Privy Council for special leave to appeal against the order of the High Court. The case having been completely and finally disposed of by the High Court, there remains no ground on which bail can be granted.

Miscellaneous petition against an order of the First Class Magistrate, Mandla, dated the 9th August 1924.

Mr. *P. C. Dutt*, for the Applicant.

JUDGMENT.—The applicant was convicted by a First Class Magistrate, Mandla, of the offence of abetment of cheating and sentenced to a fine of Rs. 800 and imprisonment till the rising of the Court. He did not appeal. His co-accused who was convicted of the offence of cheating appealed to the Sessions Judge. The Sessions Judge upheld the conviction but reduced the sentence and referred the case of the applicant to this Court for enhancement of sentence. The applicant having been called upon to show cause why his sentence should not be enhanced contended, as he was entitled to do under s. 439 (6), Cr. P. C., that his conviction was bad. This Court, however, held that the conviction was correct and enhanced the sentence by awarding six months' rigorous imprisonment in addition to the sentence passed by the Magistrate.

The applicant now applies for bail alleging that he intends to apply to the Privy Council for special leave to appeal. He relies on *Queen-Empress* v. *Subrahmania Ayyar* (1). In that case special leave had been granted by their Lordships of the Privy Council and it appears that on the petitioner's application to them for bail they had expressed the opinion that the matter should be decided by the High Court which had convicted the applicant. On the application being made to the High Court a Bench of three Judges held that they had jurisdiction to make an order releasing the applicant on bail pending the decision of the Privy Council. No reasons are given for this opinion but it seems what influenced them was the admission of the appeal by the Privy Council. The present case differs from the above case in that no leave to appeal has yet been granted and the case cannot be said to be under appeal so as to make possible the application of s. 498 of the Cr. P. C. So far as matters stand at present the case has under the Cr. P. C., been completely and finally disposed of and there remains no ground for granting bail. I refer in this connection to *Diwan Chand*

(1) 24 M. 161; 2 Weir 657.

v. *King-Emperor* (2). The application is dismissed.

Z. K. *Application dismissed.*

(2) 15 P. R. 1908 Cr.; 19 P. W. R. 1908 Cr.; 8 Cr. L. J 89.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1541 OF 1924.

January 9, 1925.

Present:—Mr. Justice Campbell.

HARNAM SINGH—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Sentence—Maximum sentence, imposition of—Reasons, whether must be recorded.

Where a Court awards the maximum sentence provided by the law for an offence it should record its reasons for doing so.

Petition for revision against an order of the Additional District Magistrate, Amritsar, dated the 15th October 1924.

JUDGMENT.—In this case notice issued on the question of sentence. Neither in the Magistrate's judgment nor in that of the Court of Appeal is any reason given for the imposition of the maximum sentence of imprisonment provided by the law and there is no appearance on behalf of the Crown to support the order. It is possible that the offence is a very serious one, but the Courts below do not expressly say so and it is not difficult to imagine worse cases than that of the petitioner. He has already undergone more than three months' rigorous imprisonment and a substantial fine has been imposed.

I accept the petition to the extent of reducing the substantive sentence to the amount of imprisonment already undergone. The sentence of fine and imprisonment in default will stand.

Z. K. *Petition accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 81 OF 1925.

July 20, 1925.

Present:—Mr. Findlay, Officiating J. C., and Mr. Prideaux, A. J. C.

DIWAN DHIMAR—ACCUSED—APPELLANT

versus

EMPEROR—NON-APPLICANT.

Evidence Act (I of 1872), s. 30—Self-exculpatory confession of co-accused, admissibility of—Presumption—Recovery of weapon—House occupied by others besides accused.

The principle underlying s. 30 of the Evidence Act is that unless the parties are admittedly *in pari delicto* and unless the confessing prisoner implicates himself to the full as much as the co-prisoner, whom he is incriminating, it would be highly unsafe to rely on such confession so far as the co-prisoner is concerned. [p 1004, col. 2.]

In the absence of evidence connecting the accused with a weapon found in a house in which other people besides him reside or to which others have access, no presumption can be drawn against the accused from its recovery from the house. [p. 1005, col. 2.]

Queen-Empress v. *Nirmal Das*, 22 A. 445; A. W. N. (1900) 169; 9 Ind. Dec. (N. s.) 1334, followed.

Criminal appeal against the judgment of the Sessions Judge, Bhandara, dated the 28th April 1925, in Sessions Trial No. 5 of 1925.

Mr. *S. R. Mangrulkar*, for the Appellant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The appellant Diwan Dhimar as well as his co-accused Mansaram Gowara and Kodu Lodhi have been convicted under s. 302, Indian Penal Code, of the murder of one Budhu Lodhi at *Mauza* Jagpur (Balaghat) on the 1st of March 1925. Diwan has been sentenced to death, and the other two co-accused, who have also appealed, —Mansaram and Kodu Dhimars— have been sentenced to transportation for life each. The appeals of all three men are disposed of in this judgment. Two other co-accused Fagia and Timia Dhimars, who were tried in the Sessions Court on the same charge, were acquitted there.

The facts of the case are very fully stated in the judgment of the Sessions Judge, and there can be no doubt that the deceased Budhu Lodhi was brutally done to death on the night of the Ist of March or early morning of the 2nd idem. The wounds described in the evidence indicate that, in all probability, an axe or *kulhari* was the weapon used, and the circumstances of the case all suggest that there must have been several assassins involved in the crime.

Taking up first the appeal of Diwan, the material on which the Sessions Judge has found him guilty may briefly be summarised as follows:—

The fact that Mansaram and Kodu made the confessions (Exs P-14 and P-15) on the 7th of March 1925, to a Magistrate in the Balaghat Jail. In these confessions they both implicated Diwan as having taken a prominent part in the murder of Budhu.

The finding of a blood-stained axe (Art. A.) in the house of Diwan. That axe is shown by the report of Imperial Serologist (Ex. P-16) to have been stained with human blood.

The fact that Kodu, when he made discovery of the *balis* (Art. B-1) which were found concealed in his house, made a statement to the effect that Diwan had taken them out of the ears of the deceased after the murder and that he had made them over to him (Kodu) for the purpose of concealment.

Evidence of motive on the part of Diwan.

Turning first of all to the confessions of Mansaram and Kodu, it has been urged before us on behalf of the appellant Diwan that these confessions were inadmissible as against Diwan for the simple reason that they did not implicate in either case Mansaram and Kodu to the full extent and the latter two men rather suggested that they were in each case mere silent spectators of the crime, who took no part therein. We take up first of all to the confession of Mansaram. Its contents can only be described as a statement intended to be exculpatory as regards himself, while it attempts to implicate others in the murder. His story is that Kodu came to call him on the night in question at midnight. Diwan, Timia, and Fagia were with him. He was asked to come to Kodu's house in order to eat baked gram. The deceased was also with the party, and Kodu and Diwan went inside with deceased, as well as apparently Timia also. Fagia and Mansaram remained sitting in the *chhapri* outside. Mansaram, through a *tatti*, saw Diwan, Kodu and Timia assault Budhu with an axe, and having killed him they took the corpse to the back of the *badi*. There Kodu took out the deceased's *balis* and went home with them (*balis*), the others also returning to their respective houses. He went on to explain that the murder was presumably committed because Budhu had been carrying on an intrigue with Diwan's sister. Diwan, according to Mansaram, was the only one who had an axe, but Timia and Kodu had actively assisted him in the murder. Now, however, damning this statement may be to Mansaram himself, when read between the lines it cannot be otherwise construed than as one which is intended to eliminate altogether any idea that he was an accomplice in the murder; and indeed the direct suggestion is made that he happened to be a spectator of the murder simply because he had been induced to go to Kodu's house on a false pretext of partaking of baked gram there.

Kodu's confession is perhaps not to the same extent so self-exculpatory as that of Mansaram, but it differs in material details. According to him, he was at home at 1 A. M. when Mansaram, Diwan and Fagia came and called him. Budhu was apparently there also. Diwan at the same time said that Budhu was cutting jokes with his sister and apparently suggested that he must be disposed of. The party took Budhu to Kodu's house and made him sit in the *chhapri* there. Immediately thereafter Diwan struck Budhu with an axe and he died straight away. Timia—not Kodu as Mansaram declared—wrapped a handkerchief round the neck of the deceased. Thereafter, Mansaram, Diwan, Timia and Fagia lifted the corpse and took it to the back of the *badi*. Diwan then took the *balis* out of the ears of the deceased; according to Mansaram it was Kodu himself who had done this. As regards the *balis* Kodu says that he was practically forced to take them to his house and conceal them there.

The two versions of how the murder was committed, obviously are inconsistent on the most important details. According to Mansaram, for example, the brutal attack was made inside the house, while he (Mansaram) was sitting in the *chhapri*. According to Kodu the attack was made in the *chhapri*. Even Kodu's version of the affair makes his own part therein quite a minor one, and his confession can be read as consistent with an idea on his part of suggesting that, upto the actual attack on Budhu, he was unaware that there was any intention of murdering him.

It has been strongly urged on behalf of the appellant Diwan that in the circumstances of the case these two confessions of his co accused are not admissible against him. Reliance has been placed in this connection on the decision, amongst others, in *Queen* v. *Baijor Chowdhury* (1). In that case Kemp and Glover, JJ., held that the statement of one prisoner cannot be taken as evidence against another prisoner under s. 30 of the Evidence Act, unless the confessing prisoner implicates himself to the full as much as his co-prisoner implicates

(1) 25 W. R. 43 Cr.

whom he incriminates. It was further pointed out that the rules of evidence cannot be departed from, even although there may be a strong moral conviction of guilt. Amongst other decisions, relied on in this connection, that of Kotval and Kinkhede, A. J. Cs., in *Sheroo* v. *Emperor* (2), has been relied on. Therein it was pointed out that the principle laid down in *Queen* v. *Baijor Chowdhury* (1) above specified, must be given full effect to, and it was further pointed out that such a statement or confession must be a trustworthy statement in itself, and, secondly, there must be ample corroboration of the evidence of the accomplice in material particulars. A very similar decision was arrived at by Wadegaonkar, A. J. C., in *Raghunath* v. *Emperor* (3) Reference has also been made to the decision in *Gangapa Kardepa* v. *Emperor* (4) in this connection, where it was held that a conviction founded solely on the confession of a co-accused could not be sustained.

On behalf of the Crown reliance has been placed on the decision of Sanderson, C. J., and Beachcroft, J., in *Ah Foong Chinaman* v. *Emperor* (5), as well as on the old decision of Garth, C. J., in *Empress* v. *Ashootosh Chuckerbutty* (6), and it has been suggested that the confessions in this case are practically equivalent to evidence and can be accepted as affording proof within the meaning of s. 3 of the Indian Evidence Act. Reliance has also been placed on the view taken by Hallifax, A. J. C., in Criminal Appeal No. 247 of 1920, decided on the 6th of April 1921; but the view of the majority of Judges in that case was that the confession therein concerned was not evidence relevant under the Evidence Act as against a co-accused and that the only fair inference was that the Court might take such a confession into consideration with, or supplementarily to, relevant facts which might form the basis of a judgment. We see no reason for differing from this view. Reliance has also been placed on the decision of Drake-Brockman, J. C., in Criminal Appeal No. 183 of 1918, decided on the 19th of January 1918, in which it was held that there was no rule of law requiring a retracted confession to be snpported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law: *cf.*, also *Emperor* v. *Kehri* (7).

It seems to us, however, that in the present case it is needless to go into the technical question as to whether the confession of a co-accused is evidence as such or mere matter which the Court is entitled to take into consideration along with the evidence in the case. Our reason for this view is that it is an accepted principle with reference to the construction of s. 30 of the Indian Evidence Act that an obviously self-serving statement of the kind contemplated therein must at the best be almost entirely excluded as against a co-accused. It seems to us unnecessary to quote any of the voluminous case-law on the subject, because the obvious principle underlying the section is that unless the parties are admittedly *in pari delicto*, in other words unless the confessing prisoner implicates himself to the full as much as his co-prisoner whom he is criminating, it would be highly unsafe to rely on any such confession, so far, at least, as a co-prisoner is concerned. When a self-exculpatory confession of this nature is made, no guarantee whatever is afforded by it, in view of the fact that it tends entirely or almost wholly, to exonerate the maker and to lay the blame on others.

We would here remark that the position of the Sessions Judge seems to have been inconsistent in this connection. At the end of para. 9 of his judgment the following passage occurs:

"Such, in substance, are the statements of the two accused Kodu and Mansaram recorded by the Magistrate but, each of them attempted to exculpate himself as far as he could by trying to show that he did not take any active part in killing Budhu."

In para. 14 of the same judgment the following passage occurs:

"In the statements made by Kodu he did implicate himself almost to the same extent as he did the other four accused."

Now, as we have already shown, Mansaram's so-called confession is, all through, one obvious attempt entirely to exonerate

(2) 81 Ind. Cas. 891; 25 Cr. L. J. 1067; (1925) A. I. R. (N.) 78.
(3) 89 Ind. Cas. 516; 26 Cr. L. J. 1380.
(4) 21 Ind. Cas. 673; 38 B. 156; 15 Bom. L. R. 975; 14 Cr. L. J. 625.
(5) 48 Ind. Cas. 504; 46 C. 411; 22 C. W. N. 834; 28 C. L. J 105; 20 Cr. L. J. 24.
(6) 4 C. 483; 3 C. L. R. 270; 1 Shome L. R. Cr. R. 79; 2 Ind. Dec (N. S.) 307.
(7) 29 A. 434; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 360.

himself. He was on his own account a mere spectator, from outside the house of the murder, having been induced to go to the scene thereof on a false pretext. Kodu's statement is only on a slightly higher plane, and it does not explicitly admit that he knew before hand that murder was the object of the meeting at midnight. He says he took no part in the affair beyond the fact that the axe was held by him after the murder and that he was forced to take away the deceased's *balis*. Still further, as we have already shown, the two confessions are inconsistent and contradictory on even the broadest and most elementary details with regard to the murder.

When examined by the Committing Magistrate on the 4th of April 1925, both the confessions were completely retracted by each man concerned. Read between the lines these confessions may be damning evidence against the persons who made them, but, on the general principle underlying s. 30 of the Indian Evidence Act, we consider that it would not only be unsafe but wholly impossible to take them into consideration as against the appellant Diwan. The very nature of the statements suggests that when the confessions were made, each man was only attempting to exculpate himself at the expense of Diwan and the other alleged members of the party.

With regard to the contents of these confessions, as obviously giving a garbled account of the occurrence and not being reliable in themselves, even if we had considered that it was possible from the technical point of view to take them into consideration under s. 30 of the Indian Evidence Act, we should still not have felt it safe to rely upon them: *cf. Emperor* v. *Noni Gopal Gupta* (8). For the above reasons, therefore, we are of opinion that the confessions of Mansaram and Kodu cannot be taken into consideration in the present case as against Diwan.

Turning to the other evidence against Diwan, very little indeed is left. The most important fact is the recovery of an axe (Art. A) from his house, which has been proved to be blood-stained. This is, doubtless, a highly suspicious point as against Diwan, but it does not seem, of itself, to have afforded a sufficient basis for a conviction. Various other people lived in the house, in which the axe was found, including the father of Diwan and his cousin Chamrya. Timia, one of the accused acquitted in the lower Court, lives in the same compound. If these men or any of them were the murderers, it would seem to have been the easiest thing in the world for one of them to have introduced the axe into Diwan's house without his knowledge, and there has been, we may say, no proof that this axe, in particular, belonged to Diwan. It is difficult, therefore, to see why in the absence of other evidence any special presumption should be made against Diwan specially with reference to the finding of this axe in the house in question rather than against any other person living in the house, or having ready means of access thereto: *cf.*, *Queen-Empress* v. *Nirmal Das* (9).

As regards the fact that when Kodu discovered the *balis* and gave them up to the Police, he made a statement to the effect that Diwan had taken them out of the ears of the murdered man and given them up to him to keep, the Sessions Judge has clearly taken an incorrect view of the law. This was, indeed, frankly admitted by the Standing Counsel. Under s. 27 of the Indian Evidence Act, when any fact is deposed to as discovered in consequence of information given by an accused, only so much of such information, as relates to the fact thereby discovered, may be proved.

The further statement made by Kodu as to the circumstances under which the *balis* had come into his possession, was a mere explanatory one made after the discovery of the *balis*: *cf.*, evidence of Amarkanth (P. W. No. 11). But whether it was made after the discovery or at the time thereof, it is clearly not admissible as against Diwan. This item of the so-called evidence against Diwan must, therefore, admittedly be excluded.

We may add that the evidence as to the alleged motive on the part of Diwan for killing Budhu is very fragmentary. A witness like Budhu (P. W. No. 9) merely says that the deceased used to joke with Diwan's sister. Prosecution witness No. 5 Lotarya's evidence amounts to very little, and indeed the only part of it that would have been valuable relates to questions put to the witnesses in the course of the Police investigation and was inadmissible. The evidence of Gangaram (P. W. No. 10) does not

(8) 10 Ind. Cas. 582; 38 C. 559; 15 C. W. N. 593; 12 Cr. L. J. 286.

(9) 22 A. 445; A. W. N. (1900) 169; 9 Ind. Dec (N. S.) 1334.

advance the prosecution case in this connection to any appreciable extent, and *Musammat* Jasoda (P. W. No. 13) even gives the lie to the slight story the witnesses mentioned did tell. *Musammat* Janki (P. W. No. 15), the mother of the deceased, again implies that there was no criminal intimacy between Diwan's sister and the deceased. Prosecution witness No. 10 Gangaram's story strikes one, indeed, as absurd and improbable on the face of it. It is unlikely in the extreme that Mantula (Diwan's sister) would have volunteered the information of her having had a liaison with Budhu. Mantula, we may say, was not examined for the prosecution. The proof of motive, therefore, on the part of Diwan is fragmentary and unsatisfactory in the extreme. There may be against him a strong moral conviction, that he was concerned in this matter, but there is a complete absence of any sufficient legal proof of the fact. We, therefore, reverse the conviction and sentence in the case of Diwan and acquit him on the charge of murder. He will be at once released.

Coming to the case of the appellants Mansaram and Kodu, the circumstances are, however, different. In each man's case the confession is admissible as against himself and forms, in our opinion, extremely damning evidence. It is impossible to read either confession without feeling certain that each man was present at the murder of Budhu. The suggestion of Mansaram that he was taken to the place on a false pretext and remained an quiescent spectator is absurd on the face of it. No murderer or murderers, when they go to commit their crime, take with them mere spectators unless these latter are to render in some form or other vital help in the accomplishment of the crime. We see no reason why the confession of either man should, as against himself, be disbelieved. They had been in jail custody for a whole day when they made the confessions. If the story they told before the Committing Magistrate to the effect that they made the confessions at the instance of the Police were true, their contents would in each case have been much more thoroughgoing and on the face of them mere self-inculpatory than they were.

As regards Mansaram also there is the fact that his shirt (Art. N) was stained with human blood. There is the further fact that he as well as Kodu were at a singing party which preceded the murder, as also the fact (*cf.*, the evidence of *Musammat* Janki, P. W. No. 15) that Mansaram had come and fetched Budhu from his house on the night in question. In Mansaram's case, therefore, there is ample evidence to justify the finding that he was concerned in this murder, and the lesser sentence allowed by the law having been passed in his appeal is dismissed.

The case against Kodu, apart from his confession is even stronger still. There is the damning fact that the blood-stained *balis* belonging to the deceased were given up by him from his house, where they had been carefully concealed in an elaborate fashion in a hole in the wall, wrapped up in paper. There can be very little doubt that the traces of blood found in his house were, in reality, those of human blood, although it was not possible to have them examined by the Imperial Serologist. Apart from the recovery of the *balis* from Kodu, there is the further fact that on Kodu's *dhoti* (Art. M) human blood was also found. The evidence, in short, against Kodu is, if possible, even more thoroughgoing and even more convincing than that against Mansaram, and we fully concur in the correctness of his conviction by the Sessions Judge. The lesser sentence allowed by the law having been passed in his case, Kodu's appeal is also dismissed.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 538 OF 1925.

May 29, 1925.

Present:—Mr. Justice Harrison.

ABDULLA—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110, order under, immediately after acquittal of accused on charge of receiving stolen property, propriety of.

Immediately after his acquittal in a case under s. 411 of the Penal Code an order was passed against the accused under s. 110 of the Cr. P. C.:

Held, that in the circumstances an order under s. 110, Cr. P. C, should not have been made against the accused unless a very strong case was made out against him.

Case reported by the Sessions Judge, Karnal, with his letter No. 146-J, dated the 22nd March 1925.

FACTS.—Abdulla was restricted to his village for one year by order, dated 16th August 1924, of Agha Muhammad Sultan Mirza, Magistrate, First Class, Karnal. The appeal was rejected by the District Magistrate on 24th November 1924. Abdulla has now applied to this Court for revision.

GROUNDS.—Sixteen witnesses appeared for the prosecution and 27 in defence. The learned District Magistrate has upheld the conviction because he was of opinion that the Magistrate who made the inquiry and saw the witnesses had come to the conclusion that the evidence for the prosecution was to be believed and not that of the accused and also because among the prosecution witnesses there were a Station Master and a Sub-Inspector who suspected the appellant in cases of thefts of their own properties. A perusal of the evidence in detail, however, shows that the evidence for the prosecution does not prove much. Prosecution witnesses Nos. 5 and 8 do not say anything against the accused; P.W. No. 12 says that his reputation is not very bad; P.W. No. 11 says that he is not a professional thief; P. W. No. 4 says that one Santu suspected the accused of theft of his buffalo but Santu appeared as D. W. No. 26 and stated that no buffalo of his had ever been stolen. Accused has had litigation with P. Ws. Nos. 7 and 9 as appears from the copies of judgments which are on the record. Prosecution witnesses Nos. 10, 13, 14 and 15 admit in their cross-examination that they gave evidence in the previous case under s. 411, Indian Penal Code, against the accused in which the accused was acquitted. This leaves only five witnesses P. Ws. Nos. 1, 2, 3, 6 and 16. Of these P. Ws. Nos. 1, 3 and 16 are Sub-Inspectors and P. W. No. 2 is the Station Master. The Station Master says that he suspected the accused of theft of his buffalo and that accused had agreed to pay him Rs. 50 but did not keep his promise and yet he admits that in the report to the Police he made no mention of accused's name. Daulat Ram, Sub-Inspector, P. W. No. 3 says that he suspected the accused in a theft of his own but he was unable to find anything or to challan the accused. A mere suspicion is no proof of anything against the accused. As opposed to these prosecution witnesses we have got the consistent testimony of 27 witnesses for the defence who all say that the accused is of good character. The Sub-Inspector (P. W. No. 1) admits that he challaned the accused in a case under s. 411, Indian Penal Code, but he was acquitted in that and after that there have been no complaints received by the Sub-Inspector against the accused. The accused was similarly challaned under s. 110 in 1919 but was discharged. In my opinion the evidence on the record does not justify the conviction of the appellant. The case is, therefore, reported to the High Court for revision with a recommendation that the conviction be set aside.

Mr. *Shamair Chand*, for the Petitioner.

Mr. *C. H. Carden Noad*, Additional Government Advocate, for the Respondent.

ORDER.—Abdulla was restricted to his village for one year by an order, under s. 110, Cr. P. C. His appeal was dismissed by the District Magistrate. The case has been sent up by the learned Sessions Judge who has recommended that the order should be set aside, and he supports his recommendation by various reasons, one of which that for discrediting the evidence of the Station Master is shown by Counsel to be incorrect. For the reasons given by the learned Sessions Judge and also because the accused having just been acquitted in a 411 case, should not, in my opinion, have been restricted immediately after without a very much stronger case being made out, I accept the application for revision and cancel the order.

Z. K. *Application accepted.*

OUDH CHIEF COURT.

CRIMINAL REFERENCE No. 41 OF 1925.

November 19, 1925.

Present:—Mr. Justice Stuart, Chief Judge.

KASHI RAM KHOSLA AND OTHERS —APPELLANTS

versus

R. L. DISKSHIT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Interlocutory order—Jurisdiction of Magistrate—Revision.

Ordinarily there is no justification for a Supreme Court or any other Court to take up in revision what is really an interlocutory matter in a Criminal Court.

Therefore, no interference in revision is ordinarily justified with the order of a Magistrate holding that he has jurisdiction to try the case before him.

Case reported by the First Additional Sessions Judge at Bara Banki.

Mr. *H. C. Dutt*, for the Appellants.

Dr. *J. N. Misra*, for the Opposite Party.

JUDGMENT.—I refuse to interfere in this matter. I do not consider that there is ordinarily any justification for a Supreme Court or any other Court to take up in revision what are really interlocutory matters in a Criminal Court. There is no provision in the Cr. P. C., for an interlocutory appeal against a Magistrate's decision that he has jurisdiction in a case. The question which is being agitated before me is whether the Magistrate had or had not jurisdiction. If the authorities had intended that such an order should be liable to be questioned before the decision of the case a provision should have been made to enable the order to be questioned in appeal at that stage. I can conceive few instances where any real advantage would be gained by interrupting the course of a criminal trial through bringing up such a matter to a Court of Appeal. There is nothing in the circumstances of this case which would justify me deciding the point under argument at this stage. The worst of a reference of this kind is this. If I decide the matter on the merits and say that a Magistrate had no jurisdiction and close proceedings, the applicant would, undoubtedly, be satisfied, but if I take the opposite view and decide that the Magistrate had jurisdiction I am thereby intervening in a most improper manner on a point which may conclusively have to be decided on appeal In these circumstances I refuse to take any action and return the record and direct the Magistrate to continue the trial of the case. I wish to make it absolutely clear that I express no opinion one way or the other as to whether he had jurisdiction or not.

N. H. *Record returned.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 262 OF 1925.

May 22, 1925.

Present:—Mr. Justice Abdul Raoof.

GAHRA—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 498—Enticing away married woman—Wife neglected by husband—Sentence.

Where in a case under s. 498 of the Penal Code it appears that the husband and wife have not been on good terms and that the husband did not care much about the wife and took no action in respect of the offence until several months after the date of its commission, a heavy sentence is not called for.

Criminal revision from an order of the Sessions Judge, Ferozepore.

Mr. *Muhammad Rafi*, for the Petitioner.

Messrs. *Des Raj Sawhney* and *Sagar Chand*, for the Respondent.

JUDGMENT.—On the facts found all the ingredients of the offence contemplated by s. 498, Indian Penal Code, are found to exist. The offence has, therefore, been clearly established against the petitioner. I must, therefore, uphold the conviction.

The evidence, however, shows that the complainant and *Musammat* Sodhan were not on very good terms. She appears to have had a sheer contempt for her husband so far so that she treated her daughter with callousness when face to face with her in Court. I have also to take into consideration the fact that although the complainant was informed of the abduction of the woman immediately after the occurrence he took no action until after about eight months. This fact also shows that he did not care much about the woman. The woman has turned a Muhammadan and all these months she has been living as the wife of the petitioner. By the conviction of the petitioner the authority of the law has been fully vindicated. It is, however, not necessary to inflict a heavy sentence on the petitioner under the circumstances of the case.

I, therefore, accept the petition for revision so far as to reduce the sentence to the period already undergone which is over four months. The fine and the order as to compensation shall stand.

Z. K. *Appeal partly accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 203 OF 1925.

October 22, 1925.

Present:—Mr. Neave, A. J. C.

MRS. CHOB SINGH AND OTHERS—PLAINTIFFS —APPELLANTS

versus

A J. WILLIAMS AND OTHERS—DEFENDANTS —RESPONDENTS.

Partition—Decree directing payment in cash by one sharer to others, nature of—Charge, whether created—Procedure to enforce payment—Suit, separate, whether maintainable—Civil Procedure Code (Act V of 1908), s. 47—Transfer of Property Act (IV of 1882), s. 100—Partition Act (IV of 1893).

A sale which a partition Court can make under the provisions of the Partition Act must be a sale of a complete share and implies the transfer of ownership of some definite and specified property. [p. 1010, col. 1.]

A partition decree is a joint declaration of the rights of persons interested in the property of which partition is sought, and is a decree in favour of each sharer whether plaintiff or defendant. [p. 1010, col. 2.]

Where in order to equalize the shares allotted to the different co-sharers under a partition decree, a certain sum of money is directed to be paid by one sharer to the others, the remedy of the sharers to whom the payment is to be made is by way of execution of the decree for partition. No charge in respect of the amount to be paid is created on the share allotted to the party who is required to make the payment and a suit to enforce the payment of the money by way of charge is not, therefore, maintainable. [p. 1010, col. 1.]

Section 100 of the Transfer of Property Act, which defines the nature of a charge, requires both the specification of the property and that it should be made security for the payment of the money, there can be no charge unless the property concerned is reasonably certain. [p. 1010, col. 1.]

Second appeal from the judgment and decree of the Sub-Judge, Lucknow, dated the 12th January 1925, confirming that of the Munsif, South Lucknow, dated the 18th September 1924.

Mr. *Rajeshwar Prasad*, for the Appellants.

Mr. *Kashi Prasad*, for the Respondents.

JUDGMENT.—This is a second appeal by the plaintiffs arising out of a suit to enforce a charge on immoveable property. The house, a portion of which is in suit, originally belonged to an Indian Christian Mr. Hutchins who died in 1907 leaving a widow, a son and two daughters. The widow became owner of one-third and the children, who are appellants before this Court, to two-thirds of the house. The first respondent, Mr. Williams, obtained a personal decree against the widow and in execution brought her one-third share to sale, purchasing it himself at the auction. He then brought a suit for possession of his share by partition against the present appellants, and on the 17th July 1920 obtained a final decree. Under this decree he was allotted something more than an exact one-third of the house and was directed to pay Rs. 460 4 to the appellants on account of that excess. This sum has admittedly not yet been paid and Mr. Williams was in 1924 adjudicated insolvent.

In the present suit the plaintiffs-appellants contend that this sum of Rs. 460 4 constitutes a charge on the share which was allotted to Mr. Williams and that they are entitled to recover it by bringing that share to sale. Mr. Williams has been joined as defendant respondent No. 1. The other defendant-respondent is a subsequent transferee. It may be mentioned here that Mr. Williams obtained possession of his share and 18 months after the final decree was passed sold it to one Janki Prasad, who first mortgaged it to Kandhai Lal and then sold it to Kishen Dayal, the second respondent. The first sale to Janki Prasad was effected by an auction publicly held after due advertisement.

Both the Courts below have held that the sum of Rs. 460 4 does not constitute a charge on the property and that in any case the second respondent as a transferee without notice is not liable to pay it.

In appeal it is contended that a charge over the whole property has been created by operation of law or in the alternative that the language of the decree itself implies a charge over the excess awarded to Mr. Williams beyond his one-third share.

In support of the first contention the only authority cited is *Shahebzada Mohomed Kazim Shah* v. *R. S. Hills* (1). In this case, however, the facts were peculiar. The decree provided expressly that with the consent of all the parties interested in the properties the sums awarded should form a charge upon the allotments made to the parties in the partition. In the present case the final decree merely recites "it is declared that the plaintiff is the owner of the portion marked red in the map filed by Abdul Razzaq *Amin* annexed herewith. Plaintiff to deposit Rs. 460-4 according to the report of the said *Amin* on account of the excess price of his share." Stress has been laid on the use of the word "price" to

(1) 35 C. 388; 12 C. W. N. 373.

support a theory that essentially the decree is equivalent to a sale of the property. The Partition Act (IV of 1893) contains provisions empowering the Court making the partition to direct the sale of shares in certain cases and under s. 55 of the Transfer of Property Act the seller is entitled "where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money to a charge upon the property in the hands of the buyer for the amount of the purchase-money or any part thereof remaining unpaid." The argument is that Rs. 460-4 in this case is an unpaid part of the purchased money.

With these contentions I am unable to agree. There was clearly no sale in this case and the use of the word "price" in the decree is misleading. It should really have been "value". What the Court intended was evidently to award compensation to the present appellants for the small excess beyond his share which was allotted to Mr. Williams owing to the impossibility of making a division on the spot of the property exactly proportionate to the shares of the parties. The sales which a partition Court can make under the Partition Act must be sales of complete shares and a sale always implies the transfer of ownership of some definite and specified property. In the present case there was no definiteness and no specification of the property. It is suggested that the *Amin's* map and report which were incorporated in the decree defined the excess of which Rs. 460-4 represented the value but this is denied by the opposite party. Neither map nor report is on the record. It was obviously for the appellants if they relied on these to produce them. They have not done so. Further, s. 100 of the Transfer of Property Act, in which the nature of a charge is defined, required both the specification of the property and that it should be made security for the payment of money. There can be no security unless the property concerned is reasonably certain. In the present case Mr. Williams was entitled to one-third of the property and of this no transfer was made to him. It is only in respect of the undefined excess that it could possibly be argued that he acquired a title under the decree. This excess area being uncertain and undefined it cannot be said on what the charge would rest.

A partition decree as has been pointed out in *Pursotam Rao Tantia* v. *Radha Bai* (2) is a joint declaration of the rights of persons interested in the property of which partition is sought and is a decree in favour of each sharer whether plaintiff or defendant. The proper course for the appellants in the present case was to take out execution. They apparently realised this for in para. 4 of the plaint it is stated that the Court awarded to the plaintiff by way of compensation Rs. 460-4 and in para. 6 that the plaintiffs made various attempts to execute the order of the Court to recover the money from Mr. Williams. It appears that it was only when these attempts proved infructuous, and when four years after the passing of the decree Mr. Williams was adjudicated insolvent, that it occurred to them to file this suit.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(2) 6 Ind. Cas. 692; 7 A. L. J. 451; 32 A. 469.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 7-B OF 1924.

March 17, 1925.

Present:—Mr. Kotval, A. J. C.

DEVIDAS—APPELLANT

versus

TRIMBAK—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 74—Mortgages, prior and subsequent—Mortgage decree paid off by puisne mortgagee—Liability of other puisne mortgagee not made party to suit—Damdupat, *rule of, whether applicable.*

Under s. 74 of the Transfer of Property Act a puisne mortgagee who pays off a decree obtained by a prior mortgagee acquires the rights and powers of the prior mortgagee as determined by the decree. [p. 1011, col. 1.]

The decree is not, however, binding on any other puisne mortgagee who was not made a party to the suit and the liability of such puisne mortgagee must be determined on the basis of the mortgage. Whatever may be the position under the decree, a puisne mortgagee who was not made a party to the suit is not liable under the rule of *damdupat* to pay more than double the amount of the principal secured under the prior mortgage. [*ibid.*]

Appeal against a decree of the Second Additional District Judge, Amraoti, dated the 3rd November 1923, modifying that of the Additional Munsif, Daryapur, dated the 26th of February 1923.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *R. N. Padhye*, for the Respondent.

JUDGMENT.—Defendants Nos. 1 and 2 borrowed Rs. 120 from Gopal Mukund Buti on the 7th February 1912 and mortgaged their house as security for the loan. Defendant No. 3's husband was surety for the debt. On the 9th August 1915 Buti instituted a suit on the mortgage and on the 29th October 1915 obtained a decree for sale for Rs. 81-5-0 and interest till the date fixed for payment against defendants Nos. 1 to 3 and defendants Nos. 4 to 6 who were subsequent mortgagees. On the 28th April 1916, a day before the date fixed for payment, defendant No. 4 paid Rs. 84 to Buti in satisfaction of the amount and interest and obtained a receipt. He then transferred his rights under Buti's mortgage obtained by the payment of Rs. 84 to the plaintiffs. The plaintiffs filed this suit for Rs. 168 the *damdupat* of Rs. 84 on the 23rd September 1922. Defendant No. 7 who is the contesting party in the litigation is a subsequent mortgagee who should have been but was not made a party to Buti's suit on his mortgage. The lower Appellate Court has disallowed the claim for *damdupat* and has decreed Rs. 84 only. It has found that this sum was decreed as the *damdupat* of Rs. 42 the principal due on Buti's mortgage at the date of his suit. The only point with which we are now concerned is whether the plaintiffs are entitled to claim *damdupat* or any interest on the sum of Rs. 84.

Under s. 74 of the Transfer of Property Act the plaintiffs have acquired the rights and powers of the mortgagee as such by their payment. These rights are the rights created by the decree, *Narayan* v. *Nathmal* (1), and if defendant No. 7 had been a party to Buti's suit the plaintiffs might have become entitled to further interest for the period after the date fixed for payment. But the decree is not binding on defendant No. 7 as he was not made a party to the suit. His liability must be determined on the basis of the mortgage. If Buti had sued him now Buti would not have got a decree against him for more than Rs. 84. There is no reason why more should be allowed against him because the plaintiffs as defendant No. 4's representatives are suing instead of Buti.

The lower Appellate Court's decision is correct. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 65 Ind. Cas. 275; 17 N. L. R. 200; (1922) A. I. R. (N.) 155.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1085 OF 1925.

November 16, 1925.

Present:—Mr. Justice Cuming and Mr. Justice B. B. Ghose.

L. R. COUNSELL—PETITIONER

versus

Srimati SUKUMARI DEBI—OPPOSITE PARTY.

Calcutta Rent Act III of 1920, ss. 15, 18, 24—Proceeding to fix standard rent—Rent unduly low, question of, not raised before Controller—Revision—Question, whether can be raised before President—Procedure on revision—Decision under fixing standard rent by consent of parties, whether can be considered—Order fixing standard rent of portion of premises, whether relevant in fixing standard rent for whole building.

When the proceedings before the Rent Controller have been such that he was not called upon to exercise his judgment and to give his opinion as to whether the rent which was paid on the 1st November 1918 in respect of the premises in dispute was unduly low or not, it is not open to either party by an application for revision of the order of the Rent Controller under s. 18 of the Calcutta Rent Act, to start a new point and allege that the rent was unduly low and ask for the opinion of the President and get a standard rent fixed on that basis by the President. It is a wrong application of the word "revision" to say that although the decision of the Rent Controller was not sought on a particular point, it is open to any of the parties by an application for revision to the President of the Rent Tribunal to start a new point altogether and to have his decision on the point for the first time. [p. 1013, cols. 1 & 2.]

Section 24 of the Calcutta Rent Act merely lays down that where there is a decision of the Controller on a particular question, the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him. Where, however, there is no decision of the Rent Controller to revise, there is nothing which the President of the Tribunal can revise. [p. 1013, col. 1.]

A decision fixing the standard rent in respect of certain premises must be regarded as a decision *in rem*, but where standard rent is fixed by consent of parties, the order fixing the standard rent cannot be taken into consideration in any subsequent proceeding between different parties for fixing a standard rent, nor can a decision fixing a standard rent of a portion of a certain premises be Considered in a proceeding for fixing a standard rent for the whole of the premises, as the two premises are not identical. [p. 1013, col. 2.]

Rule against an order of the President of the Tribunal Calcutta Improvement Trust, dated the 17th August 1925.

Dr. *D. N. Mitter* and Babu *Hira Lal Ganguli*, for the Petitioner.

Sir *Provas Chandra Mitra* and Babu *Hira Lal Chuckerbutty*, for the Opposite Party.

JUDGMENT.

Ghose, J.—This case came before this Court once on a previous occasion from a decision of the President of the Tribunal,

On that occasion the President had dismissed the application for fixing a standard rent on the ground that the demised premises did not fall within the provisions of the Calcutta Rent Act. The decision of the learned President of the Tribunal was set aside by this Court and the case was sent back to him for trial of the other issues involved in the case.

The present Rule was obtained by the tenant for the revision of the judgment now pronounced by the President fixing the standard rent in revision of the standard rent fixed by the Rent Controller.

Before the Rent Controller the relevant question that was raised apparently was that the premises were let out on a higher rent than what was alleged by the tenant on the 1st of November 1918 The Pleader for the landlady made an application before the Rent Controller to the effect that the hearing of the matter should be adjourned till the decision of an appeal arising out of a suit for rent brought in the Alipur Court was decided. This the Controller refused to do. Upon that the Pleader appearing for the landlady did not choose to take any part in the proceedings and did not cross examine any of the witnesses examined on behalf of the tenant who was the petitioner before the Rent Controller. On the evidence the Rent Controller found that the premises were let out on a rent of Rs. 235 per month on the 1st of November 1918 and adding 10 per cent. to that amount he fixed Rs. 259 as the standard rent for the demised premises.

The landlady applied for revision of that order under s. 18 of the Rent Act on various pleas. A large number of issues were framed by the President. The material finding with regard to the rent at which the premises were let on the 1st of November 1918 as found by the Controller was affirmed by the President of the Tribunal. The learned President then took up for his consideration what were the 5th and 6th issues before him. These had reference to the fact whether a standard rent had been previously fixed with regard to the premises between two persons, namely, Tuni Meerza and Wishart and to a previous order with regard to the fixing of standard rent of a portion of the building which is now in question which is said to have been 6/7ths of the disputed premises. The President while observing that fixing of standard rent is an order *in rem* did not accept the fixing of the standard rent between Tuni Meerza and Wishart as such on the ground that the order was passed on compromise between the parties. He, therefore, used the fact that the rent was standardized only as a piece of evidence in coming to his conclusion and he made the same use of the standard rent fixed for the portion of the premises. The argument which he used was that in fixing the rent for the portion (6/7ths of the demised premises) the Rent Controller took into account what he thought to be the proper standard rent of the entire premises. This finding he used for the purpose of coming to his conclusion, which is the vital question in this case, that the rent at which the premises were let on the 1st November 1918 was too low. There was another fact which he took into consideration in coming to his conclusion and it was that the premises were let out at Rs. 280 in November 1913.

The decision of the President turned upon the question involved in the 4th issue before him.

The point taken on behalf of the petitioner before us may be shortly stated thus: Under s. 15, sub-s. (3), cl. (*d*) the Rent Controller may fix the standard rent at such amount as he deems just where the rent paid on the 1st day of November 1918 was in the opinion of the Controller unduly low and the discretion of the Controller is limited by the 1st portion of the proviso (*i*) where it is stated that under cl. (*d*) the standard rent shall not be fixed at a higher amount than the highest rent actually paid for the premises at any time since the 1st day of November 1918. As I have already stated the procedure followed by the opposite party before the Rent Controller was such that the Rent Controller was not called upon to exercise his judgment and to give his opinion as to whether the rent which was paid on the 1st November 1918 was unduly low or not. The Rent Controller found the rent as it was on the specified date. There was a dispute as regards the amount of rent paid at the time which he decided in favour of the allegation made by the tenant and which has been found to be correct by the President of the Tribunal. Can the landlady under such circumstances by an application for

revision of the order of the Rent Controller under s. 18 of the Rent Act start a new point and allege that the rent at that time was unduly low and ask for the opinion of the President and get a standard rent fixed on that basis by the President ?

It seems to me that the contention on behalf of the petitioner is sound. I think that under the Act the Controller should first form his opinion whether the rent on the prescribed date was unduly low under cl. (*d*) of s. 15 (3) of the Rent Act, and then he is to exercise his discretion in fixing the standard rent. When he does that it is open to the President of the Tribunal to revise that order on an application made by any of the parties. It seems to me a wrong application of the word " revision " to say that although the decision of the Rent Controller was not sought for on a particular point it was open to any of the parties by an application for revision to the President of the Tribunal to start a new point altogether and to have his decision—not revising a decision of the Rent Controller but a new decision of his own—for the first time.

It is contended on behalf of the opposite party that s. 24 of the Rent Act which lays down that in revising the decision of the Rent Controller the President of the Tribunal shall follow, as nearly as may be, the procedure laid down in the C. P. C., for the regular trial of suits, implies that the President can treat the application for revision as a suit irrespective of what was done before the Rent Controller. It seems to me that that is not the proper reading of that section. Although it is difficult to understand what is really meant by that provision, it seems to be clear that the President of the Tribunal is to follow the procedure laid down in revising a decision of the Rent Controller. If there is no decision of the Rent Controller to revise there is nothing which the President of the Tribunal can revise. Apparently this section lays down that where there is a decision of the Controller on a particular question the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him.

It seems to me, therefore, that the President of the Tribunal had no jurisdiction under s. 18 or s. 21 of the Rent Act to express his opinion as to whether the rent paid on the 1st of November 1918 was unduly low or not in the absence of anything to show that the Rent Controller was invited to express his opinion upon that point.

It has been further argued on behalf of the opposite party that assuming that the President had no jurisdiction to fix the standard rent on the basis that the rent paid on the 1st November 1918 was unduly low he has fixed the standard rent after taking into consideration the two proceedings before the Rent Controller to which I have already referred. But the judgment of the President of the Tribunal can hardly be construed in that way. It is quite clear that he treats the decisions in both the proceedings as evidence for the purpose of coming to the conclusion that the rent paid on the 1st November 1918 was too low.

An attempt was made to support the dedecision of the President of the Tribunal on the ground that the standard rent fixed in the case between Tuni Meerza and Wishart should be considered as a decision *in rem*, because although there is a recital of the decision having been arrived at on consent the Rent Controller was not authorized to fix a standard rent on consent of the parties. That may be so. But it is quite clear that the Rent Controller who had decided that case treated his decision as having been arrived at on consent of parties. If that is so the President of the Tribunal was quite right in his opinion that it could not operate as a judgment *in rem*. Nor could the decision fixing a standard rent of a portion of the premises be so considered, as the two premises are not identical.

In my opinion, therefore, the judgment of the President of the Tribunal cannot stand and must be reversed and the decision of the Rent Controller restored.

The Rule is made absolute with costs, the hearing fee will be five gold *mohurs*.

Cuming, J.—I agree.

Z. K. *Rule made absolute.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 309 OF 1924.

November 6, 1925.

Present:—Mr. Justice Raza.

FAQIR MOHAMMAD KHAN AND ANOTHER —DEFENDANTS—APPELLANTS

versus

SHAMBHU DATT AND OTHERS—PLAINTIFFS —RESPONDENTS.

Appeal—Appellant, duty of—Burden of proof.

The burden of showing that the judgment appealed from is wrong lies upon the appellant. If all that he can show is nicely balanced calculations which lead to equal possibilities of the judgment on either the one side or the other being right, he is not entitled to have the judgment upset in appeal.

Appeal against the judgment and decree of the First Additional Subordinate Judge, Gonda, dated the 23rd April 1924, reversing that of the Munsif, Gonda, dated the 13th March 1922.

Mr. *Hakimuddin*, for Mr. *Mohammad Ayub*, for the Appellants.

Mr. *S. M. Ahmad*, for the Respondents.

JUDGMENT.—This is a defendants' appeal arising out of a declaratory suit. Ram Saran (deceased) sold an 8-pies share out of the plots in suit to the respondents Nos. 1 and 2 by a deed dated the 19th January 1922. The plaintiffs brought the present suit for a declaration that the sale-deed was null and void as against them. A half share in the property belongs to the respondents Nos. 1 and 2 and the plaintiffs brought the suit claiming the remaining half share. They alleged that Ram Saran had no share in the plots in suit and wanted it to be declared that no title passed to the defendants Nos. 1 and 2 under the sale deed in question. The defendants Nos. 1 and 2 denied the plaintiffs' title to the 8 pies' share in question and their possession also. The claim was rejected by the first Court but decreed by the Court of first appeal. The defendants Nos. 1 and 2 have brought this appeal challenging the findings on the points decided against them. The principal points for decision in this appeal are these:—

Had Ram Saran any right to or interest in the property in suit?

Are the plaintiffs entitled to the share claimed by them?

The appellants' learned Counsel tried to show that with reference to Exs. A-7 and A-1 that Ram Saran was owner of the property in dispute, but he could not show that and admitted in the course of arguments that Ram Saran's name was not entered in any paper as owner of any share in the plots in suit. I do not find and have not been referred to any evidence showing that Ram Saran had a title (or subsisting title) to the property in respect of which the sale-deed in question was executed by him.

As to plaintiffs' title, it is amply proved by the evidence on the record that they have a half share in the property. The decree passed by the Settlement Court and also the decree which they obtained against the father of the defendants Nos. 1 and 2 themselves show clearly that they are entitled to a share in the property and that the extent of their share is one-half. In my opinion the defendants Nos. 1 and 2 cannot question the plaintiffs' right to or interest in the property to the extent of the half share. So far as I see they dishonestly obtained the sale-deed in question from Ram Saran to claim the property in dispute against the plaintiffs. In my opinion the defendants Nos. 1 and 2 cannot question the plaintiffs' right to or interest in the property to the extent of the half share, so far as I see they dishonestly obtained the sale-deed in question from Ram Saran to claim the property in dispute against the plaintiffs. In my opinion the learned Subordinate Judge was perfectly right in finding that the plaintiffs have a half share in the property and that Ram Saran owned no share in the plots in suit. The sale-deed executed by Ram Saran does not affect the plaintiffs' half share.

As pointed out by their Lordships of the Privy Council in the case of *Nabakishore Mandal* v. *Upendrakishore Mandal* (1) "the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded." So far as I see the appellants have failed to show in this case that the judgment appealed from is wrong.

Hence this appeal is dismissed with costs. The appellants shall pay the respondents' costs.

Z. K. *Appeal dismissed.*

(1) 65 Ind. Cas. 305; 20 A. L. J. 22; (1922) M. W. N. 95; 26 C. W. N. 322; 35 C. L. J. 116; 42 M. L. J. 253; 24 Bom. L. R. 346; 15 L. W. 417; 30 M. L. T. 234; 3 P. L. T. 311; (1922) A. I. R. (P. C.) 39 (P. C.).

OUDH CHIEF COURT.

SECOND RENT APPEAL No. 25 OF 1925.

November 6, 1925.

Present :—Mr. Justice Hasan and Mr. Justice Misra

MOHAMMAD JAIMUR KHAN—PLAINTIFF—APPELLANT

versus

RAGHUNATH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Mortgage of under-proprietary rights—Suit to recover rent by superior proprietor against under-proprietor—Rate of rent, determination of—Suit by mortgagee to enforce mortgage—Property purchased by mortgagee—Suit by superior proprietor against mortgagee for recovery of rent—Res judicata.

An under proprietor effected a mortgage of his under-proprietary rights and thereafter the superior proprietor obtained a decree for arrears of rent against the under-proprietor on the basis of a rental computed with reference to the annual gross income of the tenure, without making the mortgagee a party to the suit. The mortgagee subsequently brought a suit on foot of his mortgage and in execution of the decree obtained by him purchased the tenure himself. In a suit by the superior proprietor to recover rent from the mortgagee auction-purchaser:

Held, that the rate at which rent had been decreed in the previous suit brought by the superior proprietor against the under-proprietor did not operate as *res judicata* against the mortgagee who was not a party to that suit and was not bound by the decree passed in that suit against his mortgagor. [p. 1016, col. 1.]

Appeal from a decree of the Additional District Judge, Gonda, dated the 25th January 1925, confirming that of the Assistant Collector, First Class, Gonda, dated the 30th July 1923.

Messrs. *M. Wasim* and *M. Mahmud Beg*, for the Appellant.

Mr. *Niamatullah*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal in a suit for arrears of rent against the defendants from the decree of the Additional District Judge of Gonda, dated the 21st January 1925. The Additional District Judge confirmed the decree of the Trial Court except on a certain minor matter with which we are not concerned in this appeal.

The original owner of the under-proprietary tenure in respect of which the rent is claimed by the plaintiff-appellant was one Muhammad Khan. He made a simple mortgage of the entire tenure in favour of the father of Raghunath Singh and Birnar Singh, respondents Nos. 1 and 2 of the present appeal, on the 31st March 1914. The superior proprietary interests through a process with which we are not concerned came to be vested in one *Musammat* Kulsum Bandi. *Musammat* Kulsum Bandi brought several suits for recovery of rent against the original under-proprietor and other persons who had acquired interest in the under-proprietary tenure but to none of those suits the mortgagee or his representatives were ever made a party. The superior proprietor obtained decrees for rent in those suits at a rental which was computed with reference to the annual gross income of the tenure. The mortgagee then brought his suit for sale of the property over which he held the mortgage, that is the entire under-proprietary tenure, with which we are now concerned in this appeal. He obtained a preliminary decree on the 13th November 1918 against the original mortgagor and other persons who had acquired interest in the under-proprietary tenure. This decree was made absolute on the 3rd September 1919. In due course the under-proprietary tenure was sold in obedience to the mortgage-decree and purchased by the mortgagee's sons, Raghunath Singh and Birnar Singh, on the 23rd October 1920.

The only point argued in support of the appeal before us is that the decrees which *Musammat* Kulsum Bandi had obtained operated as *res judicata* in favour of the plaintiff-appellant in the matter of the amount of rent. We think that the argument cannot be accepted. It was broadly argued that an auction-purchaser buys the interest of the judgment-debtor. It was also argued that an auction-purchaser in a sale under a mortgage-decree buys the interests of his mortgagor as they stood at the date of the purchase. According to our judgment both these lines of arguments miss the crucial point which is involved in the proposition necessary for the learned Advocate for the appellant to establish in support of the plea of *res judicata*. We have to consider the nature and the extent of the estate which a purchaser at an auction sale in execution of a mortgage-decree acquired under that sale. If we were to decide this case according to English Law nothing could be easier than to make ourselves perfectly intelligible. On a mortgage having been created in respect of an estate in fee simple the legal estate at once vests in the mortgagee and the mortgagor is left with nothing more than an equitable interest which is popularly described as equity of redemption. But though we are not administering the rules of English Law we

think we are perfectly justified for the purposes of deciding the plea of *res judicata* in resorting to the distinction just now mentioned. When this particular mortgage was made by Muhammad Khan in favour of Sital Bakhsh, the father of the respondents Nos. 1 and 2, both the mortgagee and the mortgagor held separate defined interests in their own rights. None could be said to represent the other and when the sale took place in pursuance of that mortgage all that the auction-purchaser got was the estate which had remained with the mortgagor. To that extent he is the representative of the mortgagor but as regards the interest which he himself held, which we prefer to describe as the legal estate that vested in him all along from the date of the mortgage right up to the date of the purchase, it is admitted that that estate was never represented in the suits for arrears of rent. The view which we are taking is expressed in a different form in a recent decision of the High Court of Bombay in the case of *Ramchandra Dhondo* v. *Malkapa Narsapa* (1). We desire to say most respectfully that we are in entire agreement with that decision. We must, therefore, hold that the plaintiff-appellant is not entitled to avail himself of the plea of *res judicata* in the matter of the rate of rent as against the respondents.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 36 Ind. Cas. 443; 40 B. 679; 18 Bom. L. R. 757.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2318 AND 2319 OF 1922 AND 1266 TO 1268 OF 1923.

April 20, 1925.

Present:—Mr. Justice Cuming and Mr. Justice Chakravarti.

CHANDI CHARAN LAW—PLAINTIFF—APPELLANT

versus

MEHER BANU AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 105, 110—Landlord and tenant—Kabuliyat *providing for payment of additional rent for additional area—Proceeding taken by landlord for settlement of fair rent for additional area—Back rents, whether can be recovered on basis of* kabuliyat.

Where a landlord who is entitled to recover additional rent for additional area under the terms of a *kabuliyat* executed by the tenant elects to apply under s. 105 of the Bengal Tenancy Act for the settlement of fair rent on the ground of additional rent for additional area, he is bound by the terms of s. 110 of the Act and such settlement can take effect only from the beginning of the agricultural year next after the date of the decision fixing the rent. It is not in such a case open to the landlord to sue for the back rents of the additional area on the basis of the *kabuliyat*.

Appeals against the decrees of the District Judge, Noakhali, dated the 25th July 1922, affirming those of the Munsif, Feni, dated the 12th January 1922.

Mr. *Narendra Chandra Basu* (with him Babu *Satyendranath Mitra*), for the Appellant.

JUDGMENT.—These five appeals raise a point of some importance. The plaintiff in all the five appeals is the landlord and he sues for arrears of rent of 1323, 1324, 1325 and 1326 *B. S.* in respect of a certain *taluk* and four *jotes*. The suit for rent was brought under the terms of a *kabuliyat* for additional rent for an additional area which had been found in certain settlement proceedings under s. 105 of the Bengal Tenancy Act. It would appear that there were certain settlement proceedings under Chapter X of the Bengal Tenancy Act and during the course of those proceedings the landlord applied under s. 105 for settlement of fair rents in respect of the *taluk* and the four *jotes* on the ground of additional rent for additional area. The Settlement Officer has given an increased rent for the increased area. The landlord has now sued for rent of the original area plus the back rents for the additional area which has been found to be in the defendants' possession by the Settlement Officer. The lower Courts have allowed the plaintiff's claim so far as regards the rent for the original area, but have disallowed his claim for additional rent for the additional area on the ground that as the plaintiff had proceeded under s. 105 of the Bengal Tenancy Act, the increased rental took effect from the beginning of the agricultural year next after the date of the decision and that, therefore, his claim for additional rent for the additional area for the period previous to the decision was not sustainable.

The learned Advocate appearing for the appellant landlord has contended that even though under the terms of s. 110, the additional rent would be realizable from the agricultural year next after the date of the

decision of the Settlement Officer, still under the terms of his contract he is entitled to additional rent for the additional area for the three years preceding the date of the Settlement Officer's decision and that the Settlement Officer's decision is no bar to the plaintiff's suing for additional rents. We are, however, of opinion that the decision of the learned District Judge is correct. Section 110 of the Bengal Tenancy Act provides that "when a rent is settled by a Revenue Officer under this Chapter, it shall take effect from the beginning of the agricultural year next after the date of the decision fixing the rent".

Now, it was open to the plaintiff to have waited until the final publication of the Record of Rights, and, he could, then, three months after the final publication, have brought a suit on the contract. He did not, however, choose to do so. He elected a remedy which was also open to him, namely, to apply under s. 105 and having done so, he is bound by the terms of s. 110 which provides that such settlement of rent shall take effect from the beginning of the agricultural year next after the date of the decision fixing the rent; but having proceeded under s. 105, it was not open to him to sue on the contract for the back rents of the additional area. This being so, the decision of the learned District Judge is correct and these five appeals are dismissed.

As the respondents do not appear we do not make any order as to costs of these appeals.

Z. K. *Appeals dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 71 OF 1923.

July 21, 1925.

Present:—Mr. Justice Jackson.

VEMULAMANDA BHADRAYYA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PENUMETCHA JAGGARAJU—PLAINTIFF—RESPONDENT.

Execution of decree—Judgment-debtor, whether entitled to scrutinize validity of previous applications—Failure to raise objections, effect of—Res judicata.

There is nothing in law absolutely prohibiting a judgment-debtor from examining the validity of all the previous applications for execution made by the decree-holder; but in practice he will often find that he is barred by *res judicata*. [p. 1018, col. 2.]

Where a judgment-debtor is appraised of proceedings in execution, it is incumbent on him to raise all legal objections to their sustainability and if he omits to do so it is not competent to him to make an application subsequently to have it declared that certain prior execution proceedings were invalid or that a previous execution petition was barred by limitation. [p. 1017, col. 2; p. 1018, col. 1.]

Appeal against an order of the Court of the Subordinate Judge, Narasapur, in A. S. No. 191 of 1922, dated the 26th January 1923, preferred against an order in E. A. No. 3186 of 1921 in O. S. No. 1156 of 1913 on the file of the Court of the District Munsif, Bhimavaram.

Mr. *K. Venkatarama Razu*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—Appeal against the order of the Subordinate Judge of Narasapur, in A. S. No 191 of 1922.

The decree-holder in O. S. No 1156 of 1913 filed execution applications in 1914, 1918 and 1919. On 7th December 1921, the judgment-debtor moved the Court of execution under s. 47 of the C. P. C., for a declaration that the execution petition of 1918 was barred by limitation, and thus the proceedings of 1919 would also not be valid.

It has been found by the District Munsif in the original proceedings that the petitioner was duly appraised of the execution petition of 1919 and then was the time that she should have contested the validity of that of 1918. The question for determination is whether she can raise the plea at this late stage.

The case reported as *Rajilagiripathy* v. *Bhavani Sankaran* (1) is good authority for holding that such pleas should be advanced at the earliest opportunity and if the party fails to take action he cannot raise them on subsequent occasions. The Privy Council ruling reported in *Rajah of Ramnad* v. *Velusami Tevar* (2) is to the same effect. The passage quoted on page 756 of Rustomji's Limitation Act, 3rd Edition: "The reasonable construction of the words of cl. 5, Art. 182 would seem not to allow a

(1) 80 Ind. Cas. 103; 47 M. 641; 19 L. W. 650; 47 M. L. J. 4; (1924) M. W. N. 527; (1924) A. I. R. (M.) 673.

(2) 59 Ind. Cas. 880; 40 M. L. J. 197; 19 A. L. J. 168; 13 L. W. 290; (1921) M. W. N. 51; 33 C. L. J. 218; 25 C. W. N. 581; 23 Bom. L. R. 701; 29 M. L. T. 345; 48 I. A. 45 (P. C.).

roving examination into all the previous applications in order to ascertain whether there might not be a weak link in the chain" seems, as the learned commentator himself observes to be too unequivocally worded. It might run "there is nothing in law absolutely prohibiting a party from examining all the previous applications; but in practice he will often find that he is barred by *res judicata*."

I find that the present case is one where the party had full opportunity of raising the question at the time of the application of 1919 and she cannot raise it after the proceedings of 1918 and 1919 have been allowed by her to be treated as in accordance with law. The findings of the lower Courts are correct.

I see no force in the contention that the learned Subordinate Judge gave no finding. He distinctly states what he holds to be the correct view, but adds that it is unnecessary because he has also found that no petition lies under s. 47 of the C. P. C., a point which requires no consideration, since I have confirmed the order of the lower Courts on the merits.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 431 OF 1924.

November 6, 1925.

Present:—Mr. Findlay, Officiating J. C.

Musammat SARJA AND ANOTHER—
—PLAINTIFFS—APPELLANTS
versus
Musammat TULSI AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 28—Sale-deed, registration of—Property situate in and outside jurisdiction of Registration Officer—Vendor having no title to property within jurisdiction—Non-transferable property included in sale-deed—Registration, validity of—Transfer of Property Act (IV of 1882), s. 54—Sale—Delivery of possession—Constructive possession.

Registration of a sale-deed is invalid if the title of the vendor is found to be non-existent in the only item of the property sold that is situate within the jurisdiction of the Registration Officer. [p. 1020, col. 1.]

In order to render registration a nullity, it is not necessary that the fraud practised on, or misrepresentation made to, the Registering Officer must be by both the parties in collusion. Any fraud or misrepresentation by one party alone is sufficient to render the registration a nullity. [*ibid.*]

For the purpose of registration, the Registering Officer is bound in normal cases to accept the description of the property given in the deed presented for registration before him and such registration is absolutely void if one of the properties described in the deed is on the face of it non-transferable, *viz.*, an occupancy field, irrespective of the fact whether it is really so or not. [p. 1019, col. 2.]

For the purposes of s. 54 of the Transfer of Property Act in order that a sale of immoveable property worth below one hundred rupees should be valid, there must be a real delivery of the property, and merely some sort of constructive possession is not sufficient. [*ibid.*]

Appeal against the decision of the District Judge, Bhandara, in Civil Appeal No. 6 of 1924, dated the 30th November 1923.

Messrs. *M. V. Abhyankar* and *A. V. Wazalwar*, for the Appellants.

Mr. *M. B. Kinkhede*, R. B., for the Respondents.

JUDGMENT.—The present appellants *Musammat* Sarja and *Musammat* Janki brought a suit against defendants-respondents *Musammat* Tulsi and *Musammat* Zibu for a declaration that the deed of gift dated the 19th March 1913 executed by Muka the deceased father of the plaintiffs and of the second defendant in favour of the first defendant was void. In particular it was urged that the registration of the document of gift at Brahmapuri was invalid and was only effected there by fraudulently inserting amongst the property to be passed a mango tree situated in *Mouza* Bothali of the Brahmapuri Tahsil, whereas all the other property was situated in the Bhandara Tahsil.

On the issues which arose on the pleadings of the parties the Subordinate Judge, Bhandara, came to the following findings:—

(*a*) that Muka's ownership of the trees in question was not established ;

(*b*) that the registration of the deed of gift at Brahmapuri was in the circumstances a nullity ;

(*c*) that the plea of an oral Will by Muka was not established and that the deed of gift could not be regarded as such a Will.

Musammat Tulsi appealed to the Court of the District Judge, Bhandara. The latter held that Muka had acquired the mango tree or at least a share in it from the rightful owner Dewaji before he executed the deed of gift, and that the said deed of gift conferred a good and valid title on the appellant Tulsi. On these findings the Judge of the lower Appellate Court reversed the decision of the first Court and

dismissed the plaintiffs' suit. The plaintiffs have now come up to this Court on second appeal.

The first and all important points for consideration is whether Muka was the owner of the mango tree in question either in whole or in part prior to the execution of the deed of gift dated 19th March 1913. The terms of the deed of gift (Ex. P-1) are unequivocal in this connection and clearly imply that the said tree was unreservedly Muka's property just like the other items included therein. The all important evidence in this connection is that of D. W. No. 1, Tatu, the son of Dewaji, the vendor of the tree in question. The first defendant is the daughter of the sister of this witness who deposed that when Muka attempted to register the deed of gift at Brahmapuri, it was discovered that no property in the said Tahsil belonged to Muka and hence it was arranged to transfer the tree to him. This witness frankly admits that no possession of the tree was given over to Muka until after the parties had returned from Brahmapuri to Bothali. He further makes the all significant admission that Dewaji only held a one-anna share in the tree and that it was this only which was passed. The gift deed, on the contrary, purports to transfer the whole tree.

Now, in the case of a sale under s. 54 of the Transfer of Property Act of tangible immoveable property under Rs. 100 in value such transfer can only be made either by a registered document or by delivery of the property. The District Judge in coming to the conclusion he did, has wholly overlooked this most vital and essential circumstance. At the moment the deed of gift was executed and registered, possession of the property had not been delivered over and, therefore, Muka had no title which he could transfer. Over and above this, there is the fact that Dewaji's title in the tree only related to $\frac{1}{8}$th part thereof; whereas under the deed of gift ownership of the whole tree professed to pass.

It has been urged on behalf of the respondents that there is clear evidence that there was an intention on the part of Dewaji to pass the ownership of the tree to Muka. We are not concerned with whether there was an intention to transfer the tree when the deed of gift was executed and registered. The real vital and essential point is whether on the said date Muka was the owner of the tree. This question arises altogether independently of the allegations of fraud or undue influence, and there can, in my opinion, be one answer thereto. It has been urged that the unregistered sale-deed was in effect completed at a subsequent date by the delivery of the property, but the really vital point here is whether the condition I have referred to laid down in s. 54 of the Transfer of Property Act was complied with or not. In my opinion it is patent on the evidence that, on the date the deed of gift was executed and registered, Muka was not and could not have been the owner of the tree in question. For the purposes of s. 54 there must be a real delivery of property, some sort of constructive possession is not sufficient: *cf. Biswanath Prasad* v. *Chandra Narayan Chowdhury* (1). In the present case on 19th March 1913 there was not even proof of constructive possession.

Thus, on the date the deed of gift in question was registered at Brahmapuri, there was no property for transfer situated in that Tahsil. It follows therefrom that the registration of the gift deed at Brahmapuri was void and a mere nullity.

From still another point of view the said registration was also necessarily invalid. The deed of gift professed to transfer amongst other items field No. 173 described as occupancy. It is not seriously contended that the said field is in reality occupancy and this was admittedly a misdescription. It cannot seriously be contended that a Registering Officer could be expected to hold an elaborate enquiry as to whether a field described as occupancy was in reality such or not. For the purposes of registration, the Registering Officer is in the normal case bound to accept the description of the property given in the deed he is dealing with. From this point of view, therefore, having regard to the absolute prohibition contained in the Tenancy Act of 1898, s. 46 (3) and (5), the Registering Officer was bound to have refused to register Ex. P-1, which purported amongst other things to transfer occupancy rights. There was, in my opinion, no good ground for the lower Appellate Court's refusal properly to consider this point, and there was still less reason for a remand as to whether the land was occupancy land or not. It sufficed for the purposes of the duty of the Registering Officer that the land was described as occupancy land and he was

(1) 63 Ind. Cas. 770; 48 C. 509 at p. 515; 48 I. A. 127 (P. C.).

bound under the law to refuse registration, *cf. Nilkant* v. *Ghulya* (2).

These two points alone are sufficient for the disposal of this appeal. I may add, however, that the view of the law put forward by the learned District Judge in para. 5 of his appellate judgment was clearly incorrect. He appears to have held that even if Dewaji had no share in the tree and Muka had really acquired no good title therein, that would not affect the validity of the deed of gift unless both the parties to the transaction had acted collusively in getting the document registered at Brahmapuri. Any fraud or misrepresentation by one party alone would, in my opinion, have been ample to render the registration a nullity. I know of no basis either in law or in reason for the view enunciated by the learned District Judge in this connection.

It follows from the above findings that the deed of gift was not validly registered and was in any effect inoperative because of its registration at Brahmapuri in which Tahsil none of the property which was then in the ownership of Muka was situated. The judgment and decree of the lower Appellate Court are accordingly reversed and the judgment and decree of the first Court are restored. The present respondent No. 1 will bear the plaintiffs-appellants' costs in all three Courts.

N. H. *Decree reversed.*

(2) 42 Ind. Cas. 384; 13 N. L. R. 165.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 312 OF 1924.

November 7, 1925.

Present :—Mr. Justice Raza.

MR. MASIH UDDIN AHMED—PLAINTIFF—
—APPELLANT

versus

MUNIR AHMAD AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Pre-emption—Sale of under-proprietary plot—Vendee holder of other under-proprietary plots in village—Suit for pre-emption by superior proprietor—Equal rights—Procedure.

An under-proprietary plot in a village was sold to the defendant who held under-proprietary rights in other plots of land in the village. Plaintiff, who was a superior proprietor in the village, brought a suit to pre-empt the sale:

Held, that the plaintiff and the defendant were equally entitled to pre-empt the sale and that the question as to who was entitled to the property should e decided by drawing lots.

Second appeal against a decree of the District Judge, Barabanki, dated the 14th April 1924, confirming that of the Munsif, Ramsarahighat at Barabanki, dated the 31st January 1924.

Messrs. *Naimullah* and *Niamatullah*, for the Appellant.

Messrs. *Ram Bharose Lal* and *Raj Narain Shukla*, for Respondent No. 2.

JUDGMENT.—This is a plaintiff's appeal arising out of a pre-emption case. The property sold was an under-proprietary plot in a village of which the plaintiff is the superior proprietor. The vendee holds under-proprietary rights in the village.

The plaintiff brought the suit alleging that he had a preferential right to pre-empt the property. The suit was contested by the vendee (defendant No. 2).

The learned Munsif rejected the claim holding that the vendee had preference as against the plaintiff. His decision was upheld by the Court of first appeal.

The plaintiff has appealed to this Court challenging the finding on the point decided against him.

I think this appeal should be allowed. Both the lower Courts were of opinion that the ruling in *Muhammad Abdul Aziz* v. *Bhagwan Das* (1) applied to this case. I am not prepared to agree with them on that point. In my opinion the ruling in *Raja Ali Mohammad Khan* v. *Ram Bilas* (2) is fully applicable to this case. The plaintiff and the vendee are equally entitled to pre-empt the property. The question as to who is entitled to the property should be decided by drawing lots.

Hence I allow the appeal and setting aside the decrees of the Courts below, remand the case to the first Court under O. XLI, r. 23, Sch. I, C. P. C., with directions to re-admit the suit under its original number in the register and proceed to determine the suit according to law.

Costs will abide the result.

Z. K. *Appeal allowed; Case remanded.*

(1) 65 Ind. Cas. 281; 8 O. L. J. 560; (1922) A. I. R. (O.) 101.

(2) 9 O. C. 271.

RANGOON HIGH COURT.

SECOND CIVIL APPEALS NOS. 26 AND 27 OF 1922.

January 1, 1923.

Present:—Mr. Justice Maung Kin.

MG. PO KIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MG. OH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 54, 59—Construction of document—Transfer by pyatpaing, *nature of—Redemption—Specific performance—Transferor, whether can recover possession.*

Plaintiff effected a transfer of certain property in favour of defendant by a *pyatpaing* but there was no registered instrument. Plaintiff brought a suit for redemption of the land alleging that the transaction was a mortgage and the defendant filed a counter suit for specific performance on the ground that the transaction was a sale. The Court arrived at the finding that the transaction was neither a sale nor a mortgage:

Held, (1) that on the finding no question of redemption or of specific performance could arise;

(2) that inasmuch as the transfer by *pyatpaing* did not transfer any interest in the property to the defendant the plaintiff was entitled to recover possession of the property.

Second appeal from the judgment and decree of the Divisional Court, Myaungmya, in C. A. Nos. 103 and 104 of 1921.

Mr. *Hay*, for the Appellants.

Mr. *Ba Tin*, for the Respondents.

JUDGMENT.—I remanded this case on the issue: "Did the plaintiff in this case tender the redemption money and if so, was it before or after the expiry of three years from the date of the transfer by a *pyatpaing*?"

The concurrent findings of the lower Courts are that the money was tendered after the expiry of the three years.

The transfer in question could not be proved to be a mortgage or sale, as there was no registered instrument evidencing it. This was common ground between the parties.

The plaintiff wants the property back. The defendant claims the transaction to be a sale with the option of re-purchase within three years. And as that period is long since past; they ask that the plaintiff may be ordered, to give them a registered conveyance as agreed upon. Whatever else it might have been, the transaction was not a sale or a mortgage. If it was not a mortgage, there is no question of redemption in the proper sense of the term. It follows, therefore, that it is immaterial to consider whether there was a forfeiture clause or not and if there was one, whether it is valid in spite of the English principle of law, "once a mortgage always a mortgage," which is embodied in s. 60 of the Transfer of Property. Act. In other words it is not necessary to decide whether *Maung Naung* v. *Ma Bok Son* (1) was correctly decided. There is a doubt as to its correctness.

If there was a proper sale effected with due formalities, the plaintiff must fail and the suit for specific performance must be decreed. But there was no such sale. The sale by the *pyatpaing* did not transfer any interest in the property to the defendant. The option of re-purchase does not affect the matter at all.

Upon the above conclusions the plaintiff's suit must be decreed and the defendant's suit dismissed.

The appeals of Mg Po Kin arising out of C. R. Suit No. 81 of 1920 and of Civil Regular Suit No. 116 of 1921 are allowed with costs.

The point as to what amount if any, is due from Mg Po Kin to the defendant does not arise in this case.

The remand was unnecessary.

Z. K. *Appeal allowed.*

(1) 1 L. B. R. 192.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 245 OF 1925.

October 22, 1925.

Present:—Mr. Justice Neave, A. J. C.

GANESH—DEFENDANT—APPELLANT

versus

Raja SURAJ BAKHSH SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Custom—Landlord and tenant—Grove-holder—Right to transfer grove—Decision regarding right of mortgage, whether* res judicata *as regards right of sale—Burden of proof—Presumption.*

Before the principle of *res judicata* can be applied it must be shown that the matter for decision was directly and substantially in issue in a previous suit between the same parties. [p. 1022, col. 1.]

There is an essential distinction between a transfer by a tenant or grove-holder by way of lease or mortgage and a transfer by way of sale. A previous judgment deciding that a grove-holder has a right to mortgage the grove does not operate as *res judicata* with regard to the right of the grove-holder to sell the grove. [p. 1022, col. 2.]

According to the usual custom prevailing in Oudh a tenant is debarred from selling a grove held by him, and if he does so the landlord can treat the

portion sold as abandoned and sue for recovery of possession of such portion from the transferee. [p. 1022, col. 2.]

The terms under which a tenant holds a grove are a matter of contract between him and his landlord. Where, however, a general custom exists with regard to groves, every person who plants a grove must, in the absence of evidence of an agreement to the contrary, be held to have acted in accordance with the custom. [p. 1022, col. 2; p. 1023, col. 1.]

Appeal against a decree of the Sub-Judge, Sitapur, dated the 12th February 1925, setting aside that of the Munsif, Bishwan, dated the 19th November 1924.

Mr. *Ishwari Prasad*, for the Appellant.

Mr. *Bisheshwar Nath*, for Respondent No. 1.

JUDGMENT.—The plaintiff-respondent brought a suit for possession of half of two plots of grove land and for a declaration that the defendant-appellant had not acquired any right under a sale-deed executed on the 20th of July 1923 by the second defendant in favour of the appellant. The defence was that the grove had been planted after the first regular settlement and that there was no custom in the village under which a grove-holder was precluded from transferring his rights in a grove. There was a further plea that the matter was *res judicata* as a suit in respect of the same grove had been decided between the appellant's vendor defendant No. 2 and the plaintiff-respondent's father.

The first Court held that the matter was not *res judicata*, but dismissed the suit on the ground that the plaintiff had failed to prove the custom on which he relied. The lower Appellate Court has granted the plaintiff a decree.

The first plea taken in arguing the appeal is that the matter is *res judicata*. Reference is made to a judgment of the District Judge of Sitapur in a case in which the present defendant No. 2 had mortgaged the grove now in suit to a third party. It was held that the custom in the *wajib-ul-arz* forbidding transfers by grove-holders had become a dead letter as it was proved that in more than one instance such grove-holders had mortgaged their rights. An appeal was filed in this Court but was dismissed.

Before the principle of *res judicata* can be applied it must be shown that the matter for decision has been directly and substantially in issue in a previous suit between the same parties. In the present case the question in issue is the right to sell, in the previous case it was the right to mortgage. As has been pointed out in *Ali Muhammad Khan* v. *Chhedan* (1) there is a essential distinction between a transfer by way of lease or mortgage and a transfer by way of sale where different considerations apply. It may also be remarked that it appears from the judgment of the lower Appellate Court the question of *res judicata* was not pressed there. I think it is clear that the principle does not apply in this case.

The next point taken is that, even if the matter of the right of a grove-holder to sell is not held to be *res judicata*, the previous judgments are strong evidence admissible under s. 42 and s. 13 of the Indian Evidence Act. The same consideration, however, of the essential difference in character between a sale and a mortgage renders this argument of little avail. Even if the evidence is admissible it is not of much value in the present case.

Two recent decisions of this Court were relied on by the learned Subordinate Judge. They are *Bhikari Lal* v. *Hadi Ali Khan* (2) and *Mahabir Parshad* v. *Uman Shankar* (3). The second of these cases is remarkably similar to the present case. In it also only half the grove-holder's rights had been sold and the same plea was taken as has been taken here that this circumstance was inconsistent with the theory that the grove-holder's rights had been abandoned. It was, however, held that according to the usual custom prevailing in Oudh, a tenant is debarred from selling a grove held by him and that if he does so the landlord can treat it as abandoned and sue for recovery of possession from the transferee. It was found that there had been abandonment of half the grove. In the present case all that the plaintiff is seeking is to recover possession of half the grove.

Finally the learned Pleader for the appellant urged that there could be no custom in the present case inasmuch as admittedly the grove in suit was planted after annexation, and, that, therefore, there had not been time for a custom to grow up. The terms under which the tenant held the grove must be a matter of contract between him and his landlord. Where, how-

(1) 15 Ind. Cas. 385; 15 O. C. 91.

(2) 82 Ind. Cas. 810; 1 O. W. N. 520; 10 O. & A. L. R. 1159; 11 O. L. J. 738; (1925) A. I. R. (O.) 239.

(3) 85 Ind. Cas. 527; 2 O. W. N. 22; 10 O. & A. L. R. 1310; L. R. 6 A. (O.) 39; 12 O. L. J. 258; (1925) A. I. R. (O.) 319; 28 O. C. 133.

ever, a general custom exists with regard to groves it is obvious that every person who plants a grove must in the absence of any evidence of an agreement to the contrary be held to have acted in accordance with the custom. In the Bench ruling which has already been referred to it was found that the custom now set up by the plaintiff in the present case was of general prevalence in Oudh.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1240 OF 1925.

October 22, 1925.

Present :—Mr. Justice Sulaiman and Mr. Justice Mukerji.

JHABBU RAM—DEFENDANT—APPELLANT

versus

Thakur BAHORAN SINGH *alias* BAHURI LAL AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation by manager to pay off barred debt, validity of.

A manager of a joint Hindu family, other than the father, has no power to alienate the family property in lieu of any antecedent debt of his own. An alienation by him can only be upheld if the transfer is for legal necessity or for the benefit of the family. The payment of a barred debt is not a necessity and, therefore, an alienation of family property by the manager for the payment of such a debt cannot be upheld. [p. 1023, col. 2; p. 1024, col. 1.]

Second appeal against a decree of the District Judge, Agra, dated the 16th March 1925.

Mr. *P. L. Banerji*, for the Appellant.

JUDGMENT.—This is an appeal by a defendant mortgagee arising out of a suit for partition of certain properties. Originally a mortgage was made by Ram Dhan the plaintiffs' grandfather in the year 1902 in favour of the mortgagee's predecessor. Subsequently, after the grandfather's death and in the year 1919 three out of his four sons, Narain Singh, Deo Sukh and Punni Lal executed a fresh mortgage in lieu of the amount due on the previous document. It is conceded that Narain Singh was the eldest member of the family then alive and was the *karta*. Tikam Singh the plaintiffs' father the fourth son of Ram Dhan was alive. He was probably not then in the village and was living with his father-in-law. He did not join in the deed. By 1919 when the second document was executed twelve years had expired since the first mortgage. In view of a clause entitling the mortgagee to recover the whole amount in case of default of payment of interest, the mortgage debt had become time-barred according to the rulings of *Gaya Din* v. *Jhuman Lal* (1) and *Shib Dayal* v. *Meharban* (2). In the present case the mortgagee had also pleaded payment of further interest so as to save limitation, but that plea was not substantiated in the opinion of the learned District Judge.

The Court of first instance held that the plaintiffs were bound by the mortgage of 1919 inasmuch as it had been executed in lieu of a debt due from the plaintiffs' grandfather Ram Dhan which was an antecedent debt. The learned Appellate Judge has, however, come to a contrary conclusion and held that the plaintiffs are in no way bound to pay the mortgage of 1919. The learned Advocate for the appellant contends that on the authority of a recent Full Bench case *Gajadhar* v. *Jagannath* (3) even a time-barred debt is a good debt and can form a good consideration for an alienation by a managing member of a joint Hindu family. His contention is that a time-barred debt is a debt under the Hindu Law which did not recognise any rule of limitation. That case, however, is clearly distinguishable. The Full Bench had to consider the power of the father of a Hindu son to transfer property in lieu of an antecedent debt of his own which had become time-barred. The Full Bench came to the conclusion that such a debt, although the remedy to recover it was barred, still existed as a debt and was, therefore, an antecedent debt in lieu of which a father could alienate the property. The case of a mere manager of a Hindu family is, however, different. He has no power to alienate the property in lieu of any antecedent debt of his own. An alienation by a managing member can only be upheld if the transfer is for legal necessity or for the benefit of the family. The point to be considered, therefore, is whether the mortgage made by Narain Singh the managing member of the family can be said to have been for legal necessity. If the legal remedy

(1) 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510.
(2) 69 Ind. Cas. 981; 20 A. L. J. 819 at p. 828; (1923) A. I. R. (A.) 1; 45 A 27.
(3) 80 Ind. Cas. 684; 22 A. L. J. 601; 1924) A. I. R, (A.) 551; 46 A, 775.

to recover the debt of 1902 had become time-barred by 1919 there was obviously no 'necessity' to pay this amount. The mere fact that Narain Singh, Deo Sukh and Punni Lal imagined that they were bound to pay it would not necessarily make it a legal necessity so as to make the alienation binding on Tikam Singh. In this view of the matter it is open to Tikam Singh or his sons to repudiate his liability under this mortgage on the ground of want of legal necessity.

The other point urged on behalf of the appellant is that when the partition comes to be made the share covered by the mortgage-deed of 1919 should, if it can be done conveniently and without prejudice to the plaintiffs' right, be allotted to the other brothers and their descendants. On this point the learned Judge has not expressed any opinion one way or the other. In fact all that he has held is that plaintiffs are entitled to one-fourth property on partition and that the share of the plaintiffs is to be free of liability for the mortgage of 1919. The question what would be an equitable and just method of partition will come up for consideration when the final partition will be carried out. The appeal is accordingly dismissed under O. XLI, r. 11, C. P. C.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 28 OF 1924.

September 11, 1925.

Present :—Mr. Justice Devadoss and Mr. Justice Waller.

ALAGA PILLAI—PLAINTIFF—APPELLANT

versus

RAMASWAMY THEVAN AND OTHERS—DEFENDANTS NOS. 1 TO 5—RESPONDENTS.

Evidence Act (I of 1872), s. 116—Landlord and tenant—Estoppel—Tenant, eviction of, by true owner—Attornment to true owner—Suit in ejectment by landlord—Jus tertii, *plea of, whether can be taken.*

No tenant can set up a *jus tertii* in a third person in answer to a suit by the person who let him into possession. But where the true owner ejects the tenant from the possesison of the land, the tenancy ceases and after the eviction the tenant can attorn to the true owner and set up his title in answer to a suit in ejectment by the landlord who let him into possession. In such a case the landlord cannot rely upon the law of estoppel as contained in s. 116 of the Evidence Act as preventing his former tenant from pleading a *jus tertii* in a third person. [p. 1025, col. 1.]

The eviction of the tenant by the true owner need not, however, be by actual dispossession of the tenant. If the true owner is armed with a legal process for eviction which cannot be lawfully resisted, even though the tenant is not put out of possession, the threat to put him out of possession amounts in law to eviction. [*ibid*.]

Hill v. *Saunders*, (1825) 107 E. R. 1157; 4 B. & C. 529; 7 D. & R. 17; 9 Moore 238; 2 Bing 112; 1 Car. & P. 80; 4 L. J. (o. s.) K. B. 2; 28 R. R. 375, *Matthey* v. *Curling*, (1922) 2 A. C. 180 at p. 232; 91 L. J. K. B. 593; 127 L. T. 247; 66 S. J. 386; 38 T. L. R. 475 and *Doe* v. *Barton*, (1840) 113 E. R. 432; 11 Ad. & E. 307; 3 P. & D. 194; 9 L. J. Q. B. 57; 4 Jur. 432; 52 R. R. 354, relied on.

Defendant was let into possession of certain lands by the plaintiff's predecessor-in-title. Notice was served upon the defendant by the Government under s. 7 of the Madras Land Encroachment Act of 1905 on account of alleged unauthorised occupation of Government land. The defendant then attorned to Government and accepted a *patta* from them. In a suit by the plaintiff in ejectment under the original lease :

Held, that the plaintiff could not plead estoppel under s. 116 of the Evidence Act and could not succeed against the defendant unless he was able to make out a title against the Government. [p. 1026, col. 1.]

Letters Patent Appeal against the judgment and decree of Mr. Justice Wallace, in S. A. 834 of 1921, preferred against a decree of the Court of the Third Additional Subordinate Judge, Tanjore, at Mayavaram, in A. S. No. 5 of 1920, preferred against that of the Court of the District Munsif, Shiyali, in O. S. No. 357 of 1918.

Mr. *S. Muthiah Mudali*, for the Appellants.

Mr. *C. A. Seshagiri Sastri*, for the Respondent.

JUDGMENT.—This appeal is against the judgment of our learned brother Wallace, J., allowing S. A. No. 834 of 1921. The only point in this appeal is whether s. 116 of the Indian Evidence Act is a bar to the plaintiff's suit. It is found that the defendants were let into possession of the plaint property 40 years before the suit by the plaintiff's paternal grandfather. The plaintiff brought the suit for ejecting the defendants from the possession of the plaint property. The District Munsif of Shiyali dismissed the suit as being barred by limitation.

On appeal the Additional Subordinate Judge of Tanjore at Mayavaram set aside the decree of the District Munsif and gave a decree to the plaintiff for possession of the property and directed him to pay Rs. 400 as compensation being the value of the house on the suit property. Wallace, J., set aside the decree of the Subordinate Judge

and restored that of the District Munsif. The plaintiff has preferred this appeal.

Mr. Muthiah Mudaliar for the appellant contends that the defendants were not entitled to set up the title of the Government in answer to the plaintiff's suit. His argument is that the plaint land is a portion of Survey No. 498 and that he is the owner of the whole Survey No. 498 though he paid tax only for the trees standing thereon, and the defendants having been let into possession by the plaintiff's predecessor-in-title are bound to deliver possession to the plaintiff Under s. 116 of the Indian Evidence Act, no tenant of immoveable property, or person claiming through such tenant, shall during the continuance to the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immoveable property. No tenant can set up a *jus tertii* in a third person in answer to a suit by the landlord. But it is well-settled that where the true owner ejects the tenant, the tenant could attorn to the true owner and set up the title of the true owner in answer to a suit for ejectment by the landlord who let him into possession. So long as his tenancy is subsisting the tenant is not entitled to set up the title of a third person. But if he is evicted from the possession of the land by the true owner then the tenancy ceases and after the eviction he could attorn the true owner. The eviction need not be by actual dispossession of the tenant. If the true owner is armed with a legal process for eviction which cannot be lawfully resisted even though the tenant is not put out of possession, the threat to put him out of possession amounts in law to eviction. In this case the Government served upon the defendants notice Ex. III (*b*) under s. 7 of the Madras Land Encroachment Act III of 1905. The Land Encroachment Act provides means by which persons in unauthorised occupation of Government land may be evicted. Under s. 7 before taking proceedings under s. 5 or s. 6 the Collector or Tahsildar or Deputy Tahsildar as the case may be, shall cause to be served on the person reputed to be in unauthorised occupation of land being the property of Government a notice specifying the land so occupied and calling on him to show cause before a certain date why he should not be proceeded against under s. 5 or under s. 6. Under s. 3 any person unauthorisedly occupying any land which is the property of the Government shall be liable to pay the full assessment imposed on the land. Under s. 5 a person in unauthorised occupation of land belonging to Government may be made liable to pay what is known as penal assessment. Under s. 6 any person unauthorisedly occupying any land for which he is liable to pay assessment under s. 3 may be summarily evicted by the Collector. Exhibit III (*b*) is a notice issued under s. 7 and on the failure of the defendants to comply with the terms of the notice eviction would have followed as a matter of course. The defendants paid the assessment and a year before the suit was brought they accepted *patta* from the Government. Exhibit III (*b*), the notice under s. 7 of the Madras Land Encroachment Act III of 1905 amounts in law to eviction. If the plaintiff had title to the land he should have brought a suit against the Government for a declaration that the land is his and for the recovery of the penal assessment levied from him as well as from his tenants. He did not take any action against the Government. The explanation given by Mr. Muthia Mudaliar is that the plaintiff was a minor at the time and he attained majority only within three years before the suit. But that would not save his right against the Government.

The case in *Eledeth Thavazhi* v. *Eliangathil Sankara Valia Rajah Avargal* (1) is distinguishable from the fact of the present case. In that case there was no eviction by the owner having paramount title. If the alienee attorns to a third person though he has true title, that would not protect him against a suit of the landlord in ejectment. It is unnecessary to discuss the cases cited by Mr. Seshagiri Sastri for the respondent such as *Hill* v. *Saunders* (2), *Matthey* v. *Curling* (3) and *Doe* v. *Barton* (4). In *Ram Chandra Chatherjee* v. *Pramatha Nath Chatterjee* (5) it was held that it was open to the tenant to prove a subsequent cesser of the landlord's title by ouster by the holder of a title paramount and to attorn

(1) 45 Ind. Cas. 656; 7 L. W. 574; (1918) M. W. N. 376; 8 L. W. 44; 24 M. L. T. 79.

(2) (1825) 107 E. R. 1157; 4 B. & C. 529; 7 D. & R. 17; 9 Moore 238; 2 Bing 112; 1 Car. & P. 80; 4 L. J. (o. s.) K. B. 2; 28 R. R. 375.

(3) (1922) 2 A. C. 180 at p. 232; 91 L. J. K. B. 593; 127 L. T. 247; 66 S. J. 386; 38 T. L. R. 475.

(4) (1840) 113 E. R. 432; 11 Ad. & E. 307; 3 P. & D. 194; 9 L. J. Q. B. 57; 4 Jur 432; 52 R. R. 354.

(5) 63 Ind. Cas. 754; 35 C. L. J. 146; (1922) A. I. R. (C.) 237.

to the latter without actually going out of possession. The eviction by the true owner or the owner of the paramount title puts an end to the tenancy and if the tenant attorns to the true owner he does not do so as a tenant of the landlord who let him into possession but accepts a new tenancy from the true owner. It does not matter in cases of this kind that the true owner is the Government. A tenant is not entitled to set up the title of the third person even though the title is that of the Government. But he is entitled to plead that he was evicted by the true owner whether the true owner be the Government or a private person and that after such eviction he attorned to the true owner. In such a case the landlord who let him into possession cannot rely upon the law of estoppel as contained in s. 116 of the Indian Evidence Act as preventing his former tenant from pleading a *jus tertii* in a third person. The defendants in this case were evicted by the Government from the plaint land before the date of the suit and the acceptance of *patta* by them was after the eviction and, therefore, the plaintiff cannot succeed against the defendants unless he is able to make out a title against the Government. The Secretary of State is not a party to the suit and there is no finding that the plaintiff has a better title than the Government, whereas the evidence seems to point the other way.

In the result the Letters Patent Appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

Z. K.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2434 AND 2435 OF 1922.

August 13, 1925.

Present :—Justice Sir Hugh Walmsley, KT., and Mr. Justice Mukerji.

BHABATARINI DEVI—DEFENDANT—APPELLANT

versus

ROY KIRAN CHANDRA ROY BAHADUR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Rent suit, finding arrived in—Subsequent suit for rent not triable by Court which decided previous suit—Res judicata—*Appeal, second—Finding of fact—Evidence ignored—Interference by High Court.*

A finding arrived at in a rent suit tried by a Court not having jurisdiction to try a subsequent suit for rent between the same parties does not operate as *res judicata* in the subsequent suit, although the decision in the previous suit is a valuable piece of evidence to be considered in the subsequent suit. [p. 1027, col. 1.]

Where in arriving at a finding of fact a lower Appellate Court ignores a valuable piece of evidence altogether, the finding is not binding on the High Court in second appeal. [p. 1027, col. 2.]

Appeals against the decrees of the District Judge, Faridpur, dated the 9th of June 1922, modifying those of the Munsif, Faridpur, dated the 2nd of May 1921.

Babus *Jogesh Chandra Ray* and *Surendra Nath Das Gupta*, for the Appellant.

Dr. *D. N. Mitter* and Babu *Surendra Nath Bose*, for the Respondents.

JUDGMENT.

Walmsley, J.—These two appeals arise from two rent suits. The suits relate to two successive periods, one from *Baisakh* 1319 to *Pous* 1322, and the other from *Magh* 1322 to the end of 1325. The annual rent is Rs. 345, so with the addition of a claim for damages at the rate of 25 per centum the claim in each suit is well above Rs. 1,000.

The defendant-appellant's case is that the plaintiff-landlord has dispossessed them from three of the plots comprised in the tenancy and leased those three plots to another party and on that account they say that they are entitled to a suspension of rent. As to the truth of their allegation, they refer to the decision in a previous suit for rent in respect of the same tenancy. That suit was for a shorter period and the amount claimed was less than Rs. 1,000 and the suit was tried and determined by a Munsif whose pecuniary jurisdiction did not go beyond Rs. 1,000. That officer, therefore, would not have been competent to try these two suits and on that account the Courts below have held that a decision in the former suit does not operate as *res judicata*. After rejecting this argument they have come to the conclusion that the plaintiffs have not dispossessed the defendants from any part of the tenancy.

On behalf of the defendants, it has been urged once more that the principle of *res judicata* does apply to the question whether the tenants are entitled to a suspension of rent. It is conceded that the fact that the Munsif who tried the earlier suit would not have been competent to try the present suits takes these suits out of the provisions of s. 11 of the C. P. C., but it is said that the statement of the law in that section is not exhaustive and reference is made to remarks by their Lordships of the Privy Council in the cases of *George Henry Hook* v. *Admi-*

nistrator-General of Bengal (1) and *Ramachandra Rao* v. *Ramachandra Rao* (2). It is not necessary to examine those decisions at length or to refer to the earlier decision mentioned in the former. The extension of the doctrine to which they allude will not assist the appellants in these suits. In fact the passage in the second judgment on which reliance is placed begins with these words "it is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision no longer open to appeal, *given by another Court having jurisdiction to try the second case.*" I have no hesitation in holding that these two decisions do not modify in any way the effect of the decision in the case of *Run Bahadur Singh* v. *Locho Koer* (3).

With this argument decided against the appellant, it is said for the respondent that the appeal is concluded by the findings of fact. I cannot accept this view, for the reason that the decision in the previous suit must be regarded as a valuable piece of evidence, and must recieve its due weight. It is unfortunate that the argument in the lower Appellate Court was directed only to showing that the decision operated as *res judicata*, for this misled the Judge into ignoring it altogether. The position, therefore, is this. It is now an admitted fact that the three plots are comprised in the village demised to the defendants, that they are not in the possession of the defendants and that they are in possession of the tenants of an adjoining village who pay rent for them to the plaintiffs. Those are the facts admitted now. In the earlier suit, however, the plaintiffs maintained that the plots did not form part of the defendants' tenancy at all, and the decision, in which the plaintiffs now acquiesce, was that they are part of the defendants tenancy. The learned Judge refers to the inconsistent attitude of the plaintiffs and even to their wilful misrepresentation, and quotes a passage from the judgment of this Court, and yet he proceeds to find that the dispossession was not by the plaintiffs. If he had treated the decision in the former suit as a valuable piece of evidence and examined the other evidence to see whether it displaced the finding in the earlier suit, his conclusion might have been different.

On the other hand I wish to point out that the learned Judge appears to be in error when he says that the persons in posssession are relatives of the plaintiffs' *bargadar*. This, however, may be nothing more than a slip of the pen, to judge from the argument based on it.

I think it is not possible for us to decide the question : we must send the cases back to the lower Appellate Court for that Court to hear the appeals afresh in the light of what I have said and to decide them in accordance with law. The costs of the hearing in this Court will abide the result.

Mukerji, J.—I agree.

Z. K. *Appeal allowed : Case remanded.*

(1) 60 Ind. Cas. 631; 25 C. W. N. 915; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313, 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 14 L. W. 221; 48 C. 499; 48 I. A. 187 (P. C.).

(2) 67 Ind. Cas. 408; 26 C. W. N. 713; 30 M. L. T. 154; 45 M. 320; 35 C L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; 20 A. L. J. 684; 43 M. L. J. 78; 24 Bom. L. R. 963; (1922) A. I. R. (P. C.) 80; 49 I. A. 129 (P. C.).

(3) 11 C. 301 at pp. 308, 309; 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1454 TO 1457 AND 1476 OF 1922.

April 16, 1925.

Present :—Mr. Justice Phillips.

PERIAKARUPPA THEVAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

AIYANARS AND OTHERS—PLAINTIFFS NOS. 1 TO 13, 15 TO 22, 24 TO 28 AND 31 TO 33—RESPONDENTS.

Landlord and tenant—Inam *lands—Ejectment suit* —Kudivaram *right, grant of—Presumption—Burden of proof—Occupancy rights, acquisition of.*

In considering the nature of an *inam* grant, *viz.*, whether it was a grant of the *melvaram* only or a grant of both *melavaram* and *kudivaram*, no presumption can be made in favour either of the grantee or of the cultivator. Each case must be considered on its own facts. [p. 1028, col. 1.]

In a suit for ejectment the plaintiff must prove his right to eject the defendant. [p. 1028, col. 2.]

In a suit for ejectment of certain tenants from *inam* lands it was found that the defendants and their predecessors-in-interest had been in possession of the suit lands from 1843 onwards and that they had been disposing of their rights in the lands and dealing with them as if they had a right of occupancy. There was no evidence to show that the original grantee of the *inam* had himself been in occupation of the lands before the grant:

Held, that the burden lay upon the plaintiff to prove that he had the right to eject the defendants and that in the absence of proof that the plaintiff owned the *kudivaram* right in the suit lands the defendants must be held to have acquired rights of occupancy and were consequently not liable to ejectment. [p. 1029, cols. 1 & 2.]

Second appeals against the decrees of the Court of the Second Additional Subordinate Judge, Madura, in A. S Nos. 21, 22, 23, 25 and 154 of 1921, preferred against those of the Court of the District Munsif, Melur at Madura, in O. S. Nos. 445, 446, 447, 449 of 1917 and 502 of 1919 respectively.

Mr. *C. S. Venkatacharair*, for the Appellants.

Mr. *A. V. Viswanatha Sastry*, for the Respondents.

JUDGMENT.—In these appeals the question at issue is whether the plaintiffs, minor *inamdars*, are entitled to evict the defendants who are cultivating their *inam* lands.

The lower Appellate Court has found that the tenants have not proved their occupancy right, and that they have not subsequently acquired the right of occupancy; and has accordingly decreed the suits in favour of the plaintiffs.

In these appeals it is contended that the lower Appellate Court has not considered the decision of the Privy Council in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (1). In that case it was finally laid down that in considering the nature of an *inam* grant, namely, whether it was a grant of the *melvaram* only or a grant of both *melvaram* and *kudivaram*, no presumption can be made in favour either of the grantee or of the cultivator. For a long period, this Court had held that there was a presumption, especially in the case of *Brahmins* that the grant was only of the *melvaram*. This presumption was held to be wrong by the Privy Council in *Upadrashta Venkata Sastrulu* v. *Divi Setharamudu* (2) which says that each case must be considered on its own facts. Subsequent to that decision a Full Bench of this Court in *Muthu Goundan* v. *Perumal Iyer* (3) held that there was an initial presumption in favour of the grant of both *varams*. In *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (1) this judgment has been referred to. It is pointed out by the learned Judges that the Full Bench decision is clearly in error and that there is no presumption one way or the other. In the present case, therefore, it would appear that in the absence of any presumption that plaintiffs own the *kudivaram*, it is incumbent on them to prove such right, which must be invoked to support their claim to eject defendants. The ordinary principle that a person suing in ejectment must prove his right to eject will apply. The learned Subordinate Judge has started his judgment with an assumption "that the burden is on the cultivating tenants to show that they and their predecessors-in-title have been in occupation of the identical lands from a date anterior to the grant." Admittedly the grants to the plaintiff's predecessors were prior to the British rule and it would be extremely difficult for the defendants to prove that at the time of the grants their predecessors were actually in possession of the lands. It seems to me, therefore, that on the authority of *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (1) the burden in the present suit is on the plaintiffs to prove their right to eject.

It is, however, contended for the respondents that this principle laid down by the Privy Council in 1922 has been modified in 1923 by the judgment in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (4) in which it is stated :—

"It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant."

It is contended that by reason of this *dictum*, the burden is upon the defendants to prove their occupancy right. The decision in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (4) is based upon two prior cases, *Secretary of State for India* v. *Luch-*

(1) 63 Ind. Cas. 538; 45 M. 536; 16 L. W. 102; 31 M. L. T. 54; (1922) M. W. N. 749; 43 M. L. J, 640; (1922) A. I. R. (P. C.) 292; 37 C. L. J. 190; 27 C. W. N. 245; 49 I. A. 286 (P. C.).

(2) 51 Ind. Cas. 304; 43 M. 166; 17 A. L. J. 725; 37 M. L. J. 42; 21 Bom. L. R. 925; 26 M. L T. 175; 30 C. L. J. 441; 10 L. W. 633; 24 C. W. N, 129; 46 I. A. 123; 2 U. P. L. R. (P. C.) 16 (P. C.).

(3) 63 Ind. Cas. 790; 44 M. 588; 40 M. L. J. 429; 13 L. W. 483; (1921) M. W. N. 263; 29 M. L. T. 398 (F. B.).

(4) 82 Ind. Cas. 226; 47 M. 337; (1924) A. I. R. (P. C.) 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 461; 28 C. W. N 809; 51 I. A. 83 (P. C.).

meswar Singh (5) and *Seturatnam Aiyer* v. *Venkatachala Goundan* (6). In both these cases it was either admitted, or found as a fact, that the tenants had been let into possession by the landlord and that consequently when the tenant claimed to possess occupancy right, it was incumbent upon him to prove it I think the same principle has been repeated in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (4). That case does not in any way modify the judgment of their Lordships delivered in the preceding year. In *Nainapillai Marakayar* v. *Ramanathan Chettiar* (4) it is stated that the lands in respect of which a decree in ejectment has been made are part of the endowed property of the temple and that it is not disputed that the defendants were 'tenants' of the temple of lands to which the suit relates. It had been definitely found by the Subordinate Judge that the plaintiffs had both *varams* in the lands and consequently it was incumbent on the defendant to prove their occupancy right. If one were to interpret the judgment otherwise, it would appear that *Chidambara Sivaprakasa Pandara Sandhigal* v. *Veerama Reddi* (1) and *Nainapillai Marakayar* v. *Ramanathan Chettiar* (4) are in conflict, and inasmuch as the judgment in the former is not referred to in the latter, I do not think that any such inference can be drawn, if the cases can be explained in any other manner. As I have said above, the later case follows two prior cases in which the land itself belonged to the plaintiff, and consequently I think that in this last case also it must be deemed that the judgment is based on such an assumption. If I am correct in this, the present suits have to be determined in accordance with the principle laid down in *Chidambara Sivaprakasa Pandara Sannadhigal* v. *Veerama Reddi* (1) and that is, that there is no presumption that the grantee of an *inam* is holder of both *varams*. In this view it might be advisable to set aside the finding of the Subordinate Judge and ask for another finding; but inasmuch as the facts are all before me, I do not think it is necessary. The District Munsif has dealt with the defendants' evidence at considerable length and has found that the defendants and their predecessors-in interest have been in possession of the suit lands at any rate from 1843 onwards and that they have been disposing of their rights in those lands and dealing with them as if they had this right of occupancy. There is not a particle of evidence to show that the original grantee was himself in occupation of the suit lands before the grant and the only available evidence as to the tenants in possession shows that so far back as there is any record, the defendants and their predecessors have been cultivating the lands and dealing with them as if they had this right of occupancy. The learned Subordinate Judge has not referred to any particular facts in favour of the plaintiffs beyond reciting the history of land tenures in this Presidency and, although that history is not inconsistent with the grant of the actual land to plaintiffs, it does not support such a grant to any greater extent than a grant of *melvaram* only. Each case has to be determined on the evidence given therein. In the present cases the District Munsif is right in holding that the plaintiffs have not proved their right to eject.

The lower Appellate Court's decrees are, therefore, set aside and the decrees of the District Munsif restored with costs both here and in the lower Appellate Court.

V. N. V.
Z. K. *Appeal allowed.*

(5) 16 C. 223; 16 I. A. 6; 13 Ind. Jur. 10; 5 Sar. P. C. J. 275; 8 Ind. Dec. (N. s.) 147 (P. C.).

(6) 56 Ind. Cas. 117; 43 M. 567; (1920) M. W. N. 61; 72 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 47 I. A. 76; 25 C. W. N. 485 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No 61 OF 1925.

August 8, 1925.

Present:—Mr. Findlay, Officiating J. C.

C. P. AUTOMOBILE ENGINEERING CO.—DEFENDANT—APPLICANT

versus

RAMCHANDRA VISHWANATH—PLAINTIFF—NON-APPLICANT.

Contract Act (IX of 1872), s. 23—Motor Vehicles Act (VIII of 1914), s. 11—Statutory rules, r. 28—Contract for running motor lorry at night, legality of—Illegal contract—Deposit, whether can be recovered.

The running of a heavy motor lorry at night in contravention of r. 28 of the statutory rules made under s. 11 of the Motor Vehicles Act being an offence, an agreement in respect of the same is illegal and as such void. [p. 1030, col. 1.]

It is not open to either of the parties to an illegal

contract to plead that he was ignorant of the provisions of the law making the contract illegal. [p. 1030, col. 1.]

In case of the failure of an illegal contract, a party paying a certain amount as a deposit at the time of the contract is not entitled to its refund under the principles underlying the maxim *in pari delicto potior est conditio possidentis.* [p. 1031, col. 2.]

Application for revision of an order of the Small Cause Court, Nagpur, dated the 25th October 1924, passed in Civil Suit No. 116 of 1923.

Mr. *S. R. Pandit*, for the Applicant.

Mr. *Gadgil*, R. B., for the Non-Applicant.

ORDER.—The main facts of this case are sufficiently clear from the judgment of the Small Cause Court, Nagpur. The defendant-Company have now come up on revision against the judgment and decree of that Court, awarding Rs. 176 to the plaintiff-non-applicant.

Only three grounds have been pressed in revision. The first and most important of these is that the contract between the parties was void under s. 23 of the Indian Contract Act, its avowed purpose including the use of a heavy motor vehicle in question between the period commencing half an hour after sunset and ending half an hour before sunrise. Some attempt on behalf of the plaintiff-non-applicant has been made to contend that the motor lorry in question was not a heavy motor-vehicle. The evidence on record, both oral and documentary, leaves not the slightest doubt upon this point. It, therefore, follows that within the knowledge of both parties this motor-vehicle was to be used in direct contravention of r. 28 of the statutory rules made under s. 11 of the Indian Motor Vehicles Act of 1914. The Judge of the Small Cause Court on this point held that it was necessary that both the parties should contemplate an unlawful manner of performance and that in the present case there was nothing to show that the plaintiff could have had reason to believe that the lorry could not be legally run at night.

This view of the law I am unable to accept. The principle applicable in a case like the present is surely that of *ignorantia legis neminem excusat.* The running of a heavy lorry at night constitutes a criminal offence. Clearly, therefore, in my opinion, the object of the contract was an unlawful one and it follows that the whole contract was void. I may add that in the case of the defendant-Company the presumption of their unlawful nature of the contract is, even stronger than in the case of the plaintiff, because it must be strongly presumed that as the owner of the vehicle in question they must have been aware of the law applicable thereto.

Even, however, if I had not found it necessary to hold that the contract was void, it would clearly seem to me to have been, in the circumstances of this case, voidable at the option of the bailor under s. 153, Indian Contract Act. In this connection I may say that although this Court must be reluctant to interfere with a finding of fact, yet the connected finding arrived at on point (*a*) of the lower Court's judgment is so clearly erroneous and against the weight of the evidence that I should have been unable to accept it. The lower Court holds that the defendant-Company knew that the plaintiff was to use the vehicle as a public one, plying for hire on the night in question. The defendant-Company's allegation on this point was that the plaintiff only informed them that he wanted the vehicle to convey the actors and their luggage to the theatre. The lower Court holds that the order (Ex. P-1) supports the plaintiff's allegation in this connection. The endorsement in question reads as follows:—

"Send lorry on hire at 8 P. M., opposite Rajaram Library, Nagpur, for carrying passengers from Sitabuldi to Mahal at Re. 1 per mile."

I do not think it would be safe to predicate any presumption either way on the vague entry of this sort. It is, at the most, as consistent with the theory that only the actors were to be carried as with the other theory. The omission of any reference to incidental matters of the actors' luggage seems to me a very minor one. On the other hand, if the defendant-Company had known that the motor was to be used on a constant succession of trips for carrying passengers on hire, it seems to me indubitable that this specific purpose would have been mentioned. Not only so, but can it be credited for one moment that the defendant-Company would have let out the lorry for such purpose at a total sum of approximately Rs. 30? The oral evidence shows that this sum was obtained from the plaintiff as the approximate total charge which would be due from him to the Company. It is difficult to suppose for one moment that the defendant-Company would ever have let out the lorry for such a purpose

with full knowledge that the plaintiff's intention and object were to obtain in a single night many times the amount which the Company were charging him.

Over and beyond this the vehicle had not on the date in question been registered as a public conveyance. This was apparently done only on the 26th of October 1923, or about a week later. It is grossly improbable that the defendant-Company would ever have entered into an illegal and improper transaction of this sort with their eyes open. It is true indeed that they sent out the lorry with a driver who had not his license. But this was a venial act of omission, which is relatively unimportant compared with the other fault which the Company would have committed if they had only allowed the plaintiff to take out this vehicle to ply for public hire on the evening in question. The lower Court, in dealing with this question of fact, arrived at the decision in a manner which shows considerable confusion of thought. The Judge seems to think that the only alternatives were that the plaintiff either asked for the lorry with the *bona fide* intention, as is said to have been stated by him, of carrying the actors and their luggage, or he asked for it for carrying passengers generally.

There is another and obvious alternative which seems to me to be far nearer the truth of the evidence on record. This is that to the defendant-Company [the plaintiff stated his object was of carrying the actors and their luggage, whereas his real and concealed intention was to use the vehicle for carrying any passengers on hire on the night in question to the theatre. Now, on this point we have, on the one side, the evidence only of the plaintiff and, on the other, the evidence of Gopal Krishan (D. W. No. 3), the Chief Clerk of the Company, and the evidence of Mr. Green (D. W. No. 4), the Manager. I can see no reason whatever why two witnesses of their standing should deliberately perjure themselves on such a point as the present. They are both emphatic on the point that the plaintiff stated that his object was to convey the actors and their luggage. Against their evidence there is only that of the plaintiff himself, and the same Judge, who disbelieves the Chief Clerk and Mr. Green as against the plaintiff on the plaint I am concerned with, disbelieves the plaintiff on other points of fact: *cf.* the lower Court's finding on point (*d*).

The balance of the oral evidence on point (*a*) is thus overwhelmingly in favour of the defendant-Company and when to this are added the other general considerations, I have mentioned above, it seems to me that this Court must necessarily interfere with the finding arrived at by the lower Court on point (*a*). I think that it has been fully established that the defendant-Company only supposed that the lorry was to be used for the specific purpose of carrying the actors and their luggage. There is no reason for supposing that they had any knowledge that the plaintiff intended to allow the vehicle to ply for hire generally from this point of view also, therefore, under s. 153 of the Indian Contract Act it was open to the defendant-Company to have considered the contract as void as against them.

My previous finding, however, necessarily implies the failure of the plaintiff's suit, but as there have been considerable fault on both sides, inasmuch as the defendant-Company also sent out the vehicle with a driver who had not a license, and, moreover, sent it out in direct contravention of motor r. 28, already referred to, I think it is equitable that the parties should bear their respective costs both in this Court and in the lower Court. I order accordingly, the plaintiff's suit being dismissed. There can, I may add, be no question even of plaintiff recovering his deposit of Rs. 30, the maxim *in pari delicto potior est conditio possidentis* clearly applying in the circumstances of the present case.

Order accordingly.

N. H.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 1 OF 1925.

November 7, 1925.

Present:—Mr. Justice Raza.

RAM DAYAL —PLAINTIFF—APPELLANT

versus

NISAR HUSAIN KHAN—DEFENDANT —RESPONDENT.

Easements Act (V of 1882), s. 60 (b)—*License to construct building—Construction of building—License, whether can be revoked—Use and occupation, damages for, whether can be recovered.*

Where land is given to a licensee free of rent for building a house thereon and the licensee constructs the house, the license becomes irrevocable under s. 60 (*b*) of the Easements Act and it is not thereafter open

to the licensor either to revoke the license or to seek to recover from the licensee damages for use and occupation of the land.

Second appeal against a decree of the Subordinate Judge, Lucknow, dated the 6th September 1925, upholding that of the Munsif, North Lucknow, dated the 29th November 1923.

Mr. *Piare Lal Varma*, for the Appellant.

Mr. *Salig Ram*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit to recover Rs. 144 as damages for use and occupation of the plaintiff's land.

The plaintiff brought a suit against the defendant to recover possession of land numbered 136 and 133 in November 1917 on the allegation that it had been given to the defendant on condition that he would vacate it when required by the plaintiff to do so. The claim was resisted by the defendant on the ground that the land was given for building purposes and that he could not be ejected as he had made permanent constructions and incurred expenses acting upon the license. That suit was dismissed as it was held that the plaintiff could not revoke the license under s. 60 (*b*) of the Easements Act. The plaintiff then filed a second suit in June 1920 for recovery of rent but withdrew it afterwards. The present suit is the third suit which the plaintiff has brought to recover damages from the defendant at Rs. 4 a month. The defences were (1) that the defendant being a licensee free of rent the plaintiff could not recover damages for use and occupation of the land and (2) that the suit was barred by s. 11 of the C. P. C. and O. II, r. 2, Sch. I of the C. P. C. The first defence was accepted by both the lower Courts. The learned Judge of the Court of first appeal did not think it necessary to decide if the suit was barred by s. 11 of the C. P. C. He did not agree with the finding of the first Court that the suit was barred by O. II, r. 2, Sch. I of the C. P. C. However, as the first contention of the defendant was accepted the appeal was dismissed with costs.

The plaintiff has appealed challenging the finding on the point decided against him. So far as I see, there is no force in this appeal. It was admitted by the plaintiff's Pleader in the first Court that the land in question had been given to the defendant free of rent for building a house thereon. This being the case it is difficult to understand how can the plaintiff claim any sum from the defendant now as damages for use and occupation of the land. The conditions remain as they existed at the time the license was granted. The defendant acting upon the license has executed a work of permanent character and incurred expenses in the execution thereof. The license cannot be revoked now by the plaintiff under s. 60 of the Easements Act. Having failed in the ejectment suit the plaintiff cannot now turn round and say that the defendant is liable to pay damages for use and occupation of the land. The defendant has done nothing which may give the plaintiff a cause of action for damages. I think the suit was rightly dismissed by the first Court and the learned Subordinate Judge was perfectly right in dismissing the appeal.

I dismiss the appeal with costs. The applicant should pay the respondent's costs. The decree of the Court of first appeal is confirmed in all respects.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 146 OF 1924.

March 31, 1925.

Present:—Sir Norman Mecleod, KT., Chief Justice, and Mr. Justice Coyajee.

NANALAL LALLUBHAI—DEFENDANT—APPLICANT

versus

CHHOTALAL NARSIDAS—PLAINTIFF—OPPONENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 24—Limitation Act (IX of 1908), Sch. I, Art. 120—Suit to recover money payable under award, whether cognizable by Small Cause Court—Limitation.

A suit to recover a sum of money directed to be paid to the plaintiff under an award is not a suit to contest an award within the meaning of Art. 24 of Sch. II to the Provincial Small Cause Courts Act and is, therefore, not excluded from the jurisdiction of a Small Cause Court.

Such a suit is governed by Art. 120 of Sch. I to the Limitation Act.

Mr. *M. B. Dave*, for the Applicant.

Mr. *H. V. Divetia*, for the Opponent.

JUDGMENT.—The plaintiff filed this suit as a Small Cause suit to recover money awarded to him against the defendant by an oral award delivered in July 1919. The suit was filed on March 8, 1924. The defendant pleaded: (1) that the Small Cause

Court had no jurisdiction as the case came within item No. 24 of the Second Schedule of the Provincial Small Cause Courts Act; (2) that the suit was barred by limitation. The Judge decreed the plaintiff's claim. Now item No. 24 in the Second Schedule refers to a suit to contest an award. The award in this case is admitted. The plaintiff is only seeking to recover what was awarded to him It is, therefore, not a suit to contest an award, and the Small Cause Court had jurisdiction. Reference may be made to *Simson* v. *Mc Master* (1).

Then the defendant says that this is a suit for money; the period of limitation is, therefore, three years. The plaintiff says that a suit to enforce an award comes under Art. 120. In *Rajmal Girdharlal* v. *Maruti Shivram* (2), the plaintiff applied to file an award made on an arbitration out of Court. The application was numbered as a suit, but it was summarily rejected without trying the validity of the award, on the ground that, treated as a suit, it was time-barred. The plaintiff next filed a regular suit to enforce the award. It was objected to as being barred by *res judicata*, as well as by limitation. It was held that a suit to enforce an award was a suit not provided for by any other Article of the Indian Limitation Act, so that the time was six years under Art. 120. The petitioner relies upon the decision of this Court in *Fardunji* v. *Jamsedji* (3). The question there was whether a suit on an award was a suit for specific performance. So far as we can gather, there was no question of limitation argued before the Court, nor was it decided that a suit to enforce an award is in reality a suit to recover money directed by the award to be paid to the successful party, so that the period of limitation for such a suit was three years and not six.

The Rule, therefore, must be discharged with costs.

Rule discharged.

Z. K.

(1) 13 M. 344; 4 Ind. Dec. (N. S.) 952.
(2) 59 Ind. Cas. 755; 45 B. 329; 22 Bom. L. R. 1377.
(3) 28 B. 1; 5 Bom. L. R. 705.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

July 21, 1925.

Present:—Lord Shaw, Lord Carson, Sir John Edge and Mr. Ameer Ali.

SOURENDRA MOHAN SINHA AND OTHERS—APPELLANTS

versus

HARI PRASAD SINHA AND OTHERS—RESPONDENTS.

Sonthal Parganas Regulation (III of 1872), ss. 5, 6—Sonthal Parganas Regulation (V of 1893)—Sonthal Parganas Regulation (III of 1908), s. 5—Mortgage suit relating to property situate within Sonthal Parganas—Interest, amount of, allowable—Civil Procedure Code (Act V of 1908), ss. 11, 34—Cause of action, whether can be split up—Relief not asked for in previous suit, whether barred—Interest pendente lite, grant of—Discretion of Court—Privy Council, appeal to—Practice—Accounts, examination of—Hindu Law—Mithila School—Debts incurred by father jointly with other members of family—Pious duty of sons to pay off debts.

The effect of s. 5 of the Sonthal Parganas Regulation III of 1908, which replaced s. 5 of the Sonthal Parganas Regulation III of 1872, has been to exclude for the future the jurisdiction of Civil Courts to try cases relating to any lands in the Sonthal Parganas only during such period as the land should be under settlement, the period being reckoned from the time when the land is notified as under settlement to the time when the settlement is completed. [p. 1038, col. 2.]

Where a suit is instituted in a Court outside the Sonthal Parganas with respect to property a part of which is situate within the Sonthal Parganas the Court in which the suit is instituted must be deemed to be one having jurisdiction in the Sonthal Parganas within the meaning of s. 6 of the Sonthal Parganas Regulation III of 1872 as amended by the Sonthal Parganas Regulation V of 1893, and the Court in making a decree in such a suit is bound to comply with the provisions of that section which limits its powers [p. 1039, col. 1.]

The decreeing of interest after the date of the institution of a suit is within the discretion of the Court, and as a rule the Privy Council will not interfere with the exercise of this discretion by a High Court in India. [p. 1040, col. 2.]

The policy of the C. P. C. is that a plaintiff should not have the right to split up a cause of action against the defendant and to claim a decree on it in a later suit when he might have claimed the same on it in a previous suit. [p. 1041, col. 2.]

Where a mortgagee, in a suit to enforce the mortgage, fails to ask for a personal decree against the mortgagor, he cannot ask for this relief in a subsequent suit instituted against the mortgagor. [p. 1041, cols 1 & 2.]

In an appeal from the decree of a High Court in India, in a suit which involves a prolonged examination of numerous items of advances and loans and of the evidence relating to them, those who impugn before the Privy Council the findings of fact arrived at by the High Court upon which it based its decree, must draw the attention of their Lordships to the material evidence which they suggest that the High Court misunderstood or failed to appreciate, and on which they contend that their Lordships should come to a conclusion different from that at which the High Court arrived. [p. 1041, col. 2.]

The Hindu Law of the Mithila School is the Law of the Mitakshara except in a few matters in respect of which the Law of the Mithila School has departed from the Law of the Mitakshara. [p. 1042, col. 2.]

Under the Mithila School of Hindu Law a son or a grandson does not escape from his pious duty of paying off debts incurred by the father or grandfather merely on the ground that the debts were incurred by the latter jointly with another member of the joint family. [*ibid.*]

Consolidated appeals against the decrees of the Patna High Court (Sir Dawson Miller, Kt., C. J. and Justice Sir John Bucknill, Kt.,) dated the 12th April 1922, printed as 66 Ind. Cas. 945.

Messrs. *De Gruyther* and *S. Hyam*, for the Appellants.

Messrs. *G. Lowndes* and *E. B. Raikes*, for the Respondents.

JUDGMENT.

Sir John Edge.—These are two consolidated appeals from a decree of the 12th April, 1922, of the High Court at Patna, which varied a decree of the 17th June, 1918, of the Subordinate Judge of Bhagalpur.

The suit in which these consolidated appeals have arisen was instituted in the Court of the Subordinate Judge of Bhagalpur on the 5th February, 1915. The plaintiffs claimed Rs. 11,81,811 principal and interest alleged to be then due under a mortgage-bond of the 21st December, 1896, for Rs. 3,50,000, of which Rs. 1,36,142 were advanced in cash, the balance being money alleged to be due under a previous bond of the 3rd October, 1883, and for moneys advanced at various times, and for interest at various rates. The bond in suit provided that the principal sum of Rs. 3,50,000 was to carry $7\frac{1}{2}$ per centum compound interest with yearly rests. The principal was re-payable in the month of *Phagon*, 1310 *Fasli*, the last day of which month was the 14th March, A. D. 1903. The bond was executed by all the adult male members of the joint family, the members of which family lived in the Sonthal Parganas, and was also executed by them on behalf of all the minor members of the joint family as their guardians. It was intended that the bond should bind all the members of the joint family and the property mentioned in the bond. All the defendants, except as later in this paragraph is mentioned, are members of the joint family. The joint family is governed by the school of Hindu Law of the Mithila. The grantee of the bond, who was the mortgagee, was Surja Narain Singh, Bahadur, of the District of Bhagalpur, by profession a Pleader, who had occasionally acted for the joint family, and knew its financial position; he died long before this suit was brought, and the plaintiffs are his representatives and are the persons in whom are vested his rights under the bond. The defendant, Dwarka Prasad Singh, was by birth a member of the joint family. Since the bond was made he was adopted into another family. The other defendants, who are not members of the joint family, claim through the joint family. The executants of the bond, in addition to granting the rights of a mortgagee to Surja Narain Singh, declared by the bond that they should jointly and severally pay the principal and interest, simple and compound, for which the bond was given.

A previous suit on the same mortgage bond of the 21st December, 1896, had been brought in the Court of the Subordinate Judge of Bhagalpur on the 20th June, 1904, by the then representatives in interest of Surja Narain Singh, the deceased mortgagee, against the then members of the joint family and others who claimed title through members of that family. That suit of 1904 came on appeal to His Majesty in Council and was dismissed by His Majesty in Council acting upon and adopting the advice tendered to His Majesty in a judgment of the Board which was delivered on the 19th May, 1914, by Lord Moulton. In considering the advice which it will be the duty of their Lordships to tender to His Majesty in these consolidated appeals, it will be necessary to refer at some length to the judgment of the Board of the 19th May, 1914. That judgment of the Board is reported as *Maha Prasad Singh* v. *Ramani Mohan Singh* (1).

In each of the suits the main claim was for a decree which might be executed by a sale of the mortgaged property on default of payment by the mortgagors of the amount decreed to be due under the mortgage bond. In each of the suits there was a claim for such other relief as the plaintiffs might be entitled to, which would include a decree on the personal liability under the mortgage-bond of the persons who might be the mortgagors. The property mortgaged was the joint property

(1) 25 Ind. Cas. 451; 41 I. A. 197; 18 C. W. N. 994; 16 M. L. T. 105; (1914) M. W. N. 565; 1 L. W. 619; 20 C. L. J. 231; 27 M. L. J. 459; 16 Bom. L. R. 824; 42 C. 116 (P. C.).

of the joint family, the greater part of which was situate within the Sonthal Parganas. That joint property extended from the Sonthal Parganas into the District of Bhagalpur, and the smaller part of the joint property thus happened to be situate within the local limits of the ordinary jurisdiction of the Subordinate Judge of Bhagalpur. The mortgage-bond was executed in Bhagalpur and was registered in the Bhagalpur Registry.

The mortgage-bond has been translated, and to that translation their Lordships will refer. By their bond the mortgagors declared that they would re-pay to the mortgagee the said sum of Rs. 3,50,000 in the month of *Phagon*, 1310 *Fasli*, and further declared that they should pay interest on the Rs. 3,500,000 at the rate of $7\frac{1}{2}$ per centum per annum on the 1st *Phagon*, 1304 *Fasli*, and thereafter every year on the 1st *Phagon*, and that if they should fail to pay such interest the interest should be treated as principal, and interest on interest should be charged at $7\frac{1}{2}$ per centum per annum and converted into principal after the 1st of *Phagon*, and the compound interest should be paid by them to the mortgagee, and that even after the expiry of the due date of payment (the 1st of *Phagon*, 1310 *Fasli*) they should pay such compound interest, and that "the rates and stipulations as regards interest should in no case be reduced and changed either before or after a decree is passed."

The mortgage-bond also contained, amongst others, the following agreements by the mortgagors:—

"6. We do declare that we shall be jointly and severally bound to pay the principal, interest, compound interest as well as costs incurred in Court or privately, by the said Rai Bahadur, for realisation of the debt.

"7. For payment of the principal interest, compound interest and costs referred to above, we the executants have mortgaged and hypothecated the properties mentioned in Schedule II of this deed to the said Rai Bahadur subject to the mortgage lien created under the bond dated the 11th *Asin*, 1299 *Fasli*. This is the first mortgage, and in support of continuation of the mortgage, the said bond has been left with the said Rai Bahadur and the amount due on the said bond has been included in this bond. Save and except the amount due under this bond there is nothing due by us to the said Rai Bahadur. If we do not pay the money due to the said Rai Bahadur as stipulated in this bond, he shall be at liberty to bring a suit and to realise his dues together with costs, if any, by sale of all or any of the mortgaged properties or any portion thereof or from our person or other properties. We the executants shall not put forward any plea that the mortgaged properties should be sold first and after that the amount with cost be realised from our person and other properties. The said Rai Bahadur shall be at liberty to bring the mortgaged properties to sale first or last.

"8. If the interest be not paid as stipulated in this bond, the said Rai Bahadur shall be competent to bring a suit and to realise the interest and compound interest by sale of all or any of the mortgaged properties or any portion thereof or from our person or other properties. The mortgaged properties which will be sold for realisation of the interest will be sold free of encumbrances of the balance of the loan and future interest and the same will be considered to have been sold. If there be any surplus sale proceeds after satisfaction of the interest and compound interest for which a suit might have been brought, the same shall be taken by the said Rai Bahadur towards payment of his (principal) dues. We the executants or any other person shall have no right to the said surplus sale proceeds. By the stipulations contained in this paragraph the said Rai Bahadur shall not be bound to sue for interest and compound interest (alone) but shall be at liberty to sue for the interest and compound interest or to sue for the same along with his suit for the principal, when he will be entitled to do so."

Clause 16 of the bond is as follows:—

"16. This loan has been taken at Bhagalpur. The said Rai Bahadur shall be at liberty to bring suit in the Court of District Bhagalpur and to realize his entire dues or the interest by sale of the mortgaged properties. We the executants shall raise no objection as to the suit being tried in the Court of District Bhagalpur. If we do so the same shall not be entertainable. Some of the *mouzas*, *i. e.*, the mortgaged properties No. 1, mentioned in Schedule II lie in the District of Bhagalpur, and some in the District of Sonthal Parganas."

The Sonthal Parganas were in 1872 and are still a backward district, and the Government of India considered that the inhabitants of the Sonthal Parganas and their properties in the Sonthal Parganas required some protection from the operations of money-lenders beyond the protection which was afforded by the law generally then in force in India, and enacted the Sonthal Parganas Regulation III of 1872 (known as the Sonthal Parganas Settlement Regulation), which came into force on the 1st May, 1872, and so far as it was material was in force until Regulation V of 1893, and the Sonthal Parganas Settlement (Amendment) Regulation 1908 (III of 1908) were, as later is mentioned enacted.

Section 5 of Regulation III of 1872 was as follows :—

"5. Till such time as a settlement of the whole or any part of the Sonthal Parganas shall be made under the rules hereinafter provided, and the said settlement shall be declared by a notification in the *Calcutta Gazette* to have been completed and concluded, no suit shall lie in any Court established under the said Act VI of 1871 in regard to any land or any interest in or arising, out of any land, or for the rent or profits of any land, or regarding any village-head-ship or other office connected with the land, except as hereinafter provided ; but such suits shall be heard and determined by the officers appointed by the Lieutenant-Governor of Bengal under s. 2 of the said Act XXXVII of 1855, or by the Settlement Officers hereinafter mentioned according as the said Lieutenant-Governor shall from time to time direct."

Section 6 of Regulation III of 1872, as amended by Regulation V of 1893, was and is as follows :—

"All Courts having jurisdiction in the Sonthal Parganas shall observe the following rules relating to usury, namely :—

"(*a*) interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than 2 per cent. per mensem, notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed.

"(*b*) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan.

"*Explanation.*—The expression 'intermediate adjustment of account' in cl. (*a*) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when, without the passing of fresh consideration, the original claim is increased by such renewal.

"*Illustration.*—A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs 50 only will bear interest, and the limit of the claim on the bond will be Rs. 100."

As has been mentioned, the previous suit on the mortgage in question which came before the Board in 1914 was instituted in the Court of the Subordinate Judge of Bhagalpur, on the 20th June, 1904, and he tried the suit and made his decree therein on the 12th February, 1906. No notification that the settlement mentioned in s. 5 of Regulation III of 1872, had been completed and concluded was ever made in the *Calcutta Gazette*. In the suit of 1904, the two material issues to be determined were: (*a*) whether the Bhagalpur Court had jurisdiction in the suit, and (*b*) whether the mortgagees were precluded by s. 6 of Bengal Regulation III of 1872, as amended in 1893, from recovering compound interest or interest exceeding in amount the principal advanced. The Subordinate Judge, by his judgment delivered on 12th February, 1906, found all the issues in favour of the mortgagees, and made a decree under s. 86 of the Transfer of Property Act, 1882 (Act IV of 1882) for payment and for sale in the event of non-payment. From that decree the mortgagors appealed to the High Court at Calcutta, but at the hearing of that appeal the arguments were confined to issue (*b*). That appeal was heard by Harrington and Mukerji, JJ., who dismissed the appeal, holding themselves bound by some unreported decision of their Court to the effect that the words in s. 6 of Regulation III, of 1872—"The Court having jurisdiction in the Sonthal Parganas"—meant a Court situate in that district and constituted under the Regulation, and did not include a Court situated outside, but exercising

jurisdiction to order the sale of mortgaged property situated within that district. From that decree of the High Court there was the appeal to His Majesty in Council, which was before the Board in 1914. It appears that there were also then two other appeals to His Majesty in Council, one of which was from a decree of the High Court which reversed a decree of the Subordinate Judge with regard to the amount of interest recoverable under the decree of the Subordinate Judge as drawn up. Such was the position of the suit when the appeal to His Majesty in Council came before the Board in 1914.

The appeal to His Majesty in Council was elaborately and exhaustively argued by the learned Counsel for the parties, and the carefully considered judgment of the Board was delivered by Lord Moulton. Much of that judgment related to the history of legislation, which had ceased to apply to the Sonthal Parganas, and to which their Lordships need not now refer. In referring to that judgment of the Board, their references are to those portions of the judgment which express the decision of the Board on questions of law which are material to the right understanding of the appeal which was before the Board. If it be the fact that some of that was *obiter*, as the High Court at Patna thought, it is not to be assumed that any of the conclusions expressed in the judgment were unsound.

In the judgment which was delivered by Lord Moulton, their Lordships then constituting the Board having mentioned that the jurisdiction of a Judge of the Courts established under the Bengal United Provinces and Assam Civil Courts Act, 1887, or its predecessor, the Bengal Civil Courts Act, 1871, extended to "suits of which the value exceeds Rs. 1,000, and which are not excluded from his cognizance by the Sonthal Parganas Settlement Regulation, or by any other law for the time being in force," said that: "they were clearly of opinion that these words of exclusion refer to s. 5 of the Regulation of 1872, which excluded from the cognizance of any such Court suits relating to land, the settlement of which had not been finished and duly notified, and placed them exclusively in the hands of Settlement Officers or officers appointed by the Lieutenant-Governor of Bengal under s. 2 of the Regulation of 1855. This exclusive jurisdiction is, therefore, maintained, and suits in regard to land which is not in districts that have been notified as being completely settled are not within the cognizance of the ordinary Courts, no matter what may be the value of the matter in dispute. It is not necessary for the purpose of this appeal to examine further into the jurisdiction of Courts established under these provisions, because the Court of Bhagalpur, in which the present action was brought, is not one of such Courts."

Later in the judgment the Board said:

"The information supplied to their Lordships by the parties as to the notifications appearing in the *Calcutta Gazette* show conclusively that, although portions of the lands mortgaged had been settled, and notification had been duly made that such settlement had been completed, at dates prior to the institution of the suit, other portions were not settled. It is clear, therefore, that the suit came within the provisions of s. 5 of the Sonthal Parganas Settlement Regulation, 1872, relating to the exclusive jurisdiction of officers appointed by the Lieutenant-Governor of Bengal, or by Settlement Officers, inasmuch as it related to land which had not been settled, or the settlement of which had not been declared by a notification in the *Calcutta Gazette* to have been completed and concluded. The Court of Bhagalpur had, therefore, no jurisdiction to entertain the suit, and this appeal should be allowed.

"Reliance was placed by Counsel for the respondents on the stipulation in the bond that the mortgagees might enforce it in the Court of Bhagalpur. Their Lordships are of opinion that this has no effect. That Court had no jurisdiction to entertain the suit, which, beyond question, was a suit in regard to land in the Sonthal Parganas, and that being so the parties could not give it the necessary jurisdiction by consent. To do so would be to nullify the express prohibition of s. 5 of the Sonthal Parganas Regulation, 1872, which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of that jurisdiction."

The judgment of the Board also dealt with the question of the right of the mortgagees to claim compound interest. That question was also before the Board in one of the other appeals as to which the Board had to tender advice to His Majesty, and their Lordships held that "Apart

from the question of jurisdiction, any Court dealing with the subject matter of the suit would be bound to give full force and effect to the provisions of s. 6 of the Sonthal Parganas Settlement Regulation, 1872, relating to usury, and, therefore, to have refused to decree any compound interest arising from any intermediate adjustment of interest, or an amount of total interest exceeding the principal of the original debt or loan."

The plaintiffs in the suit of 1904 did not specifically ask the Subordinate Judge of Bhagalpur, or the High Court or the Board to grant them a decree for money in their general claim for further relief on the personal undertaking in the mortgage bond of the mortgagors to pay the debt and interest.

Their Lordships in considering the present consolidated appeals will, where necessary, follow and apply the judgment of the Board which was delivered by Lord Moulton in the previous suit, but the question as to the jurisdiction of the Court of the Subordinate Judge of Bhagalpur to entertain the present suit depends on circumstances which did not exist when the previous suit was instituted on the 20th June, 1904.

By Regulation III of 1908, ss. 5 and 5A were substituted for s. 5 of Regulation III of 1872. Section 5 which was substituted for s. 5 of the Regulation of 1872 is as follows :—

" 5. (1) From the date on which, under s. 9, the Lieutenant-Governor declares, by a notification in the *Calcutta Gazette*, that a settlement shall be made of the whole or any part of the Sonthal Parganas, until the date on which such settlement is declared, by a like notification, to have been completed, no suit shall lie in any Civil Court established under the Bengal, Agra and Assam Civil Courts Act, 1887, in regard to:—

(*a*) any land or any interest in, or arising out of, land, or

(*b*) the rent or profits of any land, or

(*c*) any village headship or other office connected with any land, in the area covered by such first-mentioned notification; nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it.

" (2) Between the dates referred to in sub-s. (1), all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor under s. 2 of the Sonthal Parganas Act, 1855, or s. 10 of this Regulation, according as the Lieutenant-Governor may from time to time direct; and such officer shall hear and, even though during the hearing the settlement may be declared to have been completed, determine them."

Section 5A does not bear on this question of jurisdiction, and need not be considered.

Their Lordships agree with the High Court that the effect of s. 5 of Regulation III of 1908, which replaced s. 5 of the Regulation of 1872, has been to exclude for the future after that substitution the jurisdiction of the Civil Courts to try cases relating to any lands in the Sonthal Parganas only during such period as that land should be under settlement, the period being reckoned from the time when the land is notified as under settlement to the time when the settlement is completed. The mortgagors were the appellants in the appeal before the High Court, and the High Court found on the evidence that the appellants in the appeal before the High Court had failed to prove that at any time the mortgaged property was notified for settlement and not notified as settled and that the defence that the Subordinate Judge of Bhagalpur had no jurisdiction to entertain the present suit failed. In their Lordships' opinion it is not shown that on the facts before the High Court the High Court came to a wrong conclusion that the Subordinate Judge of Bhagalpur had jurisdiction to entertain this suit, which was instituted on the 5th February, 1915. But in entertaining this suit the Subordinate Judge was a Court having jurisdiction in the Sonthal Parganas within the meaning of s. 6 of the Regulation III of 1872, as amended in 1893.

As the mortgage was made in Bhagalpur and some part of the mortgage lands are within the local limits of the jurisdiction of the Court of the Subordinate Judge of Bhagalpur, and as the jurisdiction of the Court of the Subordinate Judge to entertain the suit on the mortgage was not on the facts of the case, which were accepted by the High Court as proved, not excluded by the substituted s. 5 of the Regulation of 1872, their Lordships' accepting the findings on the question of the High Court as correc

hold that the Subordinate Judge of Bhagalpur had jurisdiction to entertain the present suit, which was instituted on the 5th February, 1915. In entertaining the suit the Subordinate Judge was a Court having jurisdiction in the Sonthal Parganas within the meaning of s. 6 of Regulation III of 1872, as amended by Regulation V of 1893, and was bound in making a decree in favour of the mortgagees to comply with that section, which limited his powers. Issue No. II, as amended by the Subordinate Judge, was "Are the plaintiffs (the mortgagees) entitled to (a decree for) compound interest or to one (a decree for interest) exceeding the principal (amount lent)?" The Subordinate Judge in this suit made a decree for the plaintiffs which included interest, both simple and compound, and such interest exceeded the amount of the original debt or loan. His decree in favour of the plaintiffs was for Rs. 15,27,997-8-3 in respect of the mortgage-debt and interest thereon, and for Rs. 44,164 as a personal decree in respect of the declaration in the mortgage-bond that the mortgagees would personally pay the Rs. 3,50,000, which included Rs, 12,968-11-3, which he held was not secured on the mortgaged property. From that decree the mortgagees and other defendants affected by it appealed to the High Court, not only as to the interest which had been allowed, but also as to the personal decree.

The appeal was heard by Sir Dawson Miller, C. J., and Mr. Justice Bucknill. These learned Judges carefully considered the facts of the case and applied s. 6 of Regulation III of 1872 as amended in 1893. They disallowed all the compound interest on the actual debts, and thereby reduced the amount of Rs. 15,27,997 to Rs. 3,88,673, and similarly reduced the amount of the personal decree from Rs. 44,164 to Rs. 23,181. Assuming that s. 6 of Regulation III of 1872, as amended in 1893, applied, it is not disputed that those reductions were correctly arrived at by the High Court. In their Lordships' opinion s. 6 of Regulation III of 1872 as amended applied.

It was also contended in the appeal to the High Court that some of the money claimed, Rs. 12,968-11-3, as a debt was not advanced for a necessity of the joint family and was not an antecedent debt for which the joint family property was liable under the mortgage bond. As to that Rs. 12,968-11-3 the High Court agreed with the Subordinate Judge that the mortgaged property was not liable in respect of it, and that it might be recovered under a personal decree, but the High Court by disallowing compound interest on it, reduced the personal decree which had been made from Rs. 44,164 to Rs. 23,181.

The High Court allowed no interest on the principal loan as the interest which had been paid or was included in the Rs. 3,50,000 amounted to more than the money lent or advanced, and made a decree for the plaintiffs for Rs. 3,90,157, and decreed that the mortgaged property or a sufficient part of it should be sold if that amount should not be paid on or before the 11th October 1922 and if paid on or before the 11th October, 1922, the plaintiffs should deliver up to the defendants or to such persons as they should appoint all documents in their possession or power, relating to the mortgaged properties, and should, if so required, re-transfer the same to the defendant free from the mortgage and from all incumbrances created by the plaintiffs or any person claiming under them. And further ordered and decreed that the plaintiffs should realize from the persons and properties of the defendants Nos. 1 to 5 the sum of Rs. 23,270 on their personal liability, and also ordered and decreed that the plaintiffs-respondents in the appeal to the High Court, should pay to the defendants the sum of Rs. 6,012 being the proportionate costs incurred by the defendants in the High Court.

From that decree of the High Court these consolidated appeals have been brought. The reasons alleged by the plaintiffs in their case are so far as it is necessary to refer to them, that s. 6 of the Regulation III of 1872 as amended in 1893 does not apply; that the payments already made in respect of interest ought not to have been deducted from the sum of Rs. 3,50,000, and that in any case the High Court should have allowed interest at Rs. 6 per centum from the date of the institution of the suit. The reasons alleged by the defendants in their case are, so far as it is necessary to refer to them that the claim for a personal decree is barred; that the mortgage-bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity; and that under the Mithila School of Law the joint family could not be bound by any debt which was not originally contracted by a

common ancestor of all its members, and that in such a family a descendant is not liable for any debt for which his ancestor was liable jointly with another person.

As to the contention on behalf of the plaintiffs that s. 6 of the Regulation III of 1872, as amended in 1893 does not apply and that payments already made in respect of interest ought not to have been deducted from the sum of Rs. 3,50,000. Their Lordships hold that in entertaining this suit the Subordinate Judge of Bhagalpur was a Court "having jurisdiction in the Sonthal Parganas," and they agree with the Board in the 1904 suit that any Court would be bound to give full force and effect to the provisions of s. 6 of Regulation III of 1872 amended in 1893.

Section 6 of Regulation III of 1872 as amended by Regulation V of 1908 was very carefully considered in the High Court at Calcutta in 1905 in *Ram Chandra Marwari* v. *Rani Keshobati Kumari* (2) in which case Maclean, C. J., and Pargiter, J., held that s. 6 Regulation III of 1872 as amended by Regulation V of 1903 does not authorise any Court to decree as interest a larger sum of money than would together with prior payments if any equal the original loan or debt. In that case Ghose, J., differing, held that all that a Court has to see to when a suit is instituted, is that the interest claimed in the suit does not exceed the limit prescribed in the section.

As to the contention on behalf of the plaintiffs that the High Court should have allowed interest from the date of the institution of the suit. Under the circumstances of this case as will presently appear, that contention must be limited to the sum of Rs.3,88,673. That Rs.3,88,673 was the total sum which the High Court rightly found to be allowable in respect of the principal loan. The question as to whether interest should be allowed from the institution of the suit was considered by the High Court. The Subordinate Judge who tried the suit by his decree of the 17th June 1918 decreed interest from the institution of the suit only on the amount of the personal decree and ordered that an account should be taken of the mortgage-debt due under the mortgage bond. The taking of such an account was necessary in order to complete the decree of the Trial Judge for execution. The account was taken by his successor in the office of Subordinate Judge of Bhagalpur who had not tried the suit, but in making the final order as to the account which he made on the 14th May, 1919 he did not confine himself to making an order for the amount which on taking the account he found to be due as the mortgage-debt, which would complete the decree of 17th June, 1918 of the Trial Judge, but proceeded to award interest from the date of the suit on the amount of the mortgage-debt. That as appears to their Lordships was not within the scope of his powers. He was not a Judge sitting in review or in appeal. He had to take the decree of the 17th June, 1918, as it had been drawn up. He had not power to alter it. His duty was to take the account which it directed to be taken. He had power, if necessary, to order who should be liable and to what extent, for the costs of taking the account. The allowance of interest post the date of the institution of a suit is by s. 34 of C. P. C., 1908 (Act V of 1908), within the discretion of the Court, and as a rule the Board has not interfered with the exercise of a discretion vested in a High Court. That the High Court carefully considered whether interest should or should not be allowed by the High Court post the date of the institution of this suit is apparent from the following passage in the judgment of the Chief Justice. He said:—

"It is not very clear why the learned Judge awarded interest only upon the amount of the personal decree and not on the amount of the mortgagee-decree but there is no cross-appeal on this question. I think there is much to be said for the argument that the Sonthal Parganas Regulation applies only to the interest to be decreed under the bond and does not limit the powers of a Court under s. 34 of the C. P. C., to award interest on the decretal amount until realization. But it has been held in this Court in *Keshobati Kumari* v. *Satya Niranjan Chakraberty* (3) that interest under the Code should not be awarded upon the decretal amount in so far as it includes interest on the principal debt or loan but only upon the amount of the principal debt itself as to do so would contravene the provisions of the Regulation relating to compound interest. The principle underlying this decision applies equally where the amount decreed as interest already

(2) 1 C. L. J. 182.

(3) 47 Ind. Cas. 179; (1918) Pat. 305.

equals the sum advanced. Although I have some doubt as to the propriety of the decision mentioned, I am not prepared to differ from the conclusion there arrived at and I think we should follow that decision."

Their Lordships have not before them a report of the decision of the Patna High Court to which the Chief Justice referred. But it is not necessary or advisable to consider whether the discretion of the High Court on that question of post institution of the suit interest was wisely exercised or not in respect of the amount decreed on the principal sum secured by the mortgage bond.

As to the contention on behalf of the defendants that the claim for a personal decree is barred it is necessary to consider whether the plaintiffs could have made a claim for a personal decree in the suit of 1904. Each of the suits was brought on the same mortgage-bond. In the suit of 1904 as in this suit, a decree for sale of the mortgaged property was the principal relief claimed. In the suit of 1904 a decree under s. 90 of the Transfer of Property Act 1882 (Act IV of 1882), was also claimed as a relief, and "such other reliefs as may under the circumstances of the case be deemed proper may be granted," the last mentioned claim is generally known as claim for general relief. In the present suit the fifth claim for relief is "That such other relief or reliefs as may under the circumstances of the case be deemed proper may be granted to the plaintiffs." It was under the fifth claim for relief that the personal decree was granted by the Subordinate Judge. Although in the suit of 1904 the Subordinate Judge had no power to make a decree for sale of the mortgaged property, he could have made and the High Court in appeal could have made a personal decree and the Board could have advised His Majesty that the plaintiffs were entitled to a personal decree, the plaintiffs omitted to make any specific claim for a personal decree.

The contention that the claim for a personal relief is barred arises under s. 11 of the C. P. C., 1908 (Act V of 1908), by which it is enacted that :—

"11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It is the policy of the C. P. C., 1908, as it was the policy of the C. P. C., 1882 that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. In their Lordships' opinion the right to the personal decree in this suit was barred by s. 11 of Act V of 1908 and this suit must be dismissed so far as any claim for a personal decree is concerned.

As to the contention on behalf of the defendants that the bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity, the Board may observe that in an appeal from the decree of a High Court in a suit which involved, as this did, as will presently appear from a passage which their Lordships will quote from Mr. Justice Bucknill's judgment, a prolonged examination of numerous items of advances and loans and of the evidence relating to them by a High Court, those who impugn before their Lordships the findings of fact by the High Court upon which it based its decree must draw the attention of their Lordships to the material evidence which they suggest that the High Court misunderstood or failed to appreciate, and on which they contend that their Lordships should come to a conclusion different from that at which the High Court arrived. This has not been done by either side in this case, owing most probably to the fact that it was not possible to do it. Neither side has drawn their Lordships' attention to any material evidence from which the High Court drew a conclusion of fact which their Lordships would not have drawn.

These consolidated appeals are appeals from a decree of the High Court which examined laboriously the many advances for the aggregate of which that Court made its decree. These advances were made over a series of years beginning in 1883, and

extending down to 1896, and were made to one or other of the principal adult members of the joint family, and it has not been suggested that any one of those advances was made for immoral purposes, or were secret advances and made without the knowledge of the other members of the family, who were adults at the time. The members of the family were not sufficiently provident always to live within their means, and debts were incurred which it was necessary in the interests of the joint family should be discharged. Their Lordships may quote a paragraph from the judgment of Mr. Justice Bucknill in this suit which illustrates the difficulty of the enquiry as to the loans which are included in the aggregate sum. Mr. Justice Bucknill said :—

"(4) A question as to the non-existence of legal necessity or family benefit for a large portion of the loan in question. This contention involved before the Subordinate Judge a very careful consideration of the elements of which the loan was in fact composed, and it has also been the subject of laborious enquiry and research before this Court. In cases such as these, where, in order to find the actual origin of portions, very often small and very often numerous of what is a large aggregate sum of money, one has to try to trace it back for a great many years, it is frequently almost impossible to deal with each individual item in any very satisfactory manner, and in deed, it is probably doubtful if it is right or necessary so to do. The Subordinate Judge took the broad view that in the main old loans contracted for the purpose of paying off earlier debts of a composite character should be regarded as carrying their own burden of proof that they fell, roughly speaking, within the confines of what may properly be regarded as legal necessity or family benefit."

From an examination of such of the evidence as has been brought to their Lordships' attention their Lordships accept the conclusion of the High Court that these advances were for the necessary purposes of the joint family.

As to the remaining contention on behalf of the defendants based on what is said to be the Law of the Mithila School that no member of a Hindu joint family subject to the Law of the Mithila School is bound to pay the debt of ancestor which was contracted jointly by the ancestor with another member of the joint family. That proposition thus broadly stated is a wide one, and would apply in the case of a son or a grandson of the ancestor who was under a pious duty of his father or his grandfather whether he was or was not in possession of assets which had come down to him from his father or his grandfather. That is a startling proposition. The Law of the Mithial School is the Law of the Mitakshara except in a few matters in respect of which the Law of the Mithila School has departed from the Law of the Mitakshara. Assuming that it was a debt which, if contracted by the father or grandfather alone, it was the pious duty of the son or of the grandson, to pay it is difficult to understand on what principal of the Law of Mithila school it was not a debt which it was the pious duty of the son or grandson to pay if it were contracted jointly with another who was a member of the joint family.

Assuming that the Chief Justice was correct in stating in his judgment that Vivada Chintamani is an authority which is binding upon those who are governed by the Mithila School of Hindu Law, the passages which have been cited as from it to their Lordships as appearing in the Tagore Translation at pages 34 and 35 seem to relate only to debt contracted by the ancestor with a stranger. From the judgment of the Chief Justice it appears, as was the fact, that the debt which was challenged in his Court on the authority of the Vivada Chintamani was a debt which was charged by the bond on the joint property of the family by each of the heads of the then four branches of the joint family, and all the other defendants, who were members of the joint family, were their sons or grandsons, and he observed that there was under circumstances no reason why the charges should not be held as binding upon the property in suit. With that observation of the Chief Justice, which, in their opinion, was consistent not only with commonsense, but with the law which the High Court in the appeal was administering in the suit, their Lordships agree. The Chief Justice referred to *Bhagbut Pershad Singh* v. *Girja Koer* (4) which may have come from the Mithila Country.

Their Lordships will, therefore, humbly advise His Majesty—(1) that the appeal of the plaintiffs ought to be dismissed and the appeal of the defendants allowed in

(4) 15 C. 717; 15 I. A. 99; 12 Ind. Jur. 289; 5 Sar. P. C. J. 186; 7 Ind Dec. (N. S.) 1062 (P. C.).

part and the decree of the High Court of Judicature at Patna dated the 12th April 1922, set aside so far as it was a personal decree against the defendants and in other respects except as to costs affirmed, (2) that the decree of the Court of the Subordinate Judge at Bhagalpur, dated the 17th June 1918 for the sale of the mortgaged property and for costs ought to stand except that so far as it was a personal decree against the defendants it should be set aside; (3) that neither side ought to be allowed any costs of the appeals in the said High Court and that any costs paid under the decree of that Court ought to be returned, (4) that the time within which the defendants ought to pay into Court the sum of Rs. 3,88,673 in respect of the mortgage-debt and interest ought to be extended until the expiry of eight months from the date of the receipt by the High Court of His Majesty's order in Council herein; and (5) that there ought to be paid by the plaintiffs to the defendants their costs of these appeals.

Decree varied.

Z. K.

Solicitors for the Appellants:—Messrs. *Barrow Rogers* and *Nevill.*

Solicitors for the Respondents:—Messrs. *Watkins* and *Hunter.*

OUDH CHIEF COURT.

EXECUTION OF DECREE APPEAL No. 67 OF 1925.

November 13, 1925.

Present:—Mr. Justice Hasan and Mr Justice Misra.

Kunwar LAL BAHADUR—JUDGMENT-DEBTOR—APPELLANT

versus

Lala BENI MADHO—DECREE-HOLDER—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 42, O. XXI, r. 48 (1)—Execution of decree—Transfer of decree—Court to which decree transferred, power of—Attachment, power of.

When a decree is transferred to a Court other than the Court which passed it for execution, the Court to which the decree is transferred has the same powers in executing such decree as if it had been passed by itself, including the power of attachment given by r. 48 (1) of O. XXI of the C. P. C.

Execution of decree appeal against an order of the Subordinate Judge, Hardoi, dated the 12th September 1925.

Mr. *H. D. Chandra*, for the Appellant.

Mr. *P. D. Rastoji*, for the Respondent.

JUDGMENT.—The respondents obtained a simple money-decree from the Court of the Subordinate Judge of Lucknow on the 17th April 1920 against four persons, one of whom was the appellant, Kunwar Lal Behari. On the 6th April 1921 the Court of the Subordinate Judge of Lucknow on an application being made to that effect by the decree-holders transferred the decree for execution to the Court of the Subordinate Judge at Hardoi that the salary of the judgment-debtor, Kunwar Lal Bahadur, be attached towards the satisfaction of the decree. This was presumably done under the provisions of s. 39 of the C. P. C., 1908. Since the transfer execution proceedings in relation to the decree have been taking place in the Court of the Subordinate Judge of Hardoi. Finally on the 17th April 1925 the decree holder applied to the Court of the Subordinate Judge at Hardoi that the salary of the judgment-debtor, Kunwar Lal Bahadur, be attached towards the satisfaction of the decree. Kunwar Lal Bahadur is a public servant holding the post of a Deputy Collector at Gorakhpur. Through the Collector of Gorakhpur the attachment was accordingly made by the Subordinate Judge. The action which the Subordinate Judge took was obviously taken under the provisions of O. XXI, r. 48 sub-r. (1) of the C. P. C. On the 13th July 1925 Kunwar Lal Bahadur submitted an application to the Court of the Subordinate Judge of Hardoi and thereby raised the question that the attachment of the salary was made by the Subordinate Judge without jurisdiction. The learned Subordinate Judge dismissed the application and this appeal is preferred against that order of dismissal dated the 12th September 1925.

It is argued that the power of attachment given by O. XXI, r. 48, sub-r. (1), of the First Schedule of the C. P. C., can only be exercised by the Court which passed the decree and not by the Court to which the decree was transferred for execution under the provisions of s. 39 of the C. P. C. In our judgment the contention has no substance whatsoever, when a decree is transferred to a Court other than the Court which passed the decree for execution the Court to which it is transferred "shall have the same powers in executing such decree as if it had been passed by itself": *vide* s. 42 of the C. P. C. We are, therefore, of opinion that the attachment made by the Subordinate Judge of Hardoi was made within jurisdiction.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 417 OF 1924.

September 3, 1925.

Present:—Mr. Findlay, Officiating J. C.

PIRBAX—PLAINTIFF—APPELLANT

versus

Musammat NANHEBI—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), ss. 17, 49—Unregistered document—Admission to prove collateral facts—Test—Perpetual lease deed—Premium, payment of, whether collateral fact.

For an unregistered document to be admissible in evidence the collateral fact to be proved must be independent of or divisible from the purpose, to effect which the law requires registration. [p. 1045, col. 1.]

Payment of the premium for a lease and the receipt of consideration therefor by the lessor are not collateral facts and an unregistered deed of perpetual lease is inadmissible to prove these facts. [p. 1044, col. 2.]

Balaji Teli v. *Bana Bai*, 1 N. L. R. 47 and *Kalicharan* v. *Lal Indar Shah*, 48 Ind. Cas. 923; 15 N. L. R. 31, followed.

Second appeal against a decree of the Additional District Judge, Nagpur, dated the 15th March 1924, in Second Appeal No. 40 of 1924.

Mr. *A. V. Wazalwar*, for the Appellant.

Mr. *W. R. Puranik*, for the Respondent.

JUDGMENT.—The plaintiff Pirbax sued the defendant *Musammat* Nanhebi for possession of two fields in *Mouza* Surabardi (Nagpur) in the Court of the Subordinate Judge, Second Class, Nagpur. The defendant is the *malguzarin* of the village, and the two fields in question Nos. 57 and 25 respectively had become the *khudkasht* land of the defendant about the *Fasli* year 1327. The plaintiff had been the *mukhtiar* of the defendant for some 9 or 10 years and had done her Court as well as rent realization work. The plaintiff's case was that as a reward for his services the defendant gave over to him field No. 57 and half of the field No. 25 on 14th April 1918. She accepted $2\frac{1}{2}$ times the assessment and conferred upon him perpetual tenancy rights therein. The plaintiff's case further was that he personally cultivated these fields during the *Fasli* years 1328-1330 and duly paid the rent to the defendant. He was also recorded in the *jamabandi* as tenant of the fields in question and in 1329 the two parties had jointly constructed a well on the *dhura* of field No. 25. In 1331 *Fasli* year a quarrel ensued between the parties, and the plaintiff left the village. He accordingly let out the fields in question to sub-tenants for a year, but the defendant ousted the latter and took possession on 10th June 1921. The plaintiff, thereupon, applied for re-instatment in the Court of the Tahsildar, Nagpur, but his application was dismissed. Hence he filed the present suit.

The defendant denied the alleged grant of perpetual tenancy in favour of the plaintiff, as well as the fact that he had paid consideration therefor or had actually cultivated the fields and paid rent to her. If any entries in the village papers were in favour of the plaintiff, it was alleged that they had been made in collusion with the *patwari*, and further allegations were made that the plaintiff as defendant's agent had fraudulently brought into existence a lease-deed on some blank paper containing her thumb-mark which she had been in the habit of giving when he was in her service. She alleged that she had, all through, been in possession of the fields and that no sub-tenants on behalf of the plaintiff had cultivated them.

On the issues, which arose on these and the connected pleadings, the Subordinate Judge held that the *patta*, dated 14th April 1918, was inadmissible in evidence as being unregistered, and he also held that the oral evidence of the contents of the lease was inadmissible. On the remaining issues, after a careful survey of the evidence, he held that the plaintiff had not cultivated the fields in the *Fasil* years 1328-1330 and that the defendant had never accepted rent from the plaintiff. The Judge of the first Court accordingly dismissed the plaintiff's suit.

An appeal to the Court of the Additional District Judge, Nagpur, by the plaintiff, similarly proved unsuccessful. The learned Additional District Judge held that to allow the plaintiff-appellant to produce the unregistered deed for the purpose of proving what were termed by him collateral matters, such as the payment of the premium to the defendant and the receipt of consideration by her, would defeat the provisions of the Statute relating to registration. The judgment of the first Court was accordingly confirmed.

The plaintiff has now come up on appeal to this Court. Reliance has been placed on behalf of the appellant on the

decision of Hallifax, A. J. C., in *Maktumbi* v. *Anant Ram* (1) and that in *Gangabisan* v. *Tukaram* (2). In the latter case, Stanyon, A. J. C., held that a compulsorily registrable, but unregistered, deed of sale, though inadmissible to prove the fact and terms of the sale itself, may nevertheless be admitted to prove the agreement to sell, for the purpose of obtaining such legal or equitable relief as may arise out of the contract. In the other case decided by Hallifax, A. J. C., his finding was that the document therein concerned purported to be a lease and was admittedly meant by the parties to be such a lease. All that the learned Additional Judicial Commissioner held in this case was that the fact of its execution was evidence that, before it was executed, the parties had agreed that there should be a lease and that it also might be used as evidence of the previous oral agreement.

I am unable, however, to see that the Judge of the lower Appellate Court was wrong in the view he took in this connection with reference to the decision in *Varada Pillai* v. *Jeevarathnammal* (3). It is wholly incorrect in the present case to say that it is only desired to prove the unregistered document in question for collateral purpose, such as the fact that a premium had been paid, or to show the character of the plaintiff's possession. Here we have definite findings of fact that the plaintiff was never in possession and never paid rent, and, in spite of any possible amount of verbiage, the fact remains that the only object of the plaintiff, in seeking to have this document produced in the evidence, is to prove that he was the tenant of the fields in question. The decisions in *Balaji Teli* v. *Bana Bai* (4) and *Kalicharan* v. *Lal Indar Shah* (5) seem to me to be fully applicable. Under the former decision such a document would be even inadmissible in support of a claim for damages in respect of the contract alleged to have been entered into and broken. For such a document to be admissible in evidence the collateral fact to be proved must be independent of, or divisible from, the purpose, to effect which the law requires registration. It is utterly impossible to postulate this requirement of the present case. I agree, therefore, with both the lower Courts that the document in question was correctly excluded from evidence.

The next point urged on behalf of the appellant is that the lower Courts have erred in rejecting the *jamabandi* evidence (Exs. P-2, P-3, P-4, P-7, and P-8), which favours the appellant's case. It has been suggested that there was no sufficient evidence on which to hold that the *patwari* had colluded with the appellant in the preparation of these documents. It must suffice to say that all the facts and reasonable inferences point in this direction. The fact that the applicant, although well aware of Court procedure and the like, deliberately refrained from getting the alleged lease registered, points not only to the least but to the *jamabandis* having been tampered with at his instance. It may either be that the *patwari* deliberately colluded with the appellant, or that he was misled by the fact that the appellant was actually superintending the cultivation of the fields on defendant's behalf, into accepting his story of the lease in his favour. There was abundant evidence, in short, to justify the lower Appellate Court coming to the finding it did in this connection, and the fact that the appellant failed to produce his diary, in which he had entered the expenses he incurred in cultivating the land as well as the alleged receipt book, seems to me to constitute a most damning item against him.

The other and last point urged on behalf of the appellant was that he should have been given a further opportunity to examine the *patwari*, *vide* the order-sheet, dated 4th December 1923, of the first Court. There is no possible reason for interference in second appeal in this connection. The Subordinate Judge seems to have exercised a proper judicial discretion in not granting a further adjournment for the examination of the *patwari*, and the fact that the defendant's No. 4 witnesses were examined on the very next day, is no reason for supposing the first Court's order of 4th December 1923 to have been wrong.

The present second appeal has no substance whatever and is dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

Appeal dismissed.

G. R. D.
N. H.

(1) 84 Ind. Cas. 670; (1923) A. I. R. (N.) 73.
(2) 2 Ind. Cas. 244; 5 N. L. R. 70 at p. 74.
(3) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 316; 38 M. L. J. 313; 18 A. L. J. 274; 46 I. A. 285; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).
(4) 1 N. L. R. 47.
(5) 48 Ind. Cas. 923; 15 N. L. R. 31.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 269 OF 1924.

November 23, 1925.

Present:—Mr. Justice Raza.

MANZUR HUSAIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

VIKALAT FATIMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Finding of fact—Genuineness of transaction—Notice, absence of—Interference by High Court.

There is no jurisdiction in a High Court to entertain a second appeal on the ground of an erroneous finding of fact, however inexcusable the error may seem to be. Where there is no error or defect in procedure a finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.

A finding that a transaction was not genuine and that a certain party had no notice of the transaction, is a finding of fact which cannot be questioned in second appeal.

Second appeal against a decree of the Additional Sub-Judge, Sitapur, dated the 28th February 1924, reversing that of the Munsif, Sitapur, dated the 4th December 1922.

Mr. *Ali Mohammad*, for the Appellants.

Messrs. *Bishambhar Nath* and *Rajeshwari Prasad*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal. The plaintiffs are the sons of Qaem Ali by his second wife. Nazir Husain was the son of Qaem Ali by his first wife. The defendants Nos. 2 and 3 are his sons by the defendant No. 1. Qaem Ali owned a 4-annas share in two *mohallas* in Sitapur. He sold that share to one Afzal Husain for Rs. 500 by a deed dated the 12th September 1913. Afzal Husain re-transferred the same to Nazir Husain by a sale-deed dated the 29th September 1913, Nazir Husain died in January 1915. The defendants Nos. 1 to 3 sold the entire property to the defendants Nos. 4 to 14 by a registered sale-deed dated 20th April 1916. The plaintiffs brought the present suit alleging that Nazir Husain had executed an unregistered agreement in their favour on the 29th December 1913 promising to convey half of the property to them on payment of Rs. 250 within seven years from the date of the agreement. They, therefore, prayed for specific performance of the contract.

The claim was resisted by the defendants Nos. 4 to 14. They denied the agreement and also challenged its validity and effect. They alleged further that the plaintiffs were estopped from bringing the suit as they had knowledge of the sale in favour of the contesting defendants. The first Court found that the defendants Nos. 4 to 14 were estopped as they had notice of the agreement in question which was genuine and valid, that the agreement was binding on them, that the plaintiffs also were aware of the sale in favour of the defendants Nos. 4 to 14 but they were not estopped from bringing the suit. The plea of limitation raised by defendants was also found against them.

The defendants appealed and their appeal was allowed by the learned Subordinate Judge of Sitapur.

In my opinion there is no force in this appeal. So far as I see the lower Appellate Court has found that the alleged agreement is not genuine and that the vendees (contesting defendants) had no notice or knowledge of the agreement in question. I have examined the agreement in question. It appears to be an agreement without consideration. The learned Subordinate Judge has referred to the circumstances which go to show that no agreement was really executed by Nazir Husain as alleged. This is surely a finding of fact. The other findings that the vendees had no notice of the alleged agreement is also a finding of fact. The alleged agreement cannot, therefore, be enforced against the contesting defendants. A Court of second appeal is not competent to entertain the question as to the soundness of a finding of fact by the Court below. A second appeal can only lie on one or other grounds specified in s. 100 of the C. P. C. No second appeal shall lie except on the ground mentioned in s. 100 (see s. 101 of the C. P. C.). There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, inexcusable the error may seem to be. Where there is no error or defect in procedure the finding of the first Appellate Court upon a question of fact is final if that Court had before it evidence proper for its consideration in support of the finding. The lower Appellate Court had before it all the evidence and after considering the whole evidence it came to the conclusion that the agreement in question was not genuine and valid and that the vendees had no notice or knowledge of the agreement. Under these circumstances the plaintiffs' claim must be rejected. I can find no ground for interference.

I dismiss this appeal with costs. The

appellants shall pay the costs of the contesting respondents.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1032 OF 1920.

December 22, 1924.

Present:—Mr. Justice Abdul Raoof.

SANTA SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

NARAIN SINGH—PLAINTIFF—*Musammat* DEOKI AND OTHERS—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Ejectment suit—Tenancy, allegation of, not established—Burden of proof.

Where in a suit for ejectment on the allegation that the defendant took possession of the property in dispute as the plaintiff's tenant the allegation as to the tenancy of the defendant is not made good, the plaintiff is entitled to succeed on the strength of his title unless the defendant proves that he has been in adverse possession of the property for the statutory period. In such a case it is not necessary for the plaintiff to prove that he has been in actual possession of the property at some period within twelve years previous to the commencement of the suit.

Second appeal from a decree of the District Judge, Amritsar, dated the 2nd February 1920, affirming that of the Munsif, First Class, Amritsar, dated the 29th July 1918.

Sheikh *Niaz Muhammad*, for the Appellants.

Messrs. *Harcharn Das Bhalla* and *Anant Ram* for Dewan *Mehr Chand*, for the Respondents.

JUDGMENT.—Upon the findings recorded by the lower Appellate Court, the facts stand as follows:—That the plaintiff is the owner of the house in dispute, that Ghasita did not take possession of the house as plaintiff's tenant, and that the appellants were not the sub-tenants of Ghasita. The result is that the plaintiff's allegation as to the tenancy of Ghasita and the sub-tenancy of the appellants has not been made good. The appellants consequently must be treated as trespassers. The lower Appellate Court has returned no finding on the third issue. That issue was remitted because I was then of the opinion that if the tenancy of Ghasita was not established the plaintiff would have to prove possession within 12 years. That view appears to be wrong. The law on the subject has been laid down in the case of *Jai Chand* v. *Girwar Singh* (1) in which the various rulings bearing on the point have been considered and it has been held that, under the circumstances similar to those of the present case, if a plaintiff has established his title it lies upon the defendant who alleges adverse possession to establish his possession for more than 12 years. The rule is thus summed up in the head-note* of the Allahabad case "The plaintiff who was the *zemindar*, sued to eject the defendant from certain land within the ambit of the plaintiff's *zemindari*, alleging that the defendant was in possession merely as a licensee. The defendant denied that he was a licensee, and claimed that he had acquired a title to the land in suit by adverse possession. The defendant, however, failed to prove that he had been in adverse possession of the land for more than 12 years. *Held*, that the plaintiff was entitled to succeed simply on the strength of his *prima facie* title as a *zemindar*. It was not necessary for him to go further and prove that he had been in actual possession at some period within 12 years previous to the commencement of the suit." On the question of defendants' possession both the Courts below have concurrently held that the defendants had admitted the title of the plaintiff in 1915, and that it was not open to them to claim title by adverse possession.

The result is that the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 52 Ind. Cas. 366; 41 A. 669; 17 A. L. J. 814.

*Head-note of 41 A.—[*Ed.*]

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 66 OF 1925.

November 25, 1925.

Present:—Mr. Justice Ashworth and Mr. Justice Raza.

ABDUL RAHMAN—APPELLANT

versus

Babu FATEH NARAIN DAS AND ANOTHER—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), ss. 10, 13—Civil Procedure Code (Act V of 1908), s. 65—Auction-sale—Property, when vests in auction-purchaser—Sale between date of auction and confirmation—Pre-emption, right of—Notice, absence of, effect of.

Property knocked down to an auction-purchaser at a Court-auction vests in the auction-purchaser from the date of the auction and not from the date of the confirmation of the sale. Such an auction-purchaser,

therefore, becomes entitled to a notice under s. 10 of the Oudh Laws Act in respect of any sale which takes place subsequent to the date of the auction and before the date of confirmation and if such notice is not given to him he is entitled to pre-empt the sale. [p. 1048, col. 2; p. 1049, col. 1.]

Second appeal against a decree of the Subordinate Judge, Unao, dated the 1st October 1924, modifying that of the Munsif, Safipur at Unao, dated the 28th January 1924.

Mr. *Zahur Ahmad*, for the Appellant.

Mr. *Rajeshwar Prasad*, for the Respondents.

JUDGMENT.—This second civil appeal arises out of a pre-emption suit. The plaintiff is Fateh Naraian Das, who is respondent No. 1 in this appeal. The claim for pre-emption is in respect of a sale effected by a sale-deed executed on 11th August 1922, and registered on 16th August 1922, of a certain *zemindari* share by one Baqar, defendant No. 2, in the lower Court but no party to this appeal, in favour of Abdul Rahman, defendant No. 1 and appellant. The plaintiff, Fateh Narain Das, based his right to pre-empt on the fact that he became a co-sharer in the village on the 27th September 1921 by reason of some share in the village being knocked down to him at an auction-sale held by a Court, which date was before the sale out of which the right of pre-emption is alleged to arise. The purchase by Fateh Narain Das at the auction sale was not confirmed until the 19th December 1922. It was the contention of the defendant No. 1, and the appellant in this appeal, that until confirmation took place, Fateh Narain Das had not acquired the position of co-sharer. The only question, therefore, which arises in this appeal is whether property knocked down to an auction-purchaser is to be deemed to vest in that auction-purchaser from the date of the auction or from the date of the confirmation of sale. The lower Courts have relied upon s. 65 of the C. P. C. which runs as follows :—

"Where immoveable property is sold in execution of a decree and such sale has become absolute the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute."

The appellant's Counsel, however, relies on s. 10 of the Oudh Laws Act (XVIII of 1876) read with the previous sections and s. 13. This section so read in effect provides that when any person proposes to sell any property he shall give notice to persons having a right to pre-empt. If he fails to do this then any such person may bring a suit to enforce his right to pre-emption after the transfer has taken place. He argues that even if an auction-purchaser has a right to claim on confirmation of auction-sale that the property vested in him from the date of the auction, this cannot place on a proposing vendor an obligation to give notice to a person who at the time was not owner. We hold that this argument cannot prevail. The language of s. 65 is a bar to any such argument. The auction-purchaser is entitled when bringing a suit for pre-emption under s. 13 of the Oudh Laws Act to say,

"I was a co-sharer not from the date of confirmation of the auction sale in my favour but from the date of that auction-sale."

If the enactment of s. 65 acts harshly on a vendor by reason of the retrospective effect that it gives to a sale certificate, prepared after confirmation of a sale, then the remedy is one for the Legislature. The Courts are bound to give effect to s. 65 as it stands. We, however, are not disposed to hold that s. 65 can be deemed to be unfair to the vendor in such a case. It was held in *Lala Gaya Parshad* v. *Misra Sidh Gopal* (1) and again in *Zalim Singh* v. *Kalloo Singh* (2) that an unconfirmed auction-sale did not vest in the auction-purchaser an interest or legal title which he could assert against strangers, to the sale. A distinction was drawn in these cases between the judgment-debtor whose property was being sold by the auction-sale (and persons claiming through him) on the one hand and third parties on the other. It is doubtful whether this distinction was rightly drawn even before the enactment of s. 65 of the present C. P. C. In the Privy Council case, *Bhawani Kumar* v. *Mathura Prasad Singh* (3) their Lordships of the Privy Council held, in respect of a sale on the basis of a mortgage, that the mortgagee who himself purchased became owner from the date of the sale and not from the subsequent date of confirmation, and it was

(1) 8 O. C. 202.
(2) 10 O. C. 273.
(3) 16 Ind. Cas. 210; 40 C. 89 at p. 102; 16 C. W. N. 985; 23 M. L. J. 311; 12 M. L. T. 352; (1912) M. W. N. 244; 14 Bom. L. R. 1046; 16 C. L. J. 606; 39 I. A. 228 (P. C.).

pointed out that it was impossible to hold that as against certain person the sale was effected from the date of the auction, and against other persons that it was effected from the date of confirmation. Any way these rulings, as pointed out by the lower Appellate Court, are of no authority now since the enactment of s. 65. Whether the auction-purchaser is, until confirmation of the auction-sale, the legal owner or merely a person who is in the process of becoming an owner, there is little hardship in requiring a vendor to give him notice. Notice must be given to him because, whatever his position, the law provides that from the date of confirmation of the sale he shall be deemed to have been owner from the date of the sale. We hold that the appellant's appeal was rightly rejected by the lower Appellate Court and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 16 OF 1925.

September 30, 1925.

Present:—Mr. Findlay, Officiating J. C.

SHRINIVAS—JUDGMENT-DEBTOR—APPLICANT

versus

JAGANNATH—DECREE-HOLDER—NON-APPLICANT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Decree, assignment of—Proceedings for substitution of names—Application for summoning witnesses—Step-in-aid of execution.

The words "step-in-aid of execution" in Art. 182 of Sch. I to the Limitation Act must be construed as meaning some step which is not of an incidental nature, but which of itself gives an independent and fresh start to, or marks a new and effective stage in, the execution proceedings. [p. 1050, cols. 1 & 2.]

An application for the summoning of witnesses to prove the assignment of a decree in course of proceedings for substitution of the name of the assignee in place of that of the assignor decree-holder is not a step-in-aid of execution. [p. 1050, col. 2.]

Muhammad Siddiq Khan v. *Lala Misri Lal*, 64 Ind. Cas. 524; 19 A. L. J. 843; (1922) A. I. R. (A.) 432, dissented from.

Prabhacararow v. *Potannah*, 2 M. 1; 3 Ind. Jur. 208; 1 Ind. Dec. (N. S.) 273, *Chunder Coomar Roy* v. *Bhogobutty Prosunno Roy*, 3 C. 235; 1 C. L. R. 23; 2 Ind. Jur. 460; 1 Ind. Dec. (N. S.) 738, *Maluckchand* v. *Bacha*, 25 B. 639; 3 Bom. L. R. 275, *Ambica Pershad Singh* v. *Surdhari Lal*, 10 C. 851; 5 Ind. Dec. (N. S.) 69 and *Vijiaraghavalu Naidu* v. *Srinivasulu Naidu*, 58 M. 399, referred to.

Application for review of an order of the Judicial Commissioner, Central Provinces, in Civil Revision No. 33 of 1924, dated the 12th December 1924.

Mr. *D. W. Kathale*, for the Applicant.

Mr. *M. D. Khandekar*, for the Non-Applicant.

ORDER.—This is an application for review of my predecessor Baker, J. C.'s order in Civil Revision No. 33 of 1924. The facts of the case are sufficiently clear from the order in question. The only point involved in this case relates to the application dated the 3rd January 1920. That application Baker, J. C., considered to be one for substitution of names. It is admitted by both the parties in the present proceedings that my predecessor erred in supposing the application to be one of the kind described. The application for substitution of names had been made on 24th March 1919. The Court ordered notice to issue and 3 days later process-fee for notice was paid by the assignee. The next stage was the application of 3rd January 1920; this was admittedly an application for issuing process to a witness to prove the assignment. The only question which remains, therefore, is whether this application can be held to constitute a step-in-aid of execution within the meaning of Art. 182 (5) of the First Schedule to the Limitation Act.

It has been urged on behalf of the non-applicant that the application for issue of process to a witness falls within Art. 182 (5) of the First Schedule to the Limitation Act. In *Ambica Pershad Singh* v. *Surdhari Lal* (1) an application to a Court to issue a proclamation of sale in respect of property already attached in execution of a decree, was held to fall within the provisions quoted. Similarly, in *Vijiaraghavalu Naidu* v. *Srinivasulu Naidu* (2) the filing of a "*batta* memorandum" asking for the issue of a sale proclamation was similarly construed. In *Muhammad Siddiq Khan* v. *Lala Misri Lal* (3), certain property having been attached in execution of a decree, and a third party came forward and objected that the property was his, in the consequential proceedings the decree-holder applied to summon witnesses obviously for the purpose of resisting the

(1) 10 C. 851; 5 Ind. Dec. (N. S.) 569.
(2) 28 M. 399.
(3) 64 Ind. Cas. 524; 19 A. L. J. 843; (1922) A. I. R. (A.) 432.

claimant's objection. This application was held to constitute a step-in-aid of execution of the kind contemplated. In the present case it has been urged that the position is really a stronger one on behalf of the non-applicant. The process, which he desired to issue to a witness, was for the express purpose of proving the assignment under which he claimed to execute the decree in question. Unless this was established the execution proceedings would necessarily have failed. The very object and sole purpose of the application, it is urged, was to further the execution proceedings and, therefore, it must be considered as a step-in-aid of execution. It is urged, however, on behalf of the applicant in view of the decisions in *Prabhacararow* v. *Potannah* (4), *Chunder Coomar Roy* v. *Bhogobutty Prosunno Roy* (5) and *Malukchand* v. *Becha* (6) that an application like the one we are concerned was not one in which proceedings are commenced but was one of an incidental kind made during the proceedings and does not, therefore, constitute a step-in-aid of execution.

With all respect to the learned Judge who decided the case in *Muhammad Siddiq Khan* v. *Lala Misri Lal* (3) quoted it seems to me impossible to accept the view therein enunciated as a correct one. It is indeed no easy matter to give a correct definition of what the words "step-in-aid of execution" in Art. 182, cl. (5) are meant to cover but it seems to me at least that these words cannot cover a subsidiary and incidental application like the one we are concerned with made in the course of an already pending proceeding. Were the non-applicant's position to be accepted each and every incidental application for the summoning of a witness or even for the production of a document and the like would in itself furnish a fresh starting point for limitation even although such application was made in the course of an already pending proceeding. For my own part I am unable to put such an extraordinarily wide and liberal interpretation on the provision in question and I opine that the words "step-in-aid of execution" must be construed as meaning some step which is not of an incidental nature, but which of itself gives an independent and fresh start to, or marks a new and effective stage in, the execution proceedings. Neither requirement can be postulated of the present application. The proceedings for substitution of names were already in progress and the application for the summoning of a witness registered no new or novel stage therein. It follows, therefore, that the application of 3rd January 1920 did not give a fresh start for limitation. The application of 4th November 1922 was, therefore, time barred. My predecessor's order dated 12th December 1924 is accordingly re-called and application for revision (Civil Revision No. 33 of 1924) is, therefore, dismissed: applicant Jagannath therein must bear the non-applicant Shrinivas Ramchandra's costs. As regards costs of the present review application I order them to be borne by the parties as incurred.

G. R. D. *Application allowed.*

(4) 2 M. 1; 3 Ind. Jur. 208; 1 Ind. Dec. (N. S.) 273.
(5) 3 C. 235; 1 C. L. R. 23; 2 Ind. Jur. 460; 1 Ind. Dec. (N. S.) 738.
(6) 25 B. 639; 3 Bom. L. R. 275.

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 30 OF 1924.
November 23, 1925.
Present:—Mr. Stuart, Chief Judge, and Mr. Justice Hasan.
Thakurain DHIRAJ KUNWAR —PLAINTIFF—APPELLANT
versus
CHANDRIKA PRASAD AND OTHERS— DEFENDANTS—RESPONDENTS.

Pardanashin *lady—Compromise, when binding—Burden of proof.*

In order that a compromise entered into by a *pardanashin* lady should be held binding upon her it is sufficient to show that the general result of the compromise was understood by her and that people disinterested and competent to give advice with a fair understanding of the whole matter, advised the lady that the deed should be executed. [p. 1051, col. 2]

Appeal against the decree and judgment of the Subordinate Judge, Fyzabad, dated the 30th April 1924.

Mr. *Ali Muhammad*, for the Appellant.

Mr. *J. K. Banerji*, for Respondents Nos. 1 to 4.

JUDGMENT.—This is a plaintiff's appeal. The facts are these. The plaintiff Thakurain Dhiraj Kuar a Hindu widow had with her deceased husband executed a deed of mortgage on the 21st June 1906. After her husband's death, a suit was instituted on the basis of this mortgage against her.

This suit was filed on the 16th December 1918 and on that date the amount due under the deed of mortgage had risen to Rs. 4,757-4. The plaintiffs in that suit eventually compromised with the lady and she signed on the 20th February 1920 a compromise by which the plaintiffs agreed to accept Rs. 3,000 with certain costs and interest in full satisfaction of their claim. She agreed to pay this amount to them. In the event of failure the mortgaged property was to be brought to sale. A decree was passed in terms of the compromise. The plaintiff has not satisfied that decree, and when execution was sought under it, she instituted the suit out of which this appeal arises on the 15th November 1923 to set aside the deed of compromise on the ground that its execution had been obtained by fraud. The sole evidence produced by her was her own statement on solemn affirmation. In the witness-box she never attempted to show the nature of the alleged fraud practised on her. She made statements which were absurd and incredible to the effect that she had no knowledge of the suit or the deed of mortgage, although she admitted having signed the compromise. She could give no reason as to why she signed the compromise. She admitted that an independent member of the legal profession had brought the compromise to her to sign. She asserted that this gentleman had not even told her what the compromise was about. Yet she signed it. The evidence on the other side was the evidence of this gentleman Mr. Naim Ullah. It is to be noted that he was not a Counsel in the suit on the date of mortgage. When the lady's Counsel in the suit had himself put forward the suggestion for a compromise, Mr. Naim Ullah was asked by the Court to take the compromise to the lady and get it signed after explaining it to her. Mr. Naim Ullah is convinced that he did explain the contents of the compromise to her to the best of his ability but after the lapse of 4 years he was naturally unable to re-collect exactly what had happened. What he stated in his evidence was that he thoroughly understood his duties in this respect, and that he imagined that he must have carried out his duties, though after 4 years he could not swear definitely as to what he had done. It is to be noticed that he reported to the Court that the contents of the compromise had been read to the lady and explained to her fully. The learned Subordinate Judge rightly, in our opinion, accepted the evidence of Mr. Naim Ullah as absolutely reliable and rejected the evidence of the lady. It is unnecessary to touch at length upon the law bearing on the case. Their Lordships of the Privy Council have laid down sufficiently in *Sunitabala Debi* v. *Dhara Sundari Debi Chowdhurani* (1), the general principles that should guide a Court in such a case. They say at page 278*:

"It is sufficient that the general result of the compromise should be understood, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady that the deed should be executed."

Now here Mr. Naim Ullah was not there to give advice but simply to explain the terms of the compromise. The wording of the compromise is in very simple *Hindustani* comprehensible to any body and the lady must have thoroughly known what she was doing. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

Z. K.

(1) 53 Ind. Cas. 131; 46 I. A. 272 at p. 278; 37 M. L. J. 483; 17 A. L. J. 997; (1919) M. W. N. 821; 22 Bom. L. R. 1; 24 C. W. N. 297; 11 L. W. 227; 47 C. 175; 2 U. P. L. R (P. C.) 2 (P. C.).

*Page of 46 I. A.—[*Ed.*]

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEAL
No. 57 OF 1923
April 13, 1925.

Present:—Mr. Justice Wallace.

THUTTA VENKATASWAMI—PETITIONER—APPELLANT

versus

VISSAMESETTI KOTILINGAM AND ANOTHER—COUNTER-PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Decree—Composition between decree-holder and judgment-debtor to accept percentage of debt, whether adjustment—Agreement, whether can be recorded.

An agreement by a decree-holder in a composition by his judgment-debtor with his creditors generally to accept a percentage of his decree debt in full satisfaction of the whole debt amounts to an adjustment of the decree which can be recorded under O. XXI, r. 2, C. P. C., as an adjustment of the decree. [p. 1053, col. 2.]

Veerappa Chettiar v. *Arumugam Poosari*, 17 M. L. J. 527 and *Periatambi Udayan* v. *Vellaya Goundan*, 21 M. 409; 8 M. L. J. 51; 7 Ind. Dec. (N. S.) 646, relied on.

Appeal against an order of the Court of the Subordinate Judge, Kistna at Ellore,

in A. S. No. 244 of 1922, against an order of the Court of the Principal District Munsif, Ellore, dated the 25th February 1922, in I. A. No. 4236 of 1921, in O. S. No. 667 of 1921.

Mr. *V. Govindarajachari*, for the Appellants.

Mr. *V. Suryanarayana*, for the Respondents.

JUDGMENT.—The question for decision in this appeal is whether an agreement by a decree-holder in a composition by his judgment-debtor with his creditors generally to accept a percentage of his decree-debt in full satisfaction of the whole debt is an adjustment which can be recorded under O. XXI, r. (2) as an adjustment of the decree. The lower Appellate Court has held that it could not be recorded, and the appellant (the judgment-debtor) appeals.

The respondent who is the transferee from the original decree-holder at one stage of his argument challenged the existence of any composition, but both the lower Courts have held on the evidence that there was a composition between the judgment-debtor and his creditors, under which they agreed some of them to accept 75 per cent. of their debt and some 80 per cent. in full satisfaction, and the present decree-holder was in the latter class. He had filed an execution petition for the whole decree amount on 14th September 1921, but dropped it after the composition agreement. It is quite clear that he was a party to that mutual agreement. That the present transferee respondent was also aware of the composition is clear from the fact that the sum for which the decree was transferred to him was not the full amount of the decree, but practically the amount which the decree-holder under the composition had agreed to take.

This composition was in October 1921, about one month after the decree. On 18th November 1921, the judgment-debtor, the appellant deposited into the first Court the amount due to this decree-holder under the adjustment on the footing of the decree, that is, 80 per cent. of the full amount due. It appears from the evidence that the money was first tendered to the decree-holder but he said that he had already transferred the decree to the present first respondent. It does not appear that the money was then tendered to the first respondent, but it was paid into Court by the judgment-debtor on 18th November 1921, along with his application to record satisfaction, to which application both the original decree-holder and the transferee were made parties. This deposit was mentioned by the judgment-debtor in his affidavit in the I. A. dated 16th November 1921 and this fact was not controverted either by the decree-holder or his transferee. I am asked to remand the case for a finding as to the tender but it is unnecessary since to the knowledge of both these parties, the money was deposited into Court for payment to the party entitled to execute. If the adjustment therefore can be pleaded as a bar in execution, the amount which the decree-holder had agreed to accept in full discharge of the decree was paid into Court on 18th November 1921. No time was fixed under the composition for payment, but one month after the composition is certainly a reasonable time.

That a mutual agreement by creditors to accept a less sum than their full debts in full discharge of their debts is an enforceable contract in this country is not, I think, open to doubt. The illustrations to s. 63 of the Indian Contract Act seem to me to make this clear. On the other side, it is argued that that section itself implies an original contract to which there was a promisor and a promisee; but I do not think the language used must necessarily import more than an ordinary obligation and implied promise of a debtor to pay back his creditor. Illustrations (*b*) (*c*) and (*e*) are, so far as appears from the language used, ordinary debts and not debts due under any contract. When the illustrations allude to a specific contract debt, it is so specifically stated—see illustration (*d*). Illustration (*e*) is practically conclusive for the purpose of this case, that such a composition with creditors is an enforceable contract, though in the case of illustrations (*b*) and (*c*) there may be no new contract created, and though until actual tender of payment, it may be still open to the creditor to refuse to accept part-payment in full satisfaction, a case analogous to that in the decision of the Calcutta High Court reported as *Debendra Narain Sinha* v. *Sourindra Mohan Sinha* (1). In the case of illustration (*e*) there is a fresh contract for which there is consideration, namely, the agreement of other creditors also to be content with part-payment and thus release money for the discharge of other debts.

(1) 24 Ind. Cas. 391.

Now, if that is the position in the case of an ordinary debt, I fail to see how it is changed when the debt is embodied in a decree. In either case, the arrangement is an adjustment of the debt due, though it cannot be enforced unless certified [*vide Veerappa Chettiar* v. *Arumugam Possari* (2) and the *ratio decidendi* of *Periatambi Udayan* v. *Vellaya Goundan* (3)] and payment in terms of the adjustment will be under the terms of its full satisfaction for the debt. It is contended that parties to a decree cannot vary their decree right. This seems tantamount to saying that there can be no adjustment of a decree. Adjustment is clearly not the same thing as satisfaction. If r. 2 of O. XXI meant to say that the decree is otherwise satisfied in whole or in part it would have said so. Adjustment is some method of settling the decree which is not provided for in the decree itself. If the decree-holder can still execute the decree in full in spite of the adjustment, then there has been no adjustment at all. This seems to me, therefore, clearly a case to which O. XXI, r. 2 applies.

The respondent, however, further pleads that the decree-holder is entitled to resile from the adjustment if he likes, and that, if he resiles, then the decree has not been adjusted, to use the words of the rule, "to the satisfaction of the decree-holder". As noted above, such a result may be permissible when there has been no mutual composition between the judgment-debtor and the creditors; but when there is this composition it is not open to a single creditor to resile from the fresh contract. The respondent contends that, even if that be so, the method of enforcing the contract on him is not by forcing him to abide by the execution proceeding but by leaving the judgment-debtor to sue him for damages for breach of contract; and this is the view that the lower Appellate Court has taken. If this fresh contract is as I hold an adjustment of the debt, I cannot see why such an adjustment should not be recorded. That is the purpose of the rule, unless the unfortunate debtor, after he has secured his composition is then thrown into the position of having to sue any and every creditor who chooses to resile from the composition. An adjustment of that sort would be worse than no adjustment at all. The adjustment when made was "to the satisfaction of the decree-holder", and that is what is meant by these words when used in the rule.

The next point taken is that the tender was not made to the transferee and that it will not bind him. This again cannot be upheld. The transferee succeeds to the contract made by his transferor and is bound to accept whatever the transferor was bound to accept. In this case I think it is clear that the decree-holder agreed under a mutual composition scheme to accept payment of 80 per cent. of his debt in full satisfaction of his debt, if paid within a reasonable time; and the money was paid within a reasonable time. This, therefore, was an adjustment of the debt tantamount to full satisfaction of the decree, and the judgment-debtor is entitled to plead that as a full defence to any execution application and to have this full satisfaction recorded under O. XXI, r. 2.

I, therefore, reverse the order of the lower Appellate Court and restore that of the District Munsif with costs here and in the lower Appellate Court. The transferee decree-holder may draw out the money deposited by the petitioner in the first Court.

V. N. V.
Z. K. *Appeal allowed.*

(2) 17 M. L. J. 527.
(3) 21 M. 409; 8 M. L J. 51; 7 Ind. Dec. (N. S.) 646.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION NO. 63 OF 1924.

April 7, 1924.

Present:—Mr. Neave, A. J. C., and Mr. Kendall, A. J. C.

THE NATIONAL BANK OF UPPER INDIA, LD., LUCKNOW, IN LIQUIDATION —JUDGMENT-DEBTOR—APPLICANT

versus

GOPAL DAS AND ANOTHER—DECREE-HOLDERS—OPPOSITE PARTY.

Companies Act (VII of 1913), ss. 169, 207, 215—Voluntary liquidation—Suit instituted by Company before liquidation—Decree for costs against Company after liquidation—Execution of decree, stay of—Power of Court.

The Court has power, under s. 169 of the Companies Act, read with ss. 207 and 215 of the Act, to make an order staying proceedings taken in execution of a decree against a Company which is in the course of voluntary liquidation. [p. 1054, col. 1.]

Where in a suit instituted by a Company long before it goes into liquidation, a decree for costs is made against the Company after it goes into liquidation, the liability of the Company in respect of such decree should not ordinarily be treated in a different way from the other liabilities of the Company and the decree-holder should not be allowed to execute the decree against the Company and must prove for his claim with the other creditors of the Company in the liquidation proceedings. [p. 1054, col. 2.]

Application, under s. 215 of the Indian Companies Act, for stay of execution proceedings in the Court of the Subordinate Judge, Lucknow.

Messrs. *N. C. Dutt* and *Hargovind Dayal*, for the Applicant.

Mr. *Jai Krishna Tandan*, for the Opposite Party.

JUDGMENT.—This is an application under s. 215 of the Indian Companies Act of 1913, made by the liquidators of the National Bank of Upper India in the following circumstances:—

The Bank went into voluntary liquidation and appointed liquidators. The resolution to go into voluntary liquidation was passed on 6th May, 1923. Before that date however, on 19th December 1921, the Bank had instituted a suit against the opposite party, which suit was dismissed in October, 1923, and a decree for Rs. 1,279-1-9 costs, was given against the Bank. These decree-holders, therefore, have applied for execution of their decree and we are asked to stay the proceedings in order to protect the assets of the Bank for the other creditors. It is pointed out that the Court has power under s. 169 of the Act to make such an order in the case of a compulsory liquidation and it is argued that that section read with ss. 207 and 215 makes it clear that the Court has similar powers in voluntary liquidation.

Nothing has been urged against this proposition, which is undoubtedly correct. The application has however been contested on the ground that the order for the payment of costs was not passed until after the Bank had gone into liquidation, and it is, therefore, urged that the decree-holders have a right to execute their decree. In support of this contention, reference has been made, not to any Indian decisions, but to certain English equity cases published in *Ex parte Levick* (1) and *Madrid Bank* v. *Pelly* (2). In the former of these, the liquidators representing the creditors endeavoured to increase the assets of the Company by bringing certain actions which failed and it was decided that they should pay costs. In the latter case the facts were different but it was decided in the particular circumstances that the costs had to be paid by the liquidators out of the assets, and not merely to be proved in the winding up proceedings. In the present instance the suit was entered on by the Bank long before it went into liquidation, and it cannot be said that the action was taken on behalf of the creditors of the Bank, and it was certainly not taken by the liquidators. It is true that the decree for costs was given after the Bank had gone into liquidation, but the liabilty on account of which these costs were decreed against the Bank occurred before the liquidation. There is no reason, therefore, why this liability should be treated in a different way from the other liabilities of the Bank. We, therefore, allow the application and order that the execution proceedings be stayed. The opposite party will have to prove for their claim with the other creditors of the Bank in the liquidation proceedings. The applicants will receive their costs in regard to these proceedings in this Court from the opposite party.

Z. K. *Application allowed.*

(1) (1867) 5 Eq. 69; 17 L. T. 237; 16 W. R. 102.
(2) (1869) 7 Eq. 442; 21 L. T. 13.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1741 OF 1924.

January 22, 1925.

Present:—Mr. Justice Campbell.

SURAIN SINGH—DEFENDANT—APPELLANT

versus

BABU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Minor—Guardian, natural, power of, to alienate minor's property—Necessity—Benefit of estate.

The natural guardian of a Hindu minor has power, in the management of the minor's estate, to mortgage or sell any part thereof in case of necessity or for the benefit of the estate.

Second appeal from a decree of the District Judge, Amritsar, dated the 11th June 1924, reversing that of the Sub-Judge, Amritsar, dated the 10th May 1924.

Mr. *Nihal Chand Mehra*, for the Appellant.

Mr. *Chiman Lal Gulati*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit by a minor for possession of land which was sold by his mother acting as his guardian.

The first two issues framed by the Trial Court were as follows :—

(1) Whether the land was sold by the mother of the plaintiff for the benefit of the minor ? and

(2) In case issue No. 1 is proved, is the sale void ?

The Trial Court held that out of the ostensible consideration for the sale Rs. 230 were set off by the vendee against the amount due on a previous mortgage which was for the benefit of the minor. The Court held that the mother had no right to convey any right or interest in the immoveable property of the minor plaintiff and that the sale was void. Nevertheless the plaintiff was ordered to pay Rs. 230 before obtaining possession of the land.

Both parties appealed to the District Judge who declined to go into the question of necessity for the sale or of benefit to the minor, but on the strength of the Privy Council ruling in *Imambandi* v. *Mutsaddi* (1) accepted the plaintiff's appeal and decreed his claim for possession without payment of anything.

The rule laid down by their Lordships of the Privy Council was one to be applied solely to Muhammadans and was based upon a consideration of Muhammadan Law. The present minor is a non-Muhammadan, and his learned Counsel before me is unable to cite any authority for the proposition that the Muhammadan rule must be applied also to non-Muhammadans. The ordinary rule stated in para. 440 of Mulla's Hindu Law is that the natural guardian of a Hindu minor has power, in the management of his estate, to mortgage or sell any part thereof in case of necessity or for the benefit of the estate.

The decision of the learned District Judge must be set aside. I accept the appeal and return the case to him for re-decision. Costs will follow the event.

R. L.
Z. K. *Appeal accepted.*

(1) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919). M. W. N. 91; 9 L. W. 518; 45 I. A 73 (P. C.).

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 322 OF 1924.
November 11, 1925.
Present :—Mr. Justice Missra.
Sheiksh MOHAMMAD AQIL—
PLAINTIFF—APPELLANT
versus
SHEO BAKSH AND OTHERS— DEFENDANTS—
RESPONDENTS.

Landlord and tenant—Ejectment—Wajib-ul-arz *empowering landlord to eject tenant on* "qasur," *effect of—Criminal complaint by tenant against landlord, whether justifies ejectment.*

A custom recorded in a *wajib-ul-arz* that a landlord would be entitled to eject a *raiyat* if the latter was guilty of any "*qasur*" cannot be enforced.

If a tenant who has a grievance against a landlord files a complaint against the latter in a criminal case his act cannot be considered as amounting to a "*qasur*" making him liable to ejectment under such a clause in a *wajib-ul-arz* as the above.

Second appeal against a decree of the Subordinate Judge, Hardoi, dated the 1st May 1914, confirming that of the Munsif, Hardoi, dated the 22nd May 1922.

Mr. *Hyder Husain*, for the Appellant.

Mr. *S. A. Bilgrami*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant for ejectment of the defendants-respondents from their residential house in village Gandanpur, District Hardoi, of which the appellant is *zemindar* and the respondents are his *riyayas*. The allegation on which he desires the ejectment of defendants-respondents is to the effect that the defendant No. 1 filed a false complaint against him (the *zemindar*) in a Criminal Court and thereby committed a "*qasur*" (fault) within the meaning of the term as used in the *wajib-ul-arz*.

Both the Courts below have dismissed the plaintiff's suit on the ground that the defendant was not guilty of any "*qasur*", and even if a custom to that effect was recorded in the *wajib-ul-arz*, it was indefinite and unjust and could not be enforced in a Court of Law.

In second appeal it is contended that this view taken by the Courts below is incorrect. I am in entire agreement with the Courts below that the custom mentioned in the *wajib-ul-arz* cannot be enforced and that if a tenant (*riyaya*) has a grievance against the landlord and files a complaint in a Criminal Court his act cannot be considered as a "*qasur*" making him liable to ejectment. If such were the case then the *riyaya* would purely be at the mercy of the

zemindar. The way before the landlord in such a case is clear. If a false case has been bought against him by one of his tenants he can bring a suit against him for damages on account of malacious prosecution. No landlord can be given the power to determine whether a particular act of a tenant is a "*qasur*" or not. If that were so then the determination of the question would be purely in the hands of a *zemindar* and it would obviously be unjust to place such a power in the hands of a landlord. I have never seen such a clause being enforced in this Province. I find no force in the contention put forward on behalf of the appellant. The suit was rightly dismissed by the Courts below.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 380 OF 1923 AND CIVIL REVISION PETITION No. 403 OF 1924.

August 25, 1925.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

MUTHUVEERASWAMI NAYDU AND OTHERS—DEFENDANTS Nos. 2 AND 4 AND RESPONDENTS Nos. 1 AND 3—APPELLANTS AND PETITIONERS

versus

V. T. A. L. ANNAMALAI CHETTIAR AND OTHERS—PETITIONER AND RESPONDENTS Nos. 2 AND 4—PLAINTIFF No. 54 AND DEFENDANTS Nos. 3, 5 AND 6—RESPONDENTS.

Execution of decree—Transfer of decree for execution—Application to bring legal representatives of deceased judgment-debtor on record—Dispute, determination of—Limitation, plea of—Jurisdiction of Court that passed decree.

Questions relating to a dispute as to who are the legal representatives of a deceased judgment-debtor and whether the decree is barred by limitation must be determined by the Court which passed the decree before it transfers the decree to another Court for execution.

Swaminatha Ayyar v. *Vaidyanatha Sastri*, 28 M. 466; 15 M. L. J. 116 (F. B.) and *Rajilagiripathy* v. *Bhavanisankaran*, 80 Ind. Cas. 103; 19 L. W. 650 at p. 652; 47 M. L. J. 4; (1924) M. W. N. 527; 47 M. 641; (1924) A. I. R. (M.) 673, relied on.

Appeal against a decree of the Court of the Subordinate Judge, Madura, dated the 8th August 1923 and made in E. A. No. 103 of 1923, in O. S. No. 28 of 1909 and petition presented alternatively under s. 115 of Act V of 1908 and s. 107 of the Government of India Act praying the High Court to revise the said order of the Court of the Subordinate Judge, Madura.

Messrs. *B. Sitarama Rao* and *S. R. Muthuswamy Iyer*, for the Appellants.

Mr. *M. Subbaraya Iyer*, for the Respondents.

JUDGMENT.—The lower Court without dealing with the objections raised has made an order directing the decree to be transferred to another Court. The application was to bring on record the legal representatives of certain deceased parties and to transmit the decree to another Court for execution. Notice was not served on all the persons on whom it should have been served. Defendants Nos. 4 to 6 raised the objection that they were not the legal representatives of defendants Nos. 1 and 7. The learned Judge observed: "In the natural course they will be the legal representatives of defendants Nos. 1 and 7." In this he is not correct. If the first defendant had left a widow for instance, defendants Nos. 3 to 6 would not be his legal representatives in respect of his personal property. The learned Judge apparently did not bring to bear his mind upon the question, as he left it to be decided by the Court to which he directed to be transferred.

Another plea put forward raised a question of limitation. Even this the Judge did not deal with.

In our opinion the objections must have been considered by the Judge. The question as to who are the legal representatives must be decided by the Court which passed the decree. See *Swaminatha Ayyar Vaidyanatha Sastri* (1). Whether the decree was barrrd by limitation or not is also a question to be determined by the Court which passed the decree. See *Rajilagiripathy* v. *Bhavanisankaran* (2).

The order is set aside and the lower Court is directed to deal with the application according to law.

No order is necessary in the civil revision petition.

We make no order as to costs in either case.

V. N. V. *Order set aside.*

Z. K.

(1) 28 M. 466; 15 M. L. J. 116 (F. B.).

(2) 80 Ind. Cas. 103; 19 L. W. 650 at p. 652; 47 M. L. J. 4; (1924) M. W. N. 527; 47 M. 641; (1924) A. I. R. (M.) 673.

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Adverse possession.

See MUHAMMADAN LAW 725
See TEMPLE GOVERNED BY SCHEME 565

——— *Crown lands—Adverse possession proved for forty years—Crown, whether should prove proprietary right within sixty years—"Subsisting title," meaning of.*

Where original title in certain lands is admitted to have been with Government, a person seeking to establish his right to them by adverse possession must prove his possession for full sixty years. The fact that the claimant is able to prove possession for a long time, *viz.*, forty years, would not entitle him to a presumption as to possession for sixty years, nor cast on the Government the onus of showing possession of proprietary right within sixty years.

In the case of a claim to Crown lands by adverse possession, it is misleading to talk of proof of "subsisting title" by Government, when there is a finding of original title in the Government, which title has not been displaced by proof of adverse possession. M SECRETARY OF STATE FOR INDIA *v.* SREERAMCOTHI CHETTIAR, 22 L. W. 546; A. I. R. 1926 Mad. 125 179

——— *Landlord and tenant—Gift, invalid, to tenant, effect of—Possession, nature of, alteration in.*

Where a tenant holding land on payment of rent continues to hold it without any change in area or rent, the mere fact that an invalid gift is executed in his favour by a disqualified proprietor of the holding without the sanction of the Court of Wards, does not operate to alter the character of the possession and to convert it into adverse possession. O ABDULLAH KHAN *v.* AMIR HAIDAR KHAN, A. I. R. 1926 Oudh 198 97

——— *Landlord and tenant—Service-tenure—Assertion of title—Limitation, operation of.*

When a tenant enters upon land as a service-tenure-holder, but subsequently asserts a title of his own, the fact that the landlord does not sue to eject him within 12 years of such assertion, does not confer on the tenant any higher title than he had when he entered into possession. C JNAN CHANDRA DHUPI *v.* RAY SATISH CHANDRA 451

——— *Permissive entry—Subsequent possession, whether can be adverse—Succession of trespassers—Periods of possession, tacking of, whether permissible.*

To constitute adverse possession, it is not indispensable that the entry should be adverse in its inception. Unless adverse in its inception, possession will be presumed to continue as it began; but this does not preclude the occupant from setting up an adverse claim at any time he chooses by any act which changes the character of his occupancy from amicable to adverse.

Adverse possession—concld.

A succession of trespassers claiming through one another (*e. g.*, as heir, legatee, assignee, or otherwise) can, though the possession of each of them has extended to less than 12 years add and tack the periods of their possession so as to defeat the right of the true owner. M NOMULA NARASIMHA *v.* VASAM MANGAMMA 556

——— Prescription against Government, proof of. *See* INAM 130

Advocate—Advocate, consent of, effect of—Consent based on misapprehension—Power of Court to disregard such consent. *See* C. P. C., 1908, O. XLVII, R. 1 509

Agra Tenancy Act (II of 1901), s. 58 (b)—*Landlord and tenant—Suit for ejectment of* thekadar—*Ejectment, grounds for—Plaint, averments in.*

A plaintiff seeking to eject a defendant on the allegation that the latter is a *thekadar* must set out definitely in his plaint the grounds on which he alleges that the defendant is liable to ejectment. The ground on which a *thekadar* or a person holding under a lease can be ejected under the provisions of cl. (*b*) of s 58 of the Agra Tenancy Act, is that the term of his lease has expired or will expire at or before the end of the current agricultural year. A statement in the plaint that the defendant is a *thekadar* of the land in dispute, paying a yearly rent and that he has no right to remain in possession, does not satisfy the requirements of the law, and a decree for ejectment cannot be granted on the basis of such a plaint. A DARIYAI SINGH *v.* CHOB SINGH, L. R. 6 A. 237 Rev. 863

Amendment of pleadings—Title subsequently acquired, whether can be put forward. *See* TRESPASS ON GOVERNMENT LAND 503

Appeal (Civil).

See C. P. C., 1908, O. XXII, R. 5 366
See C. P. C., 1908, O. XXVI, R. 14 (3) 317
See PROVINCIAL INSOLVENCY ACT, 1907, ss. 162 (*b*), 44 31

——— Appellate Court, power of, to demand Court-fees on plaint. *See* COURT FEES ACT, 1870, s. 7 IV (*a*) 729

——— *Appellant, duty of—Burden of proof.*

The burden of showing that the judgment appealed from is wrong lies upon the appellant. If all that he can show is nicely balanced calculations which lead to equal possibilities of the judgment on either the one side or the other being right, he is not entitled to have the judgment upset in appeal. O FAQIR MUHAMMAD *v.* SHAMBHU DATT, 13 O. L. J. 167 1014

——— *Finding of fact, interference with.*

Generally speaking it is undesirable for an Appellate Court to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour. The view of the Trial Judge as to the credibility of witnesses should not be put aside by the Appellate Court on a mere calculation of probabilities. Where, however, the question to be determined does not depend upon the demeanour of the witnesses and their manner in the witness-box, but upon inferences to be drawn from facts, the Appellate Court is as good a Judge of facts as the Trial Court. C ANANDA PRIYA BAISHNAVI *v.* BIJOY KRISHNA RAY 705

Appeal (Civil)—concld.

——— *Redemption suit—Preliminary and final decrees—Appeal against preliminary decree after passing of final decree, whether competent.*

Where a preliminary decree in a redemption suit is followed by a final decree, an appeal filed against the former decree after the passing of the latter decree is not maintainable if no appeal is preferred against the latter decree. **C** RAM CHANDRA GOPE *v.* PARAMESWARI GOPINI 358

——— *Suit for possession and mesne profits—Decree, value of, in excess of Rs. 5,000*—Forum of appeal.

Plaintiff instituted a suit for recovery of possession of land valued at Rs. 2,800 and mesne profits for a period prior to the institution of the suit tentatively valued at Rs. 1,200, the total value being Rs. 4,000. A decree was passed in his favour for possession with a direction for determination of mesne profits and on the mesne profits being ascertained the total amount of the decree exceeded in valuation the amount of Rs. 5,000:

Held, that an appeal against the decree lay to the High Court and not to the District Judge. **C** JOGENDRA NATH MAITI *v.* BHAGWAT DAS, 42 C. L. J. 267; A. I. R. 1926 Cal. 378 9

——— **(Second).** *See* WILL, CONSTRUCTION OF 423

——— *Custom, question of*—Wajib-ul-arz, *entry in, value of—Finding of fact—Interference by High Court.*

The question whether an entry in a *wajib-ul-arz*, even if unrebutted, is or is not sufficient proof of the custom recited therein, is a question of fact and cannot be agitated in second appeal.

It cannot be laid down as a proposition of law that an entry in a *wajib-ul-arz*, if not rebutted, must be accepted as sufficient proof of the custom recorded therein. **O** GAJRAJ SINGH *v.* NANHU SINGH, 3 O. W. N. 69; A. I. R. 1926 Oudh 143; 13 O. L. J. 121 942

——— Excuse of delay under s. 5 of the Limitation Act, application for—Appeal—Discretion of Appellate Court—High Court, interference by. *See* LIMITATION ACT, 1908, s. 5 865

——— Finding of fact. *See* CONTRACT ACT, 1872, s. 30 782

——— *Finding of fact—Evidence ignored—Interference by High Court.*

Where in arriving at a finding of fact a lower Appellate Court ignores a valuable piece of evidence altogether, the finding is not binding on the High Court in second appeal. **C** BHABATARINI DEVI *v.* KIRAN CHANDRA ROY 1026

——— *Finding of fact—Genuineness of transaction—Notice, absence of—Interference by High Court.*

There is no jurisdiction in a High Court to entertain a second appeal on the ground of an erroneous finding of fact, however inexcusable the error may seem to be. Where there is no error or defect in procedure a finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.

A finding that a transaction was not genuine and that a certain party had no notice of the transaction, is a finding of fact which cannot be questioned in second appeal. **O** MANZUR HUSAIN *v.* VIKALAT FATIMA, 13 O. L. J. 176 1046

Appeal (Second)—concld.

——— *Finding of fact—Interference by High Court.*

In a suit between a landlord and a tenant the Court of first appeal made a decree declaring the liability of the tenant to pay to the landlord half the fruit of certain trees standing on the holding of the tenant. There was an entry in the Record of Rights declaring that the tenant and the landlord had half share each in regard to the mango, beal and palm trees standing on the holding. This was followed by an entry that there were certain mulberry, guava, palm and lemon trees on the land. Against these trees there was no entry that the landlord had any title:

Held, (1) that if the Record of Rights was a document of title it was open to the High Court in second appeal to construe that document;

(2) that it was a reasonable construction of the entry in the Record of Rights that it related only to the timber and not to the produce of the trees;

(3) that even if the Record of Rights was not a document of title and was merely a document of evidence, it was open to the High Court to interfere with the decision of the Court of first appeal which was based upon the Record of Rights, inasmuch as the decision was based on something which the Record of Rights did not contain. **Pat** BHUPAL MISSIR *v.* SARBAN LAL, A. I. R. 1925 Pat. 725 735

——— *Malicious prosecution, suit to recover damages for—Finding as to innocence of plaintiff and absence of just and reasonable cause, nature of.*

In a suit to recover damages for malicious prosecution a finding that the plaintiff was innocent of the charge brought against him by the defendant and that the defendant had no just and reasonable cause for making the charge is a finding of fact and cannot be questioned in second appeal. **O** ATMA RAM *v.* SHAMBHU DIN 112

Approver. *See* CR. P. C., 1898, s. 337 253

Arms Act (XI of 1878), s. 19 (f)—*Cartridge, empty, whether ammunition—Possession of empty cartridge—Offence.*

An empty cartridge which cannot be re-loaded in India is not ammunition and the possession of such a cartridge does not, therefore, amount to an offence under s. 19 (*f*) of the Arms Act. **A** KALLU *v.* EMPEROR, 27 Cr. L. J. 136; 24 A. L. J. 208 808

——— **ss. 19, 29**—*Illegal possession of arms, prosecution for—Bijnor District—Sanction of District Magistrate, whether necessary.*

In the Bijnor District the sanction of the District Magistrate is not necessary for a prosecution under s. 19 of the Arms Act. **A** AMIR AHMAD *v.* EMPEROR, L. R. 6 A. 196 Cr.; 27 Cr. L. J. 15; 24 A. L. J. 30; A. I. R. 1926 All. 143 47

Assignment—*Assignment of interest by landlord—Tenant in possession—Payment of rent, without notice of assignment, effect of—Payment of rent in advance, whether fulfilment of obligation to pay rent—Assignee, position of—Assignee, whether bound to make enquiries—Non-enquiry by assignee, effect of—Collateral agreement, whether binding.*

If a person enters into a contract and without notice of assignment of the contract, fulfils it to the person with whom he made the contract, he is discharged from his obligation.

Payment of rent by a tenant before it is due is not a fulfilment of the obligation imposed by the covenant to pay rent but is an advance to the landlord with

an agreement that on the day when the rent becomes due such advance will be treated as a fulfilment of the obligation to pay rent.

Where the proprietary title to premises in the occupation of a tenant is assigned, it is incumbent upon the assignee to make enquiries of the tenant as to the extent of his rights and interest in the premises. If the tenant misrepresents his rights and the assignee relies upon the statement of the tenant, the latter will be precluded as against the assignee from asserting his rights to be other than those which he has stated. But if the tenant correctly represents his rights or no enquiry is made by the assignee, in either case the assignment will be subject to the tenant's rights and interests in the premises. This principle applies alike in cases where the assignee is a mortgagee, as in cases, where he is a purchaser of the premises.

If a mortgagee is privy to and has sanctioned a collateral agreement between the mortgagor and a tenant of the mortgaged property, a subsequent assignee of the mortgagee's interest is not to be permitted to assert that his interest in the premises is not affected by the agreement, because the agreement was entered into at a date subsequent to that on which the mortgage was executed. **C** TILOKECHAND SURANA *v.* BEATTIE & Co. **113**

Bengal Alluvion and Diluvion Act (IX of 1847), s. 6—*Bengal Alluvial Land Settlement Act (XXXI of 1858), s. 2—Bengal Alluvion Amendment Act (IV of 1868), s. 3*—Diara *proceedings, nature of—Proceedings, whether binding on under-tenure-holders claiming adversely to each other.*

What is dealt with in proceedings under the Bengal Alluvion and Diluvion Act and the subsequent amending Acts is the assessment of revenue, and the parties concerned are the proprietor and the Government. The powers of the Revenue Authorities operating under these Acts only extend, so far as the tenants are concerned, to ascertaining or recording existing rights, that is, to the nature and extent of any existing tenancies, and not to settling rent so as to bind the tenant. These proceedings are binding on the proprietor with regard to the assessment of revenue but are not binding as between under-tenure-holders claiming the land adversely to each other under different proprietors. **C** RADHA NATH DUTTA *v.* CHANDRA KUMAR DUTT, 43 C. L. J. 152 **718**

Bengal Land Redemption and Foreclosure Regulation (XVII of 1806), ss. 7, 8—*Notice of foreclosure, contents of.*

Under s. 8 of Bengal Land Redemption and Foreclosure Regulation XVII of 1806 the mortgagor must be notified that if he does not redeem the property mortgaged in the manner provided for by section 7 within one year from the date of the notification the mortgage will be finally foreclosed. The requirements of s. 8 are fulfilled if the notice to the mortgagor gives the full purport of s. 7 of the Regulation even though s. 7 is not expressly mentioned in the notice. **L** DIWAN SINGH *v.* JAIRAM, 2 L. C. 159 **8**

Bengal Land Revenue Sales Act (XI of 1859), s. 54—*Sale of estate—Allowance charged upon estate—Encumbrance, what is—Notice, question of, whether arises—Suit to recover allowance—Recurring liability—Limitation.*

The fact that an allowance had been received out of

certain lands for a long period from several successive owners is proof of the grant of a perpetual allowance charged on such lands.

An encumbrance is a right to or interest in land which may subsist in any third person to the diminution of the value of the land and not inconsistent with the passing of the fee in it by a deed of conveyance.

The period of limitation for a suit for the recovery of money where the liability to pay the money is recurring, arising every year, runs in respect of the amount of each yearly payment from the time when each yearly amount falls due. The mere failure to sue for the money for any particular year for more than twelve years would not bar a suit for the recovery of an amount which falls due subsequently.

In a sale under s. 54 of the Bengal Land Revenue Sales Act, no question of the notice of an encumbrance arises. **C** MANOHAR DAS MAHANTA *v.* BROJENDRA LAL DAS **411**

Bengal Municipal Rules of 1896—*Municipal election—Candidate, whether can withdraw after commencement of poll.*

Under the Bengal Municipal Rules of 1896 a candidate at a Municipal election is entitled to withdraw from the election at any time before the closing of the poll. **C** NAGENDRANATH ADDY *v.* COMMISSIONER OF THE PRESIDENCY DIVISION **722**

Bengal Public Demands Recovery Act (III of 1913), ss. 36, 37—*Certificate sale—Suit to set aside sale, maintainability of—Fraud, fictitious allegation of, effect of.*

Where a sale held under the provisions of the Bengal Public Demands Recovery Act is sought to be set aside by the certificate debtor, questions arising between the certificate holder and the certificate debtor or their representatives must be decided in accordance with the procedure laid down by s. 37 of the Act, notwithstanding that the purchaser under the auction-sale is also impleaded as a party interested in the proceeding.

A certificate debtor cannot evade the provisions of s. 37 of the Bengal Public Demands Recovery Act and maintain a suit to set aside a sale held under the Act by making fictitious allegations of fraud in respect of matters which under the section, and in the absence of fraud, must be determined by means of the procedure specified in the section. **C** BASANTA KUMAR PAL *v.* HARENDRA NATH, 30 C. W. N. 36; A. I. R. 1926 Cal. 107 **796**

Bengal Tenancy Act (VIII of 1885)—*Denial of landlord's title—Forfeiture—Remedy.*

Under the Bengal Tenancy Act the landlord cannot eject the *raiyat* simply on the ground that the tenant has repudiated the relationship of landlord and tenant. Therefore, the denial of the right of the landlord or repudiation of the tenancy, not followed by a decree of Court dismissing landlord's suit for rent, does not work a forfeiture.

Where the tenant repudiates the tenancy and the landlord is not entitled to eject the tenant on that ground, the remedy is by a proper suit for a declaration that the transferee acquired no interest from the *raiyat* by the transfer. **C** JANENDRA NATH BISWAS *v.* JOGENDRA NATH PAL **191**

——— **s. 30**—*Undivided estate—Excess land in occupation of tenant, whether can be treated as separate holding.*

In a suit for rent the owners of an undivided share of an estate can treat the excess land in the occupation of the tenants as a separate holding. C PECHA MANDAL *v.* BHAIRABENDRA NARAYAN ROY 846

——— ss. 30 (b), 39, 50—*Landlord and tenant—Tenant holding under holder of* chaukidari chakran *tenure—Resumption of tenure—Suit by landlord for enhancement of rent—Payment of rent to holder of* chakran *tenure, rate of, proof of, whether admissible to establish status as fixed rate tenant—Enhancement of rent—Duty of Court to refer to price lists.*

Tenancy rights created by the holder of a *chaukidari chakran* tenure come to an end on the resumption of the land by Government, and consequently, evidence of the rate of rent paid by the tenant to the holder of the *chaukidari chakran* tenure before its resumption cannot be availed of by the tenant to prove that he is a tenant at a fixed rate of rent and that his rent cannot be enhanced.

Where enhancement of rent is claimed under cl. (*b*) of s. 30 of the Bengal Tenancy Act, it is the duty of the Court to refer to the price lists prepared under s. 39 of the Act, irrespective of the fact whether the parties to the suit produce such lists or not. C HARIHAR ROY *v.* SARAT CHANDRA BASU 734

——— s. 49—*Civil Procedure Code (Act V of 1908), O. V, rr. 16, 17—Notice to quit, service of, mode of—Refusal to sign acknowledgment, effect of—Notice, whether must be affixed, on outer door of house.*

A notice to quit under cl. (*b*) of s. 49 of the Bengal Tenancy Act must be served in the manner provided in O. V of the C. P. C. for the service of summonses, and in a case to which the provisions of r. 17 of O. V are applicable, those provisions must be strictly complied with. Where, therefore, the person upon whom the notice is to be served takes the notice but refuses to sign an acknowledgment that he has received the notice, the serving officer must affix a copy of the notice on the outer door or some other conspicuous part of the house in which the person to be served ordinarily resides or carries on business or personally works for gain. The failure to comply with this provision would render the service of the notice ineffectual. Pat MAHADEO SINGH *v.* BASGIT SINGH, (1925) Pat. 103; A. I. R. 1925 Pat. 441; 4 Pat. 135; 7 P. L. T. 175 184

——— s. 49—*Ejectment—Under*-raiyat—*Denial of landlord's title—Notice to quit, whether necessary.*

Where in a suit for ejectment the plaintiff alleges that the defendant holds under an under-*raiyati* settlement the defendant cannot be ejected except in accordance with the provisions of s. 49 of the Bengal Tenancy Act. The mere fact that the defendant has denied the plaintiff's title will not entitle the latter to eject the former without complying with the provisions of s. 49. C ABBAS SHEIKH *v.* NEYAMATENNESSA BIBI 662

——— s. 50, *See* BENGAL TENANCY ACT, 1885, ss. 30 (*b*), 39 734

——— ss. 50 (2), 102, 105, 106, 115—*Landlord and tenant—Fixity of rent—Particulars recorded under s. 102 (2)—Presumption, whether arises—Rent paid at uniform rate, effect of.*

The presumption laid down in s. 50 (2) of the Bengal Tenancy Act does not apply where the particulars mentioned in s. 102 (*b*) of the Bengal Tenancy Act have been recorded in Ch. X of the Act if the attempt to raise the presumption is made in a regular suit and not in a proceeding under s. 105 or 106 of the Act.

Apart from the provisions of sub-s. (2) of s. 50 of the Bengal Tenancy Act, the natural presumption of fixity of rent may arise on the evidence adduced in a case. No such presumption can, however, arise merely from proof that the tenant has been paying rent at a fixed rate for the past few decades. C PITAMBAR NATH *v.* BHAIRAB CHANDRA SINHA 878

——— s. 65—*Landlord and tenant—Transfer of holding by tenant—Purchaser, whether liable to pay arrears of rent—Notice—Suit for rent—Original tenant, whether necessary party—Plaintiffs representing entire estate of landlord—Subsequent addition of parties, effect of.*

Under s. 65 of the Bengal Tenancy Act the rent due in respect of a holding is a first charge on the property, and a person who purchases the holding from the tenant with notice of the charge is liable to pay the amount of the rent due to the landlord and it is not necessary in a suit by the landlord to recover such rent to implead the original tenant, who was in possession during the period in respect of which the rent became due, as a party to the suit.

Where at the time of the institution of a suit for rent, the entire estate of the deceased landlord is represented by the plaintiffs, the mere fact that owing to certain events which have happened since the institution of the suit it becomes necessary to add certain other persons also as plaintiffs as being interested in the estate, would not render the suit as originally framed defective. C AMIYA PAL *v.* SHARBA MANGALA DEBI 657

——— s. 67—*Landlord and tenant*—Kabuliyat—*Interest on arrears of rent, rate of—Penalty—Additional rent on excess area, assessment of.*

A stipulation in a *kabuliyat* providing for the payment of interest on arrears of rent at the rate of 75 per cent. per annum cannot be regarded as penal.

A landlord suing for arrears of rent on the basis of a *kabuliyat* executed before the passing of the Bengal Tenancy Act, is not entitled to recover interest on arrears at a rate higher than that fixed by s. 67 of the Act.

A *kabuliyat* provided for the payment of rent which was described as *khajana* at a certain sum per annum and also for the payment of other sums on other accounts. All these sums together with the rent were amalgamated into a total sum which was described as *jama* or *malguzari*. There was a stipulation in the *kabuliyat* that excess rent (*khajana*) would be payable for lands subsequently found to be culturable:

Held, that the additional rent payable for the excess assessable area must be calculated on the basis of the amount of the *khajana* mentioned in the *kabuliyat* and not on the basis of the total rent mentioned therein. C JADUNATH GUHA RAY *v.* ABDUL HAJEE 459

——— s. 72—*Landlord and tenant—Transfer of landlord's interest—Liability of tenant to pay rent to transferee—Payment to landlord, effect of.*

Before the tenant can be excused from payment of rent to the transferee of the landlord under s. 72 of the Bengal Tenancy Act, two conditions must be fulfilled, first, he must have paid rent to the landlord whose interest has been transferred and, secondly, he must have done so without notice of the transfer. C BROJO DHABAL *v.* PREM CHAND KUNDU 726

Bengal Tenancy Act—contd.

——— s. 85 (1)—*Landlord and tenant*—Raiyat—*Under*-raiyati *lease—Suit to recover rent—Under*-raiyat *impleaded as party to suit—Consent of landlord—Presumption.*

The mere fact that in a suit to recover rent from the *raiyat* the landlord also impleads as a defendant a person who alleges himself to be an under-*raiyat* does not imply that the landlord has consented to any under-*raiyati* lease which the *raiyat* may have granted to the under-*raiyat* but which would not be valid under the provisions of s. 85 (1) of the Bengal Tenancy Act without the consent of the landlord. **C** MANIRADDI MOLLA *v.* AMBICA CHARAN KARMAKAR **668**

——— s. 95. *See* C. P. C., 1908, s. 141 **741**

——— ss. 102, 105, 106. *See* BENGAL TENANCY ACT, 1885, s. 50 (2) **878**

——— s. 103—*Landlord and tenant—Tenure-holder—Plot of land shown in possession of tenant under landlord—Rent realized by tenure-holder—Record of Rights, entry in—Presumption—Rebuttal.*

Plaintiffs who were tenure-holders under the defendants brought a suit to recover possession of a piece of land which they alleged formed part of their tenure of which they had been dispossessed by the defendants. The defence was a denial that the land in suit formed part of any permanent tenure of the plaintiffs. The Record of Rights which was published in 1916 showed one *A* as the tenant of the land in dispute under the defendants. There was no evidence that the defendants had ever realized any rent in respect of the land in dispute. On the other hand the plaintiffs proved that they had realized rent in respect of the land in dispute before the publication of the Record of Rights and had also obtained rent-decrees against *A* after the publication of the Record of Rights:

Held, (1) that in the circumstances the presumption raised by the entry in the Record of Rights was very slight and did not require very much to rebut it;

(2) that the presumption had been sufficiently rebutted by evidence that the plaintiffs had realized rent in respect of the land in dispute. **C** SATISH CHANDRA CHAKRAVARTY *v.* ABDUL HASIR **608**

——— s. 105—*Increase in area of tenancy—Application for enhancement of rent—Dismissal for non-prosecution—Subsequent suit, whether barred—Procedure.*

A suit for increased rent on the ground of increase in area is not maintainable when a similar claim was made in an application under s. 105, Bengal Tenancy Act, which was dismissed for non-prosecution. **C** THAKURDIN TEWARI *v.* MAHAMMAD IBRAHIM **178**

——— s. 105—*Suit to recover rent for additional area—Measurement, accuracy of—Presumption—Deductions from rent, when can be made.*

Ordinarily measurements made by Settlement Officers are accepted as scientifically made and correct, but measurements made by the landlord are not so scientifically made and it may be that such measurements may be open to challenge in a suit to recover rent for additional area but unless such measurements are challenged as inaccurate, *prima facie* they ought to be accepted as correct. Where in answer to a suit to recover rent for additional area a plea is taken that the measurements are not correct, and the Court finds from the circumstances that there are reasons to believe that the previous measurements were inaccurate the Court ought, upon the circumstances and evidence in each case, to find whether the previous measurements were or were not, as a matter of fact, accurate. If they are found to be inaccurate the Court should make such a deduction from the rent as would, in the circumstances of the case, give an approximate and accurate result. But in the absence of any case that the previous measurements are inaccurate, the Court is not justified in making a deduction from the rent. **C** CHUNDY CHURN LAW *v.* BALARAM GOPE **763**

Bengal Tenancy Act—contd.

——— ss. 105, 110—*Landlord and tenant*—Kabuliyat *providing for payment of additional rent for additional area—Proceeding taken by landlord for settlement of fair rent for additional area—Back rents, whether can be recovered on basis of* kabuliyat.

Where a landlord who is entitled to recover additional rent for additional area under the terms of a *kabuliyat* executed by the tenant elects to apply under s. 105 of the Bengal Tenancy Act for the settlement of fair rent on the ground of additional rent for additional area, he is bound by the terms of s. 110 of the Act and such settlement can take effect only from the beginning of the agricultural year next after the date of the decision fixing the rent. It is not in such a case open to the landlord to sue for the back rents of the additional area on the basis of the *kabuliyat*. **C** CHANDI CHARAN LAW *v.* MEHER BANU, 52 C. 910; A. I. R. 1926 Cal. 172 **1016**

——— ss. 109, 105—*Landlord and tenant—Application for enhancement of rent—Application by tenant for reduction of rent—Suit for rent—Plea of abatement of rent, whether can be taken.*

The defence taken by a defendant in a rent suit that there has been a diminution of the area of the tenancy and that he is consequently entitled to an abatement of rent is neither an application nor a suit within the meaning of s. 109 of the Bengal Tenancy Act, and such a defence cannot, therefore, be held to be barred by the provisions of that section even where it had been brought forward in proceedings under s. 105 of the Bengal Tenancy Act and had not been given effect to. **C** BENGARAM CHANGA *v.* BEJOY GOVINDA ROY **738**

——— s. 115. *See* BENGAL TENANCY ACT, 1885, s. 52 (2) **878**

——— s. 174—*Civil Procedure Code (Act V of 1908), s. 47—Rent decree—Sale of holding—Deposit of 5 per cent. of purchase-money in Court—Payment to decree-holder out of Court—Sale, setting aside of—Application to set aside sale, dismissal of—Appeal, whether lies.*

No appeal lies against an order deciding a question under s. 174 of the Bengal Tenancy Act between the judgment-debtor and the auction-purchaser.

In execution of a decree for rent the tenant's holding was sold and was purchased by a third party. Within 30 days of the sale the tenant made a deposit of 5 per cent. of the purchase-money into Court for payment as compensation to the auction-purchaser and made an application stating that the amount recoverable under the decree had been paid to the decree-holder. The decree-holder himself joined in this application. The judgment-debtor, therefore, prayed under s. 174 of the Bengal Tenancy Act that the sale should be set aside:

Bengal Tenancy Act—concld.

Held, that the provisions of s. 174 of the Bengal Tenancy Act had not sufficiently been complied with and that the application, therefore, must be dismissed. Pat RAGHUNANDAN PANDEY *v.* GARJU MANDAL, (1925) Pat. 183; A. I. R. 1925 Pat. 525, 4 Pat. 718; 6 P. L. T. 795 217

——— s. 182—Raiyat *holding homestead as under-raiyat, ejectment of.*

Under s. 182, Bengal Tenancy Act, a *raiyat* holding homestead as an under-*raiyat*, would be governed by the same provisions as regards ejectment from the homestead as regulate his *raiyati*. C NITAI PADA DAS *v.* SARAT KUMARI DASI 183

——— Sch. III, Art. 3—*Landlord and tenant—Suit by tenant to recover possession of holding—Landlord no party to ouster—Limitation.*

Where in a suit by a tenant for possession of his holding it is found that the landlord had no hand in the ouster and that he recognised the defendant as a tenant after the latter had entered into the land on his own account and had kept the plaintiff out of possession, the suit is out governed by the two years' rule of limitation laid down in Art. 3 of Sch. III to the Bengal Tenancy Act. C SHEIKH MOHARAMDI *v.* SHEIKH ASMAT 493

——— Sch. III, Art. 6—*Suit for declaration and recovery of possession—Tenancy, denial of—Limitation.*

The nature of a suit depends upon the allegations made in the plaint and not on the decree actually passed in the suit.

Where in a suit for declaration and recovery of *khas* possession the plaintiff denies the existence of any tenancy between him and the defendant, the suit does not fall within the purview of Art. 6 of Sch. III to the Bengal Tenancy Act. C MAHENDRA NATH BHUNIA *v.* ASHUTOSH PRADHAN 478

Bihar and Orissa Mining Settlement Act (IV of 1920), s. 23. *See* INCOME TAX ACT, 1922, s. 12 476

Bill of exchange—*Payment under mistake of fact—Notice to payee, absence of—Amount paid, whether can be recovered.*

Where a person accepts the position of a drawee of a Bill of Exchange and honours the bill under a mistake of fact, he establishes for the time being a mutual relationship between himself and the person to whom the payment is made and this relationship casts upon him the duty to inform the latter within a reasonable time that he has accepted that position under a mistake of fact. Where such person gives no notice to the person to whom the payment has been made for a long time after the discovery of the mistake, he is not entitled to recover the amount of the payment on the ground that the payment was made under a mistake of fact. B RAGHUNATH RITHKARAN *v.* IMPERIAL BANK OF INDIA, LTD., 27 Bom. L. R. 1229; A. I. R. 1926 Bom. 66 342

Bombay City Police Act (IV of 1922), s. 112 (d)—*"Reputed thief," meaning of—Person convicted of theft, whether reputed thief.*

The fact that a person has actually been convicted of theft is a ground for holding that he is a "reputed thief" within the meaning of cl. (*d*) of s. 112 of the City of Bombay Police Act. The expression "reputed thief" does not mean a thief who has achieved, not merely one or two convictions, but in addition a reputation and a distinction amongst his neighbours

Bombay City Police Act—concld.

and his community as a habitual offender. A reputed thief is not something more than a convicted thief but something less and means a person who even though he might not have been convicted as a thief is so reputed in the circles to which his reputation is a matter of interest. A man who is convicted twice of theft is more than a reputed thief and not less, the question of reputation being one of fact. B EMPEROR *v.* CHAND MAHBOOB, 27 Bom. L. R. 1388; 27 Cr. L. J. 123; A. I. R. 1926 Bom. 46 599

Bombay General Clauses Act (I of 1904), s. 19. *See* BOMBAY PUBLIC CONVEYANCES ACT, 1920, s. 26 (2) 886

Bombay Land Revenue Code (Act V of 1879), s. 83—*Landlord and tenant—Origin of tenancy—Permanent tenancy—Presumption.*

Where it is found that the land comprised in a tenancy was waste land belonging to the ancestor of the landlord in a certain year and that it was not cultivated at that time by any tenant, the presumption laid down in s. 83 of the Bombay Land Revenue Code cannot be raised in respect of such land. B RAMCHANDRA TRIMBAK MANTRI *v.* DATTU RAMA PATIL, 27 Bom. L. R. 1258; A. I. R 1926 Bom. 58 347

——— s. 83—*Landlord and tenant—Permanent tenancy—Enhancement of rent—Burden of proof.*

Under s. 83 of the Bombay Land Revenue Code if a tenant proves that he has fixity of tenure, then he is entitled to fixity of rent, unless the landlord can prove either by agreement, usage or otherwise that he has a right to enhance the rent If he proves such a right, the question of the extent of the enhancement must be left to the Court as the final arbiter. B GIRIAPPA SUBANNA *v.* GOVINDRAO GANRAO, 27 Bom. L. R. 1336; 49 B. 902; A. I. R. 1926 Bom. 52 314

——— s. 83—*Landlord and tenant—Permanent tenancy—Enhancement of rent—Burden of proof—Pleadings—Document relied on by defendant—Plaintiff, whether entitled to prove grounds of invalidity.*

Under the latter part of s. 83 of the Bombay Land Revenue Code if a landlord can prove that he has the right to enhance the rent of a permanent tenancy by virtue of an agreement, usage or otherwise, then he is entitled to do so. The burden lies on the landlord to prove that he has a right to enhance the rent.

Where a defendant in support of his pleas relies upon certain documents, it is open to the plaintiff to establish grounds which would go to prove that the documents relied upon by the defendant are invalid and are not binding upon him. B JUVASINGJI MOTISINGJI *v.* DOLA CHHALA, 27 Bom. L. R. 890; A. I. R. 1925 Bom. 390 272

——— s. 83—*Permanent tenant—Enhancement of rent—Fruit trees, rent, whether can be charged for.*

A tenant who is allowed fixity of tenure under s. 83 of the Bombay Land Revenue Code cannot be regarded as a tenant to be rack-rented.

Where a permanent tenant improves his land by growing fruit trees thereon, the assessment on the land will be increased, and consequently the landlord's rent will be increased. But the landlord cannot get rent based on the assessment and in addition rent for the fruit trees also. B GANGARAM HARI TELI *v.* GANESH PANDURANG GHANEKAR, 27 Bom. L. R. 1339; A. I. R. 1926 Bom. 49 318

——— ss. 83, 84—*Landlord and tenant—Tenancy originating with foundation of village—Antiquity—*

Bombay Land Revenue Code—concld.,

Presumption of permanence—Notice to quit, contents of—Notice requiring tenant to vacate within ten days, legality of.

The presumption laid down in s. 83 of the Bombay Land Revenue Code would not arise in a case in which the Court is able to find a definite and recent date when the actual tenancy began. Where, however, the tenants trace their origin and connection with the lands of the tenancy back to the foundation of the village, over 250 years ago, it does not follow that their particular tenancy or that of their ancestors began on that particular definite date. On the contrary in such a case there is the requisite antiquity contemplated by s. 83 of the Code and the presumption laid down therein may validly be raised.

Where a landlord requires a tenant to go out of possession of the lands of his tenancy at a particular date, the specific date on which the tenant is required to quit the property should be specified in the notice, otherwise the tenant would be left in a state of embarrassing uncertainty as to what arrangements he should make for his future home, for the removal of his furniture and other matters or else in default of complying with some ambiguous notice he might be exposed to the nuisance or annoyance of a law suit.

A notice to quit given by a landlord to a tenant ran as follows: "You are hereby given notice that within ten days from the date of receipt hereof you should pay over to us rent of the last year and you should give in writing a *kabuliyat* to pay rent for the lands you cultivate, failing which you should hand over to us the lands which you cultivate and in default steps will be taken against you to take over possession from you or obtain any other remedy according to law:"

Held, that under this notice the tenant was required either to pay the arrears of rent and pass a lease within ten days or in default to hand over possession on the expiry of ten days and that the period of three months required under s. 84 of the Bombay Land Revenue Code was not given and the notice was consequently defective. **B** AMARSANGJI INDRASANGJI *v* RANCHHOD JETHABHAI, 27 Bom. L. R. 267; A. I. R. 1925 Bom. 294 **265**

Bombay Prevention of Gambling Act (IV of 1887), s. 5. *See* PENAL CODE, 1860, s. 4 **394**

Bombay Public Conveyances Act (VII of 1920), ss. 12 (2), 26—*Bombay General Clauses Act (I of 1904), s. 19—Superintendent of Police, powers of, whether can be delegated to Assistant Superintendent—Delegation, mode of—Proof of delegation—Driving conveyance after suspension of license—Offence.*

A District Superintendent of Police has the authority to delegate powers conferred upon him under the Bombay Public Conveyances Act to the Assistant Superintendent of Police, but where in a criminal case the question arises whether there was such delegation, the delegation must be clearly proved. It is desirable that a question of such delegation of powers should not depend on a general verbal order made by the Superintendent of Police but that there should be a written order, giving references to the various sections of the Act and specifying particular powers and duties which the Superintendent delegates to the Assistant or Deputy Superintendent of Police.

Bombay Public Conveyances Act—concld.

The power to refuse to grant a license or to refuse to renew it or to suspend or cancel it, is one which is of some importance, and before delegating such a power, the Superintendent of Police ought to consider whether it can be properly delegated.

Where a person continues to drive a public conveyance after he has been deprived of his license he ought to be prosecuted under sub-s. (1) of s. 26 of the Bombay Public Conveyances Act for driving a public conveyance without a license for the time being in force, rather than under sub-s. 2 (*c*) of the section for failure to produce a license, which is not an offence really affected by the question of suspension of license except on the principle of *lex non cogit ad impossibilia*. **B** EMPEROR *v.* KARIM RAJMAHAMAD, 27 Bom. L. R. 1421; 27 Cr. L. J. 150; A. I. R. 1926 Bom. 77 **886**

Bombay Rent (War Restrictions) Act (II of 1918), s. 13—*Standard rent, finding as to, whether binding on persons not parties—Procedure.*

The finding of a Court under s. 13 of the Bombay Rent (War Restrictions) Act as to the standard rent of particular premises is not a judgment *in rem*. The fixing of the standard rent is a matter which must be decided between the parties to the suit on the evidence adduced by them. **S** PINTO *v.* SETHNA **97**

Buddhist Law, Burmese—*Inheritance—Death of one parent—Re-marriage of surviving parent—Child of first marriage, whether entitled to share in jointly acquired property of parent and step-parent.*

What the Burmese Buddhist Law regards in its rules for partition is the family rather than the individual and so long as the family subsists, all who are members of it are regarded as being entitled to partition of its property on its dissolution. Where after the death of one of the parents a child of the first marriage does not take a share either on the re-marriage or on the death of the surviving parent, he is entitled to share in the estate of the step-parent, and in such part of that estate as can be regarded as jointly acquired property of the marriage of the parent and step-parent, his share as against his parent's step-children is one-half. The estate in which such child shares is the family estate as it stands on the death of the step-parent. **R** MAUNG PO SAN *v.* MAUNG PO THET, 3 R. 438; A. I. R. 1926 Rang. 23 **653**

——— *Inheritance—Representation, principle of, whether applicable—Great-grand-children, whether entitled to inherit in competition with children or grandchildren—Grandchildren, share of*—Orasa *child, death of, during lifetime of parent—Child of* orasa *child, share of.*

Where an *orasa* child dies during the lifetime of the father leaving a child, the latter is entitled on the death of the grandfather to an equal share with any other surviving child of the grandfather and such share vests in such grandchild immediately on the death of the grandfather and passes undiminished to the heirs of the former.

Representation is not a principle of the Buddhist Law, the basic rule under that law being that the nearer heir excludes the more remote. The partial representation allowed to grandchildren in competition with children is merely an exception to that general rule and is the only exception to it.

Great-grandchildren, therefore, cannot inherit in competition with children or grandchildren and the line which the grandchildren represent must for the

Buddhist Law, Burmese—concld.

purposes of partition among the other heirs of the deceased be considered to be extinct.

Where grandchildren are entitled to inherit along with the children of the deceased, the grandchildren take ¼th of the share of their deceased parent, and the balance of such share goes to the children of the deceased. R MAUNG SHWE YE *v.* MAUNG PO MYA, 3 R. 464; A. I. R. 1926 Rang. 4 684

Burden of proof.

See BOMBAY LAND REVENUE CODE, 1879, s. 83 272, 314, 479
See HINDU LAW—WIDOW 12, 270
See HINDU LAW—WIDOW, ALIENATION BY 571
See MADRAS ESTATES LAND ACT, 1908, s. 3 (2) (*d*) 355
See MADRAS ESTATES LAND ACT, 1908, s. 125 345
See RAILWAY COMPANY 120
See TRUSTEE 223
See MALICIOUS PROSECUTION 705
See PARDANASHIN LADY 761
See POSSESSION 4
See PROVINCIAL INSOLVENCY ACT, 1907, s. 36 963
See RAILWAYS ACT, 1890, s. 72

Burma Courts Act (XI of 1922), ss. 2, 11—*Civil Procedure Code (Act V of 1908), s. 102—Rent-suit, whether land suit—Value not exceeding Rs. 500—Appeal, second, whether lies.*

A suit for the recovery of rent is ordinarily a suit on a contract for an ascertained sum, and no question of title to the property in respect of which the rent is claimed necessarily arises in such a suit. The right to receive rent is not in any strict sense a right or interest in immoveable property, and a suit for rent cannot, therefore, be regarded as a suit relating to immoveable property.

A suit for the recovery of rent of land is not a "land suit" within the meaning of s. 2 of the Burma Courts Act, and if the value of such a suit does not exceed Rs. 500 no second appeal is competent under s. 11 of the Act. R MA PAN *v.* MAUNG NUE, 3 R. 390; A. I. R. 1926 Rang. 19 639

Calcutta Rent Act (III of 1920), ss. 15, 18, 24—*Proceeding to fix standard rent—Rent unduly low, question of, not raised before Controller—Revision—Question, whether can be raised before President—Procedure in revision—Previous order fixing standard rent by consent of parties, whether can be considered—Order fixing standard rent of portion of premises, whether relevant in fixing standard rent for whole building.*

Where the proceedings before the Rent Controller have been such that he was not called upon to exercise his judgment and to give his opinion as to whether the rent which was paid on the 1st November 1918 in respect of the premises in dispute was unduly low or not, it is not open to either party by an application for revision of the order of the Rent Controller under s. 18 of the Calcutta Rent Act, to start a new point and allege that the rent was unduly low and ask for the opinion of the President and get a standard rent fixed on that basis by the President. It is a wrong application of the word "revision" to say that although the decision of the Rent Controller was not sought on a particular point, it is open to any of the parties by an application for revision to the President of the Rent Tribunal to start a new point altogether and to have his decision on the point for the first time.

Calcutta Rent Act—concld.

Section 24 of the Calcutta Rent Act merely lays down that where there is a decision of the Controller on a particular question, the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him. Where, however, there is no decision of the Rent Controller to revise, there is nothing which the President of the Tribunal can revise.

A decision fixing the standard rent in respect of certain premises must be regarded as a decision *in rem*, but where standard rent is fixed by consent of parties, the order fixing the standard rent cannot be taken into consideration in any subsequent proceeding between different parties for fixing a standard rent, nor can a decision fixing a standard rent of a portion of a certain premises be Considered in a proceeding for fixing a standard rent for the whole of the premises, as the two premises are not identical. C L. R. COUNSELL *v.* SUKUMARI DEBI, 30 C. W. N. 116; 42 C. L. J. 588; A. I. R. 1926 Cal. 305 1011

Calcutta Suppression of Immoral Traffic Act (XIII of 1923), s. 5—*Criminal Procedure Code (Act V of 1898), s. 491—Police taking charge of girl under 16—Girl attaining age of 16, whether can be kept under charge.*

Under s. 5 of the Calcutta Suppression of Immoral Traffic Act, the Police has no power to continue to keep a girl under their charge after she has attained the age of 16 years. C MAHARANI DASSI *v.* COMMISSIONER OF POLICE, 30 C. W. N. 72; 27 Cr. L. J. 159; A. I. R. 1926 Cal. 339 895

Cantonment Act (II of 1924), s. 118 (1) (a) (III)—*Ingredients of offence.*

The giving of offence by exposure of one's person is not a necessary ingredient of the offence under s. 118 (1) (*a*) (*iii*) of the Cantonment Act. The offence is complete if the exposure is wilful or indecent and in a public place. A BAURI *v.* EMPEROR, 27 Cr L. J. 107 539

Carriage of goods—*Delivery, open, whether can be claimed—Damages, whether can be recovered.*

There is no obligation on a carrier of goods to give him to the consignee. In the absence of an express stipulation to the contrary, he does not undertake to do anything more than to tender the specific goods to the consignee at the proper time and the proper place and where he is not protected from loss, to make good the value of such goods as may have been lost or damaged while under his custody, and even where the consignee removes the goods without protest, it is open to him to establish his claim for damages, if it can be proved by reliable evidence that as a matter of fact the loss or damage took place when the goods were in the custody of the carrier.

Where before taking delivery of his parcel from the carrier, the consignee suspects that a part of its contents are either damaged or lost, it is not unreasonable for him to demand that open or examined delivery may be given to him. It facilitates the subsequent inquiry as to any claim for damages preferred against the carrier, and avoids unnecessary evidence being called at the trial. Though on the one hand the refusal of the carrier to give open delivery affords no cause of action against him, on the other hand

Carriage of goods –concld.

the refusal of the consignee to take delivery of the parcel unless open delivery was given to him, does not disentitle him to his claim for damages for the portion of the goods actually lost or damaged while in the custody of the carrier, though he may not recover the loss which is the direct result of his refusal to take delivery of the remaining goods. **S** FIRM OF CHOITHSING SHEWASING *v.* SECRETARY OF STATE FOR INDIA 437

Cause of action—*Decree for partition—Agreement to hold properties as before—Subsequent suit for partition, whether maintainable—Agreement, whether requires registration—Registration Act (XVI of 1908), s. 17.*

Where subsequent to a decree for partition in a Muhammadan family, the parties agree not to execute the decree but to continue to hold the properties as tenants-in-common without division as before, such agreement must be regarded as a matter arising subsequent to the decree and as furnishing a new cause of action and a second suit for partition is, therefore, not barred.

Such an agreement amounts only to a transaction recognising a title already subsisting and does not require registration. **M** ABDUL SAMAD KHAN *v.* BIBIJAN, 49 M. L. J. 675; A. I. R. 1925 Mad. 1119; (1925) M. W. N. 513 618

C. P. Land Revenue Act (II of 1917), ss. 107, 108 (4), 220—*Status of protected* thekadar *acquired under* kabuliyat *and lease*—Thekadar, *whether can dispute terms of* kabuliyat *and lease—Jurisdiction of Civil Courts.*

Where a person obtains the status of a protected *thekadar* under a *kabuliyat* and a lease, a plea put forward by him that he is not bound by the terms of the *kabuliyat* and the lease cannot be entertained by a Civil Court having regard to the provisions of ss. 107, 108 (4), and 220 (1) of the C. P. Land Revenue Act. **N** NAKTU *v.* RAMCHANDRA BAPU 304

——— **s. 151.** *See* C. P. C., 1908, O. XXI, R. 92 962

——— **s. 160**, suit under—Applicability of s. 6. *See* LIMITATION ACT, 1908, ss. 6, 29 563

——— **s. 220.** *See* C. P. LAND REVENUE ACT, 1917, ss. 107, 108 304

C. P. Tenancy Act (XI of 1898), s. 41 (3)—*Occupancy tenant—Notice of intention to transfer holding—Tenant informed of landlord's intention to purchase—Application to fix valuation by Revenue Officer—Landlord, duty of—Transfer by tenant, validity of—Landlord, whether entitled to claim possession from transferee.*

Under s. 41 (3) of the C. P. Tenancy Act of 1898, where an absolute occupancy tenant intimates to the landlord his intention of transferring his holding, it is incumbent on the landlord not only to inform the tenant of his desire to purchase the holding at a value to be fixed by the Revenue Officer but to apply to the Revenue Authorities to fix such valuation, and if the tenant is unwilling to part with the holding in his favour for the price fixed then to bring a suit for possession on payment of the price fixed by the Revenue Officer. A mere declaration to the tenant by the landlord of his intention to acquire the holding for himself, if unaccompanied by an application to the Revenue Officer to fix the valuation, is not sufficient to disentitle the tenant from proceeding with the sale and does not entitle the landlord to claim possession of the holding from the transferee of the tenant. **N** PILURAM *v.* MAHADEO, 22 N. L. R. 19 290

Civil Procedure Code (Act V of 1908), s. 11, Res judicata. *See* C. P. C., 1908, s. 92 924

——— **s. 11**—*Custom—Landlord and tenant—Grove-holder—Right to transfer grove—Decision regarding right of mortgage, whether* res judicata *as regards right of sale—Burden of proof—Presumption.*

Before the principle of *res judicata* can be applied it must be shown that the matter for decision was directly and substantially in issue in a previous suit between the same parties.

There is an essential distinction between a transfer by a tenant or grove-holder by way of lease or mortgage and a transfer by way of sale. A previous judgment deciding that a grove-holder has a right to mortgage the grove does not operate as *res judicata* with regard to the right of the grove-holder to sell the grove.

According to the usual custom prevailing in Oudh a tenant is debarred from selling a grove held by him, and if he does so the landlord can treat the portion sold as abandoned and sue for recovery of possession of such portion from the transferee.

The terms under which a tenant holds a grove are a matter of contract between him and his landlord. Where, however, a general custom exists with regard to groves, every person who plants a grove must, in the absence of evidence of an agreement to the contrary be held to have acted in accordance with the custom. **O** GANESH *v.* SURAJ BAKHSH SINGH, 2 O. W. N. 944; L. R. 6 A. (O.) 119; A. I. R. 1926 Oudh 139 1021

——— **s. 11**—*Execution of decree—Objection that certain property is not liable to attachment, dismissal of—Attachment of other property—Objection on similar grounds as previous objection, whether can be taken.*

Section 11 of the C. P. C. does not in terms apply to execution proceedings, but the principles underlying it would be applicable to such proceedings in cases where a point has been expressly raised and decided or in cases where it must be deemed to have been raised and decided by necessary implication. But where the subject-matter of a subsequent investigation in execution proceedings is different and the basis of objection is a subsequent attachment, a previous order in regard to another property is not a bar to the objection being re-considered, inasmuch as the objection of a judgment-debtor may be allowed with regard to one item of property and may not succeed with regard to another. A decision that certain property is liable for the satisfaction of a decree cannot operate as *res judicata* when the liability of another item of property has to be considered. When a new item of property is attached it is always open to the judgment-debtor to plead that this new property is not liable to attachment. If in the course of deciding the dispute the Court has to re-consider the question of law already decided, there is no bar to such re-consideration. **A** BINDA PRASAD *v.* RAJ BALLABH SAHAI, 24 A. L. J. 273; A. I. R. 1926 All. 220 785

——— **s. 11**—Ex parte *decree for rent, whether operates as* res judicata *as to rate of rent.*

An *ex parte* decree is as much binding upon a defendant as any other decree is. The mere absence of a party does not affect the binding force of such a decree.

The decision in a previous rent suit whether *ex parte* or *inter parties*, operates as *res judicata* in a subsequent suit for rent even for a different period, if it decides any question which arises in the suit or

Civil Procedure Code—1908—contd.

if it omits to decide any question which should have been decided, if objection were taken by a party.

It is, however, always open to the defendant in a subsequent suit for rent to show that there has been subsequent variation in the rate of rent from that on the basis of which a previous suit was decreed. **C** MAHESHWARI DEI *v.* GAURHARI MAITY 380

——— **s. 11**—*Finding in previous suit that there has been no diminution in area of tenancy.*

Where in answer to a suit for rent the tenant raises the plea that there has been a diminution in the area of the tenancy and that he is, therefore, entitled to an abatement of rent and there is a finding that there has been no diminution in the area of the tenancy, the finding operates as *res judicata* in a subsequent suit for recovery of rent of the same holding, and it is not open to the tenant to put forward the same plea in answer to the subsequent suit. **C** BENGARAM CHANGA *v.* BEJOY GOVINDA ROY 738

——— **s. 11**—*Mortgage of under-proprietary rights—Suit to recover rent by superior proprietor against under-proprietor—Rate of rent, determination of—Suit by mortgagee to enforce mortgage—Property purchased by mortgagee—Suit by superior proprietor against mortgagee for recovery of rent.*

An under proprietor effected a mortgage of his under-proprietary rights and thereafter the superior proprietor obtained a decree for arrears of rent against the under-proprietor on the basis of a rental computed with reference to the annual gross income of the tenure, without making the mortgagee a party to the suit. The mortgagee subsequently brought a suit on foot of his mortgage and in execution of the decree obtained by him purchased the tenure himself. In a suit by the superior proprietor to recover rent from the mortgagee auction-purchaser:

Held, that the rate at which rent had been decreed in the previous suit brought by the superior proprietor against the under-proprietor did not operate as *res judicata* against the mortgagee who was not a party to that suit and was not bound by the decree passed in that suit against his mortgagor. **O** MOHAMMAD JAIMUR KHAN *v.* RAGHUNATH SINGH, 3 O. W. N. 55; A. I. R. 192 Oudh 1 1015

——— **s. 11**—*Punjab Land Revenue Act (XVII of 1887), s. 117—Partition proceedings—Revenue Officer, decision of title by—Subsequent civil suit, if barred—Suit for declaration that land incapable of partition—Civil Court, jurisdiction of.*

A decision by a Revenue Officer in partition proceedings on a point involving question of title does not operate as *res judicata* in a subsequent civil suit involving the same questions, where the Revenue Officer had neither converted himself into a Civil Court nor had followed the procedure laid down in the C. P. C.

A suit for a declaration that a particular land is incapable of partition, having been privately partitioned by the parties though shown joint in Revenue papers, is a suit of a civil nature and is, therefore, cognizable by a Civil Court. **L** GANGA SINGH *v.* BHAN SINGH, 1 L. C. 397 528

——— **s. 11**—*Receiver, petition for appointment of, pending appeal—Order as to merits of appeal.*

Where in an application for the appointment of a Receiver pending the disposal of an appeal, the High Court held that the cause of action alleged in the plaint had abated on the death of the defendant and on that ground dismissed the application:

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Held, that the order on Receiver application did not operate as *res judicata* in the appeal itself on the question of abatement. **M** ARUMUGHA THAMBIRAN *v.* NAMASIVAYA PANDARA SANADHI, 22 L. W. 130; 49 M. L. J. 324; (1925) M. W. N. 569; 48 M. 688; A. I. R. 1926 Mad. 109 162

——— **s. 11**—*Rent suit, finding arrived in—Subsequent suit for rent not triable by Court which decided previous suit*—Res judicata.

A finding arrived at in a rent suit tried by a Court not having jurisdiction to try a subsequent suit for rent between the same parties does not operate as *res judicata* in the subsequent suit, although the decision in the previous suit is a valuable piece of evidence to be considered in the subsequent suit. **C** BHABATARINI DEVI *v.* KIRAN CHANDRA ROY 1026

——— **s. 11, Exp. IV**—*Cause of action, whether can be split up—Relief not asked for in previous suit, whether barred.*

The policy of the C. P. C. is that a plaintiff should not have the right to split up a cause of action against the defendant and to claim a decree on it in a later suit when he might have claimed the same on it in a previous suit.

Where a mortgagee, in a suit to enforce the mortgage, fails to ask for a personal decree against the mortgagor, he cannot ask for this relief in a subsequent suit instituted against the mortgagor. **P. C.** SOURENDRA MOHAN SINHA *v.* HARI PRASAD SINHA, A. I. R. 1925 P. C. 280; 42 C. L. J. 592; 24 A. L. J. 33; (1926) M. W. N. 49; 7 P. L. T. 97; 50 M. L. J. 1; 5 Pat. 135; 52 I. A. 418; 30 C. W. N. 482 1033

——— **s. 11, Expl. IV**—*Plea not taken in previous suit—Plea not allowed to be taken, whether can be taken in subsequent suit.*

A plea which a party could and should have raised in a former suit but which was not raised in that suit must be held to have been decided against such party.

Where a plea of non-joinder was not allowed to be taken in a suit on the ground that it was taken at a late stage, the effect is as if the plea had been taken and had been decided against the party taking it and it will not, therefore, be open to that party in a subsequent suit to take that plea. **C** KARUNAMOY SINHA *v.* TINKARI GHOSE 683

——— **s. 11, Expl. VI.** *See* HINDU LAW—WIDOW 370

——— **ss. 11, 92**—*Decision in previous suit relating to temple.*

A decision given after a real and genuine contest in a suit relating to a temple, in which the trust is properly represented, is binding on all persons interested in the temple, whether they were parties to the suit or not, and the questions decided in the suit cannot be re-opened and re-tried in a subsequent suit instituted at the instance of persons interested in the temple but who were not parties to the previous suit.

Where in a suit by the hereditary trustee of a temple against the *archakas*, it is found that the lands in the possession of the latter were granted for *archaka* service and that the defendants were entitled to appropriate the income arising out of the lands for their own use after spending some amount for the daily worship in the temple, the finding operates as *res judicata* as against all persons interested in the temple and cannot be questioned in a subsequent suit instituted by worshippers of the

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temple under s. 92 of the C. P. C. M KASTURI NARASIMHA *v.* ATCHUTANA LAKSHMINARASIMHAM, 49 M. L. J. 746; (1926) M. W. N. 40; A. I. R. 1926 Mad. 267 924

——— **ss. 11, 145, O. XXI, r. 26**—*Stamp Act (II of 1899), ss. 15, 35, 36—Contract Act (IX of 1872), ss. 133, 135—Execution of decree—Stay of execution—Security given by judgment-debtor—Security bond written on plain paper bearing Court-fee stamp, validity of—Objection to validity of bond, withdrawal of—Appeal—Objection, whether can be renewed—Application by surety for cancellation of bond, rejection of*—Res judicata—*Estoppel—Agreement between judgment-debtor and decree-holder enhancing rate of interest payable on decretal amount—Time granted by decree-holder to judgment-debtor for payment—Surety, whether absolved.*

During the pendency of a certain execution proceeding the judgment-debtor applied for a stay of execution till the decision of an appeal pending against the decree. The Court granted a stay of the proceedings till a certain date but subsequently on the objection of the decree-holder and after hearing the parties it made an order that the judgment-debtor should furnish security before the date to which the proceedings had been adjourned. The judgment-debtor filed a security bond executed by the appellant which was accepted by the Court but notwithstanding the execution of that bond execution proceedings continued at the instance of the decree-holder against the judgment-debtor. Proceedings were, however, subsequently stayed on the judgment-debtor agreeing to pay interest on the decretal amount at a rate higher than that provided in the decree. After the dismissal of the appeal filed by the judgment-debtor against the decree, execution was again taken out against the judgment-debtor. Thereafter the surety put in an application stating that he did not wish to continue as surety and asking that his bond might be cancelled. This application was rejected. The decree-holder then applied under s. 115 of the C. P. C. for execution against the surety but the surety objected that execution could not proceed against him inasmuch as (*a*) the security bond was not properly stamped in accordance with s. 15 of the Stamp Act, having been written on plain paper bearing only an eight-anna Court-fee stamp instead of being written upon a paper stamped with an impressed stamp, (*b*) the Executing Court was not competent to take security from the judgment-debtor after having passed an order staying the execution of the decree, (*c*) the surety was not liable on the bond as the decree-holder had continued to prosecute the execution proceeding even after the execution of the bond and consequently the consideration for the bond had failed, (*d*) the decree-holder was not entitled to enforce the decree against the surety without first endeavouring to recover the decretal amount from the judgment-debtor, (*e*) the decree-holder had entered into an agreement with the judgment-debtor whereby the latter had agreed to pay interest at a rate higher than that mentioned in the decree and (*f*) the decree-holder had granted time to the judgment-debtor to pay up the decretal amount. These objections were overruled. On appeal:

Held, (1) that the surety's omission to raise objections to the validity of the bond in the application which he had made to the Court asking that the bond might be cancelled had not in any way affected the position of the decree-holder and did not estop the surety from contesting his liability under the bond when the decree was attempted to be executed against him and he became aware of his legal position;

(2) that the dismissal of the surety's application for cancellation of the security bond did not operate as *res judicata* inasmuch as the surety was not on the date on which he had made his previous application a party to the execution proceedings;

(3) that the surety having been made a party to the execution proceedings when the decree-holder made an application for execution of the decree against the surety, the surety's objections must be determined in the execution proceedings;

(4) that the order of the Executing Court calling upon the judgment-debtor to furnish security amounted merely to renewal of its previous stay order coupled with the condition which it was authorized to impose by sub-r. (3) of r. 26 of O. XXI of the C. P. C., and was, therefore, perfectly valid;

(5) that in the absence of a provision in the bond that the decree-holder must attempt to recover his money from the judgment-debtor before he could take proceedings against the surety, the decree-holder was entitled to proceed against the surety without attempting in the first instance to recover the decretal amount from the judgment-debtor;

(6) that the surety was under the bond liable for the amount held to be due to the decree-holder on the decision of the judgment-debtor's appeal and that he was not, therefore, liable to pay the enhanced rate of interest which the judgment-debtor had before the decision of the appeal agreed to pay to the decree-holder, and that the surety was not consequently affected by this agreement and the agreement did not absolve him from liability under the bond;

(7) that inasmuch as the bond executed by the surety contemplated that execution proceedings should be stayed, the fact that the decree-holder granted time to the judgment-debtor to pay up the decretal amount did not absolve the surety from his liability;

(8) that the surety having taken objection to the validity of the bond on the ground that it was not properly stamped, as soon as he was made a party to the execution proceedings, and no order having been passed thereafter under s. 36 of the Stamp Act admitting the bond in evidence, the surety was entitled to raise the plea of the invalidity of the bond on that ground in appeal although the plea had been withdrawn in the lower Court;

(9) that the bond was not properly stamped and was, therefore, invalid;

(10) that the decree-holder having continued the execution proceedings against the judgment-debtor in spite of security having been furnished, consideration for the security bond had failed and the bond could not, therefore, be enforced against the surety. L GURANDITTA MAL *v.* GURDASMAL-RAMCHAND, A. I. R. 1925 Lah. 552; 7 L. L. J. 343 772

——— **s. 11, Expl. IV, O. II, r. 1**—*Suit for possession as reversioner of last male owner—Subsequent suit as heir of another person, maintainability of.*

Under O. II, r. 1 of the C. P. C., a plaintiff ought to frame his suit so as to include all titles on which he is entitled to the relief he claims.

Where a plaintiff's suit for possession of certain property as reversioner to the last male owner is dismissed, a second suit for possession of the same property against the same defendant on the strength of his title as heir of another person is barred by virtue of Expl. IV to s. 11 of the C.P.C., since he ought to have pleaded both the titles in the first suit.

Civil Procedure Code—1908—contd.

Where a question of right or title has been adjudicated upon in a suit, the bar of the judgment cannot be avoided by suing on a new form of claim or on a ground of relief which might have been, but was not raised or determined, in the former suit. **M** RAVIPATI RAMIAH *v.* RAVIPATI LAKSHMI NARAYANA, 49 M. L. J. 701; 23 L. W. 13; (1926) M. W. N. 126; A. I. R. 1926 Mad. 234 660

——— **s. 11, Expl. IV, O. XXIII, r. 1**—*Hindu Law —Widow, alienation by—Reversioners, remote, whether can challenge alienation—Suit by remote reversioners for declaration, dismissal of—Second suit on basis of family custom, whether maintainable —Leave to institute fresh suit, effect of.*

Plaintiffs, alleging themselves to be the reversioners of a deceased Hindu, brought a suit for a declaration that a gift made by the widow of the deceased of property belonging to the deceased was void as against the reversioners of the deceased. One of the defences set up by the defendants was that the plaintiffs were not the nearest reversioners of the deceased and that the only person entitled to dispute the deed of gift was one *G* who was the nearest reversioner of the deceased and who had also been impleaded as a defendant to the suit. In answer to this plea the plaintiffs took up the position that even if *G* was a nearer reversioner of the deceased the plaintiffs had a right to maintain the suit on account of *G* having colluded with the other defendants. The widow died during the pendency of the suit and the plaintiffs thereupon made an application to the Court praying for permission to amend the plaint so as to be able to plead a family custom under which they were entitled to succeed to the estate of the deceased along with *G*, although the latter was a nearer reversioner of the deceased. They also prayed to be allowed to claim a decree for possession of their share in the property. The application was rejected and the suit was dismissed, but the Court while dismissing the suit remarked that the plaintiffs were at liberty to file a fresh suit for possession. Plaintiffs then brought another suit for possession of their share of the property founding their title on family custom :

Held, (1) that the allegation of the family custom was an allegation which might and ought to have been made a ground of attack in the previous suit and that not having been pleaded in the previous suit it could not be pleaded in the subsequent suit having regard to Expl. IV to s. 11 of the C. P. C.;

(2) that the previous suit having been dismissed there was no question of the suit being allowed to be withdrawn with liberty to bring a fresh suit on the same cause of action and that the expression of opinion by the Court when dismissing the suit that the plaintiffs were at liberty to bring a fresh suit for possession. did not furnish them with a cause of action for a fresh suit, and that consequently the present suit was not maintainable. **P. C.** FATEH SINGH *v.* JAGANNATH BAKSH SINGH, 27 Bom. L. R. 725; A. I. R. 1925 P. C. 55; 48 M. L. J. 64; 2 O. W. N. 25; 12 O. L. J. 117; L. R. 6 A., (P. C.) 50; 27 O. C. 334; 29 C. W. N. 749; 47 A. 158; 23 A. L. J. 739; 22 L. W. 58; 52 I A. 100 (P. C.) 280

——— **s. 24.** 167

See C. P. C., 1908, s. 105

See PRESIDENCY TOWNS INSOLVENCY ACT, 1909, s. 90 160

——— **s. 24**—*Transfer of case—Prejudice against Pleader, whether ground for transfer—Scope of enquiry.*

Civil Procedure Code—1908—contd.

When the transfer of a case is applied for on the ground that an impartial hearing of the case and proper adjudication cannot be obtained because the Judge hearing the case has shown himself as prejudiced against or in favour of one side or the other, all that has to be ascertained is whether the allegation of the absence of an unprejudiced judicial mind is true in fact there and then and any enquiry into the causes that brought about such a state of things would not only be irrelevant but be calculated to misdirect.

It would be incumbent on a higher Court to transfer a case from the file of a particular Tribunal to another Tribunal the moment it is clear that some prejudice has been created and that a fair hearing and an impartial adjudication cannot reasonably be expected even though such a state of things has been brought about by the conduct of the very party applying for the transfer.

It would, however, be a dangerous principle to establish that the moment a Judge falls out with a Pleader or *vice versa* the case should be transferred from that Judge to some other. If, on the other hand, there is any reasonable ground for supposing that the prejudice against the Pleader has in any manner or measure affected the judicial attitude towards the party or his case, a transfer should be ordered. **M** MULA NARAMMA *v.* MULA RENGAMMA 559

——— **s. 34**—*Interest pendente lite, grant of—Discretion of Court.*

The decreeing of interest after the date of the institution of a suit is within the discretion of the Court, and as a rule the Privy Council will not interfere with the exercise of this discretion by a High Court in India. **P C** SOURENDRA MOHAN SINHA *v.* HARI PRASAD SINHA, A. I. R. 1925 P. C. 280; 42 C. L. J. 592; 24 A. L. J. 33; (1926) M. W. N. 49; 7 P. L. T. 97; 50 M. L. J. 1; 5 Pat. 135; 52 I. A. 418; 30 C. W. N. 482 1033

——— **s. 42, O. XXI, r. 48 (1)**—*Execution of decree—Transfer of decree—Court to which decree transferred, power of—Attachment, power of.*

When a decree is transferred to a Court other than the Court which passed it for execution, the Court to which the decree is transferred has the same powers in executing such decree as if it had been passed by itself, including the power of attachment given by r. 48 (1) of O. XXI of the C. P. C. **O** LAL BAHADUR *v.* BENI MADHO, 13 O. L. J. 174 1043

——— **s. 47.**

See BENGAL TENANCY ACT, 1885, s. 174 217

See C. P. C., 1908, O. XXI, rr. 58, 60 414

See C. P. C., 1908, O. XXI, r. 66 819

See PARTITION 1009

——— **s. 47**—*Decree for possession—Delivery of possession in execution of another decree—Refusal of Revenue Authorities to grant mutation—Suit for possession, second, whether maintainable.*

Plaintiff obtained a decree for the recovery of his share in certain property but failed to execute it. In execution of another decree, however, he obtained symbolical possession of his share of the property and this possession continued undisturbed for some time. Plaintiff then made an application for mutation of names in his favour but his application was refused by the Revenue Court and he thereupon brought another suit for possession of his share of the property:

Held, that the refusal of the Revenue Authorities to grant mutation of names in favour of the plaint-

Civil Procedure Code—1908—contd.

iff amounted to an act of dispossession and furnished the plaintiff with a fresh cause of action upon which to maintain a suit for possession and that s. 47 of the C. P. C. was not, therefore, a bar to such a suit. O SAIRA BIBI *v.* KAZIM HUSAIN 19

——— s. 47—*Execution of decree—Examination of applicant on commission—Lengthy cross-examination—Refusal to answer questions—Dismissal of application—Appeal—Procedure.*

On an application under s. 47 of the C. P. C. the petitioner, a lady, was examined on commission for over three hours and she then refused to answer any more questions put to her in cross-examination on the ground that her head was puzzled. The Commissioner submitted his report to the Court which passed an order that the evidence of the petitioner should be discarded altogether. The petitioner thereupon refused to produce any more evidence in support of her case and her application was dismissed. On appeal:

Held, (1) that in the circumstances of the case the evidence of the petitioner should not have been discarded;

(2) that the petitioner was justified in refusing to produce any further evidence in support of her application, inasmuch as her only remedy was to obtain an order of dismissal of her application and prefer an appeal against that order. C JAMILA KHATUN *v.* GOUR MOHAN DUTTA 675

——— s. 47—*Limitation Act (IX of 1908), s. 19, Sch. I, Arts. 116, 120—Construction of decree—Decree based on compromise declaring liability to pay amount found due on taking accounts—Suit to recover amount, whether maintainable—Limitation—Acknowledgment—Statement that payment has not been paid as accounts have not been settled, effect of.*

The parties to a suit agreed to compromise their disputes and obtain a declaratory decree in the suit and a deed of compromise was drawn up. The decree embodied the terms of the compromise wholesale and provided *inter alia* that accounts should be looked into and the amounts found due should be paid. There was no actual taking of accounts, no amount was fixed as being due from one party to the other and no final decree was passed. In a subsequent suit instituted by one of the parties within six years of the date of the decree to recover from the other party moneys due by the latter on the basis of the accounts:

Held, (1) that the previous decree was only declaratory in character and was not executable and that the present suit was not, therefore, barred by the provisions of s. 47 of the C. P. C.;

(2) that the decree governed the relations between the parties superseding the compromise deed;

(3) that the suit being one to enforce the obligations arising under a decree, Art. 120 of Sch. I to the Limitation Act applied and the suit was, consequently, within time.

A compromise decree has got the features and characteristics both of a compromise and a decree and a suit based on the declarations contained in such a decree may, therefore, appropriately be regarded as a suit upon a decree and not a suit on the contract contained in the compromise.

Whether an earlier contract is superseded by a later contract on account of a certain alteration in the terms of the contract depends on whether the parties intended to rescind the original contract. It

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is, however, possible to vary a term of an original contract by a subsequent parol contract in such a way as to keep alive the original contract. M ARUNACHALAM CHETTIAR *v.* RAJESWARA SETHUPATI, 22 L. W. 195; A. I. R. 1925 Mad. 1260 338

——— s. 47—*Suit against several defendants, dismissal of—Appeal against some defendants—Suit decreed—Execution of decree—Objection by defendants not made parties to appeal, whether can be entertained.*

Where a suit is dismissed by the Trial Court and an appeal is preferred against such dismissal against some only of the defendants and the suit is decreed in appeal, the other defendants who have not been impleaded as respondents in the appeal, although not judgment-debtors, are parties to the suit within the meaning of s. 47 of the C. P. C., and an objection urged by them in the execution proceedings that the decree is not binding on them must be determined by the Executing Court. L AKHTYAR *v.* AKBAR, 1 L. C. 181

——— ss. 47, 92—*Order by Court in pursuance of scheme framed under s. 92, C. P. C.—Appeal, whether lies.*

An order passed by the Court in pursuance of a scheme of management framed by the Court under s. 92 of the C. P. C. is not an order passed in execution of a decree and is not, therefore, appealable. M BAYA C. VYTHELINGA MUDALIAR *v.* MAHADEVA IYER 794

——— s. 47, O. IX, r. 13—Ex parte *decree, execution of—Objection to jurisdiction of Court which passed decree, whether can be taken—Remedy.*

An objection to the jurisdiction of the Court that tried the suit is not one of the questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree which are allowed by s. 47 of the C. P. C., to be dealt with in execution.

After the passing of an *ex parte* decree the only course open to a defendant who wishes to raise an objection to the jurisdiction of the Court that tried the suit is to apply under O. IX, r. 13 of the C. P. C. to have the *ex parte* decree against him vacated and the suit re-heard. M RADHAKRISHNA IYER *v.* VINAYAKASWAMIAR, 22 L. W. 567; 49 M. L. J. 664; A. I. R. 1926 Mad. 128 98

——— s. 47, O. XXI, r. 22—*Execution of decree—Notice to judgment-debtor, absence of—Sale, validity of—Order setting aside sale—Appeal, second, whether lies—Notice, service of, proof of—Report of peon, whether admissible.*

An order setting aside an auction sale on the ground that no notice had been served on the judgment-debtor under r. 22 of O. XXI of the C. P. C. falls within the purview of s. 47 of the Code and is open to second appeal.

The omission to serve a notice under r. 22 of O. XXI of the C. P. C. deprives the Executing Court of its jurisdiction to hold an auction sale of the judgment-debtor's property, and a sale held in the absence of such notice is held without jurisdiction and is, therefore, void and a nullity.

A peon's report of service of notice cannot be used as evidence to prove such service unless the peon is examined as a witness and the report is proved. C SARADA PRASAD ROY *v.* KRISHNA DOME 711

——— s. 47, O. XXI, r. 90—*Execution of decree—Application to execute decree against one of several*

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judgment-debtors—Sale of property belonging to other judgment-debtor also, effect of—Suit by other judgment-debtor to recover possession of his share, maintainability of.

A decree was obtained against several persons who were members of a joint Hindu family. In execution of the decree the decree-holder purporting to proceed only against one of the judgment-debtors brought a house to sale which he described as being the sole property of the judgment-debtor against whom execution had been taken out. Before the attachment and sale of the house, however, a suit had been brought by one of the other judgment-debtors for partition of the house and the sale of the house took place during the pendency of that suit. The plaintiff in that suit obtained a decree for his share in the house and subsequently brought a suit to recover possession of his share from the auction-purchaser:

Held, that the suit was not barred by the provisions either of s. 47 or of r. 90 of O. XXI of the C. P. C., inasmuch as the execution proceeding in which the house was brought to sale did not purport to have been taken against the plaintiff at all. **N** KANHAIRAM *v.* KALICHARAN, 8 N. L. J. 181; A. I. R. 1926 Nag. 68 **218**

——— **s. 47, O. XXXIV, r. 4**—*Mortgage-decree—Order directing mortgaged properties to be sold in certain order—Appeal, whether lies—Purchaser of equity of redemption in one of several mortgaged properties, right of.*

An order made in the execution of a mortgage decree settling the order in which the mortgaged properties should be sold is a final order between the parties in a matter relating to the execution, satisfaction and discharge of the decree and is open to appeal.

Ordinarily a mortgagee decree-holder is entitled to sell the properties comprised in his mortgage in any order he pleases and there is no equity in favour of a person who has purchased the equity of redemption in one of the properties comprised in the mortgage entitling him to ask the Court to direct that the property purchased by him should be sold only in the event of the decretal amount not being recovered from the sale of the other properties comprised in the mortgage. **Pat** KHIRODHAR SINGH *v.* GAJADHAR LAL MAHTO, (1925) Pat. 164; 6 P. L. T. 393; A. I. R. 1925 Pat. 484 **221**

——— **s. 48**—*Decree directing recovery from one party only on failure of another party to pay—Limitation for execution against former, commencement of.*

Per *Phillips, J.*—(agreeing with *Davadoss, J.*, *Wallace, J., contra*).—Where a decree directs that money be recoverable from a party only on failure to recover from another party, the execution of the decree becomes barred against the former after twelve years from the date of the decree.

Where a decree directed "that first defendant do pay to plaintiff his costs of the suit; that in case of failure to recover them from first defendant, the same be recovered from the income of the trust property":

Held, that under the provisions of s. 48 of the C. P. C. the decree became incapable of execution against the trust property after the expiry of twelve years from its date. **M** SHUJA-UL-MULK *v.* UMIR-UL-UMRA, 49 M. L. J. 498; 48 M. 846; A. I. R. 1926 Mad. 20; (1926) M. W. N. 213 **597**

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——— **s. 53.**
See HINDU LAW—DEBTS **785**
See HINDU LAW—JOINT FAMILY **785**
——— **s. 65.** *See* OUDH LAWS ACT, 1876, s. 10 **1047**
——— **s. 73.** *See* C. P. C., 1908, O. XXXVIII, R. 10 **93**

——— **ss. 73, 115**—*Rateable distribution—Conditions, requisite—Manifest error—Interference—Revision.*

Section 73, C. P. C., is intended to distribute equitably the assets of the common debtor realised by the Court among the decree-holders, and to entitle a creditor to benefit under the section, the only two conditions necessary are that he must have a money-decree against the same judgment-debtor and that he must have applied for execution of that decree before the assets were realised. If these two conditions are fulfilled, he is entitled to join in the rateable distribution. It is not necessary that the execution application put in by the party should be such as would have ended in his successfully obtaining satisfaction of his decree.

Although under s. 73, C. P. C., there is a special remedy provided, namely, that of a suit, that provision does not prevent a Court from interfering under s. 115, C. P. C., where there is a manifest error in the order under s. 73 and putting that error correct, as otherwise the parties will be driven to unnecessary litigation. **M** SUBRAMANIA CHETTY *v.* RAMASWAMI CHETTI, 49 M. L. J. 753; 22 L. W. 744; (1926) M. W. N. 27; A. I. R. 1926 Mad. 179 **11**

——— **s. 80**—*Notice of suit—Disclosure of ground of complaint—Notice, sufficiency of.*

The object of requiring notice of an intended suit under s. 80 of the C. P. C. is merely to inform the defendant substantially of the ground of complaint. The notice must not be too strictly or too narrowly construed. It must not be construed as a pleading. It need not set out all the details and facts of the case which the plaintiff intends to prove. The notice must be considered sufficient if it substantially informs the defendant of the nature of the suit intended to be filed. **M** VENKATAKRISHNIER *v.* SECRETARY OF STATE FOR INDIA, 13 L. W. 464 **368**

——— **s. 91**—*Public right, obstruction to, suit relating to, by private individual—Special damage, allegation of—Pleadings.*

Where in a suit relating to the obstruction of a public right the plaintiff relies upon special damage, he must allege special damage in the plaint giving particulars and details of the special damage which has accrued to him. A mere general allegation in the plaint that the plaintiff has suffered inconvenience owing to the obstruction complained of does not amount to an allegation of special damage. Where in such a suit special damage is not alleged in the plaint it is not open to the plaintiff subsequently to say that the other side could have got the necessary information if they had chosen to ask for the particulars of the special damage alleged to have accrued to the plaintiff by reason of the obstruction. **C** RAJ CHANDRA HALDAR *v.* MAHIM CHANDRA MALLICK **728**

——— **s. 92**—*Temple governed by scheme—Supplemental scheme appointing manager for purpose of suing, validity of.*

Where a temple is governed by a scheme, an order of the District Court modifying and supplementing the scheme and appointing a manager for the pur-

pose of suing is not *ultra vires*. M MARINGANTI RAMANUJ CHARYULU *v.* PUDIPROLU BUCHI MANGARAO, 22 L. W. 485; A. I R. 1925 Mad. 1279 565

——— s. 92—*Temple—Scheme of management—Powers of Court—Court, authority of, to interfere in management of temple—Trustees, powers of, exercise of, mode of.*

A Court has no general power to regulate the affairs of a temple in respect of which a scheme has been framed under s. 92 of the C. P. C. In such a case the authority of the Court to deal with matters arising under the scheme is derived from the scheme itself and the Court has no general power outside of or independent of the scheme.

Where a scheme framed by the Court under s. 92 of the C. P. C. for the management of a temple provides for the appointment of an officer by the Board of Control set up under the scheme, the Court has no power to cancel an appointment made by the Board or to direct the Board to appoint another person in place of the one appointed.

Where under such a scheme certain powers are delegated to the Board of Control to be exercised by a vote of the majority of the members of the Board subject to confirmation by the Court, a majority of the members of the Board cannot exercise those powers by separate and individual action; the powers must be exercised in a meeting of the Board duly convened in accordance with the provisions of the scheme. Where a majority of the members of the Board purport to exercise any of such powers individually without convening a meeting, the Court has no power either to confirm or to reject what the members have purported to do, inasmuch as the action of the members cannot be regarded as that of the majority of the members in accordance with the provisions of the scheme. M BAVA C. VYTHELINGA MUDALIAR *v.* MAHADEVA IYER 794

——— s. 92—*Temple—Suit for removal of trustee and other reliefs—Interest in trust, what amounts to—Worshipper, whether entitled to maintain suit—Trustee, whether can be removed for neglect.*

The question whether the plaintiffs in a suit under s. 92 of the C. P. C. have an interest, such as is required by the section, in the trust property or not, is a pure question of fact.

The interest which the plaintiffs must possess in the trust property for the purposes of such a suit must be near and not remote, substantial and not illusory and must be an existing interest and not a mere contingency.

Although *prima facie* any Hindu has a right to worship in any Hindu temple, it does not necessarily follow that every Hindu has in relation to every Hindu temple the interest which gives him the right to sue in respect of the temple under s. 92 of the C. P. C. On the other hand it would not be correct to say that unless a person habitually resorts to a temple for purposes of worship he cannot be said to have an interest in the temple within the meaning of the section.

Persons living in villages in the neighbourhood of that in which a temple is situated who attend the temple on important occasions and celebrate their marriages in the temple are entitled to maintain a suit in respect of the temple under s. 92 of the C. P. C.

Where the *archakas* of a temple are permitted to appropriate the income arising out of a certain property for their own use after spending some portion of it on the daily worship in the temple, a conflict is likely to arise between the interest and the duty of the *archakas*, inasmuch as whatever is not spent on the worship is to be appropriated by the *archakas* In such a case it is desirable that, having regard to all the circumstances of the case, a certain proportion of the income may be directed to be set apart for the maintenance of the daily worship and the balance may be permitted to be appropriated by the *archakas*.

In a suit under s. 92 of the C. P. C. against the hereditary trustee of a small temple in a petty village it was found that the trustee had been guilty of neglect but that the corpus of the temple properties had not been wasted or alienated, and that the neglect of the trustee had aroused little public attention and the services of an efficient trustee were not likely to be secured:

Held, that this was not a fit case in which the hereditary trustee should be removed from his office. M KASTURI NARASIMHA *v.* ATCHUTANA LAKSHMINARASIMHAM, 49 M. L. J. 746; (1926) M. W. N. 40; A. I. R 1926 Mad. 267 924

——— s. 92—*Trust—Suit for removal of trustee and for scheme—Plaint confined to allegations of misconduct of trustee—Absence of grounds for scheme—Death of defendant—Abatement—Cause of action, whether survives.*

In a suit under s. 92 of the C. P. C. the plaint was mainly taken up with allegations of mis-conduct on the part of the trustee and the plaintiffs asked on that ground for the removal of the trustee. There was also a prayer for a scheme which was mentioned at the end of the plaint without giving any special reasons why the scheme was necessary. The trustee died during the pendency of the suit:

Held, (1) that the two reliefs prayed for in the plaint were distinct, although the second relief was to a certain extent dependent on the first, inasmuch as it was necessary to allege a breach of trust in order to constitute the necessary cause of action;

(2) that on the death of the trustee, the cause of action did survive against the representative of the deceased trustee for the purpose of framing a scheme, and the suit did not abate. M ARMUGHA THAMBIRAN *v.* NAMASIVAYA PANDARA SANADHI, 22 L. W. 130; 49 M. L. J. 324; (1925) M. W. N. 569; 48 M. 688; A. I. R. 1926 Mad. 162 109

——— s. 92, O. XL, r. 1—*Suit for removal of trustee and for scheme—Allegations of personal misconduct—Death of trustee—Abatement of suit—Appeal—Receiver, appointment of.*

A suit under s. 92 of the C. P. C., for removal of the Pandara Sannadhi of a *mutt* on grounds of personal misconduct without any reference to the absence of any means of preventing it, cannot be revived aginst his successor for the purpose even of framing a scheme, merely because there was also a prayer for a scheme in the plaint. In such a case, no Receiver would be appointed pending an appeal against a decree by which the Court dismissed the suit as having abated by reason of the defendant's death. M SUBRAMANIA DESIKA PANDARA SANNADHI *v.* ARUMUGA THAMBIRAN 106

——— s. 96, O. XXIII, r. 3—*Consent-decree—Objection that all parties have not consented, how can be taken—Review—Appeal, whether lies.*

Where a decree purports to be passed with the consent of the parties, an objection to the decree by a party who has consented to it on the ground that

some other parties have not consented to the decree can be taken only by making an application for review or instituting a suit for setting aside the compromise on the basis of which the decree purports to have been passed but so long as the decree purports to have been passed, on the basis of a compromise, no appeal can be maintained against it. C MADHUSUDAN CHAKRAVARTY *v.* SATISH CHANDRA NAG 620

——— s. 96 (3), O. XXIII, r. 3, O. XLIII, r. 1 (m) *—Compromise of suit—Decree passed on compromise —Appeal, whether lies.*

Where a suit is compromised and the terms of the agreement between the parties are signed by the parties, all that the Court is to do is to pass a decree according to to the terms to which the parties have agreed. In such a case there is no room for an adjudication on the question whether a lawful agreement has been arrived at, inasmuch as the parties are agreed that they have come to an agreement. The decree passed by the Court in such a case is a consent decree and is not open to appeal. B GULABCHAND RAMSUKH *v.* RAMSUKH RAMPARTAP, 27 Bom. L. R. 1279; A. I. R. 1926 Bom. 39 294

——— s. 98—*Letters Patent (Cal.), cl. 36—Appeal from subordinate Court—Difference of opinion—Procedure.*

Per *Curiam.*—Where a difference of opinion arises between two Judges forming a Division Bench hearing an appeal from a subordinate Court the appeal must be decided in the manner laid down in s. 98 of the C. P. C., and not in accordance with the provisions of cl. 36 of the Letters Patent. C PRAFULLA KAMINI ROY *v.* BHABANI NATH ROY, 52 C. 1018; A. I. R. 1926 Cal. 121 897

——— s. 99—*Master and servant—Temple—Dismissal of temple servants on charges of misconduct —Suit to set aside dismissal—Charges not identical in respect of all plaintiffs—Misjoinder—Decree, whether can be reversed in appeal—Question for consideration—Misconduct, what amounts to—Prior offences by servant, effect of—Finding of fact—Appeal, second—Interference by High Court.*

Plaintiffs, four in number, who were the holders of a piper service *inam* in a temple brought a suit to set aside the orders of dismissal passed against them by the trustee of the temple for misconduct. Each plaintiff had a share in the service *inam*. The charges of misconduct imputed to each plaintiff were different, and in the case of one set of plaintiffs were based on the acts of their father:

Held, that the suit was bad for misjoinder of parties and causes of action; but that the decree of the Court below could not be reversed on the ground of misjoinder.

In such a suit the Court has to determine whether there was justification for the order of dismissal and not whether the Court would itself have dismissed the plaintiffs for the conduct alleged.

It cannot be laid down as a general principle that the punishment to be awarded to a servant for a subsequent offence must be awarded without reference to a prior offence. When an offence has been condoned or dealt with and the offender retained in service, it is not open to the employer to subsequently dismiss him for that same offence but if the servant offends again, it is perfectly justifiable for the employer to consider the prior offences in determining in what manner the servant should be dealt with for the subsequent offence.

The question whether there is or is not sufficient ground for the dismissal of a temple servant by the trustee of the temple, is one for determination upon the particular circumstances of each case and where the question is one of degree and not of principle, the finding of the lower Appellate Court must be treated as a finding of fact, conclusive and binding in second appeal.

Where, however, the Appellate Court in considering the question of the legality of the order of dismissal proceeds on wrong principles, the High Court in second appeal is not bound by the finding of fact arrived at by the Appellate Court.

Persistent neglect of service, insubordination and disobedience of orders repeated from time to time in a servant justify his dismissal.

A temple servant cannot be dismissed on account of acts of misconduct committed not by him but by his father. M ALAGAPPA CHETTIAR *v.* SUNDARAM ANNAVI, (1925) M. W. N. 603; 49 M. L. J. 516; A. I. R. 1926 Mad. 57 525

——— s. 99—*Plaint not signed by plaintiff—Procedure.*

The absence of the signature of a plaintiff on the plaint is a formal defect, not affecting the merits of the case or the jurisdiction of the Court and may be condoned under s. 99 of the C. P. C., or may be cured at any time. S SULLEMAN *v.* ESSO 87

——— s. 101, O. XLI, r. 23—*Remand order of—Appeal—Grounds of attack.*

On an appeal to the High Court from an order of remand by the first Appellate Court, the only grounds available to the appellant to attack the judgment are those which would be available to him in second appeal. M SESHAMMAL *v.* KUPPANA IYYANGAR 452

——— s. 104, O. XXI, r. 92, O. XLIII, r. 1 (j)—*Execution of decree—Sale, confirmation of—Appeal, second, whether lies.*

No second appeal lies against an order of an Appellate Court confirming an execution sale or refusing to set it aside under O. XXI, r. 92 of the C. P. C. L 213 NANAK CHAND *v.* JAMNA DEVI, 1 L. C. 6

——— s. 105 (2)—*Appeal, second—Remand order by consent, whether can be objected to.*

Where a party to an appeal consents to an order of remand being made to enable the opposite party to show that a certain document is admissible in evidence under a certain provision of the Evidence Act, it is not open to the party so consenting to object in second appeal that the document is not admissible in evidence. C JOYNAL KARIKAR *v.* MULLUK CHAND MULLICK 287

——— s. 105, O. IX, r. 13—*Case transferred from one Court to another—Notice to defendant, absence of—Adjournment, application for, rejection of—Ex parte decree—Application to set aside ex parte decree, dismissal of—Appeal—Appellate Court, power of, to set aside ex parte decree.*

A suit pending in one Court was transferred to another Court and on the date of hearing the defendant applied for time on the ground that he was not aware of the transfer and was not ready to go on with the case. This application was refused and the case was heard on that date *ex parte* and was decreed *ex parte* on a subsequent date. Defendant filed an application under O. IX, r. 13 of the C. P. C., to set aside the *ex parte* decree but the application was rejected and no appeal was presented against that order. On appeal against the *ex parte* decree, however, the Appellate

Civil Procedure Code—1908—contd.

Court set aside the *ex parte* decree on the ground that an adjournment should have been granted on the application of the defendant and remanded the case to the Trial Court for decision according to law:

Held, (1) that the defendant not having been informed of the order transferring the case from one Court to another the application of the defendant for adjournment should have been granted;

(2) that as the improper refusal of the Court to grant time to the defendant on that date had affected the decision of the case the defendant was entitled on appeal to have the decree set aside and the case reheard, apart altogether from any question raised in any application under O. IX, r. 13 of the C. P. C., as to whether he had sufficient cause for non-appearance on the date when the decree was passed. **Pat** S. N. MULLICK *v.* GANGA GOPE, (1925) Pat. 199; A. I. R. 1925 Pat. 534 **167**

——— **s. 105, O. XLI, r. 23**—*Jurisdiction declined by Trial Court—Appeal—Remand—Incidental decision of question relating to nature of property in suit, whether binding.*

Where in order to determine the question whether a Trial Court which has declined jurisdiction in a case has or has not jurisdiction to try the case, an Appellate Court gives an incidental decision on the nature of the property which is the subject-matter of the suit and holding that the suit is triable by the lower Court remands the suit to that Court for decision on the merits, the only question which must be taken to have been finally decided by the Appellate Court is the question of jurisdiction and the decision with regard to the nature of the property cannot be treated as final so as not to be open to question in an appeal against the decree finally passed by the Trial Court. **M** LOMADA PEDDA SUBBAYYA *v.* SATHIPALLI RAYAMMA, 22 L. W. 225; A. I. R. 1925 Mad. 1016 **666**

——— **s. 109.** *See* LETTERS PATENT (MAD.), CL. 39 **126**

——— **s. 109**—*Probate proceedings—Appeal to Privy Council—Caveator, whether entitled to appeal.*

A person who had filed a caveat in the Court of first instance opposing a grant of Probate and who was impleaded as a respondent in the High Court in an appeal arising out of the proceedings is entitled to maintain an application for leave to appeal to His Majesty in Council against the decision of the High Court in appeal. **Pat** GENDAMONI DEBAYA *v.* RAGHUNANDAN SINGH, A. I. R. 1925 Pat. 712; (1925) Pat. 337; 7 P. L. T. 287 **768**

——— **s. 110**—*Appeal to Privy Council—Amount or value of subject-matter, determination of—Interest accruing due between date of filing of suit and passing of decree, whether can be included.*

Where interest is claimed in the plaint on the suit amount, such interest as accrues during the period between the filing of the suit and the passing of the decree is part of the subject-matter of the suit and the amount of such interest can be regarded as part of the amount or value of the subject-matter of the suit in the Court of first instance within the meaning of s. 110 of the C. P. C. **R** THAMSUNDASEEN *v.* S. M. A. R. R. M. CHETTY FIRM, 3 R. 405; A. I. R. 1926 Rang. 45 **647**

——— **s. 110**—*Privy Council Appeal—Subject-matter in dispute—Value of reliefs in appeal and cross-objections—Construction of document, whether substantial question of law.*

Civil Procedure Code—1908—contd.

The combined value of the relief claimed by the appellant in an appeal and that claimed by the respondent in cross-objections, determines the amount of the value of the subject-matter in dispute for the purposes of filing an appeal to the Privy Council.

The question of the proper construction of the particular words and clauses to be found in a particular document cannot be said to be one involving a substantial question of law within the meaning of s. 110 of the C. P. C. **N** GHULAM ABBAS *v.* GOVINDRAO **200**

——— **s. 110**—*Appeal to His Majesty in Council—Valuation in plaint accepted by defendant—Plaintiff, whether can question valuation.*

Where a plaintiff values the property which is the subject-matter of the suit at Rs. 10,000 and the valuation is accepted by the defendant, it is not open to the plaintiff on an application by the defendant for leave to appeal to the Privy Council to show that the value of the property is less than Rs. 10,000. **M** CHELASANI RATLAYYA *v.* ANNE BRAHMAYYA, 49 M. L. J. 309; A. I. R. 1925 Mad. 1223 **572**

——— **s. 110, O. XXI, r. 89**—*Transfer of Property Act (IV of 1882), s. 72* (b)—*Appeal to Privy Council—Substantial question of law—Mortgages, prior and subsequent—Decree obtained on subsequent mortgage—Sale in execution—Prior mortgagee, whether can apply to set aside sale—Money paid by prior mortgagee to save property from sale, whether can be added to principal.*

Whether a prior mortgagee in possession of the mortgaged property can apply under O. XXI, r. 89, of the C. P. C. to set aside an auction sale held in execution of a decree obtained by a subsequent mortgagee on a simple mortgage in a suit to which the prior mortgagee was not a party, and whether cl. (*b*) of s. 72 of the Transfer of Property Act applies to such a sale are substantial questions of law within the meaning of s. 110 of the C. P. C. **O** JAGAN NATH SINGH *v.* JAG JEWAN DAS, 2 O. W. N. 860; A. I. R. 1926 Oudh 17 **93**

——— **s. 115.**

See C. P. C., 1908, s. 73 **11**
See C. P. C., 1908, SCH. II, PART. I **313**
See RANGOON MUNICIPAL ACT, 1922, s. 14 **550**
See RANGOON RENT ACT, 1920, s. 15 **627**

——— **s. 115**—*Revision—Error of law.*

A mere error of law is not necessarily an illegality and is not an exercise by a Court of a jurisdiction not vested in it by law so as to entitle the person aggrieved to apply for revision. **L** GURDITTA SHAH-HARICHAND *v.* RAM LAL, 1 L. C. 14 **379**

——— **s. 115**—*Madras Estates Land Act (I of 1908), s. 111—Sale of holding, application for, by land-holder—Order of Revenue Divisional Officer, whether revisable by High Court—Board of Revenue, refusal of, to interfere—Interference by High Court.*

A Revenue Divisional Officer before whom an application is made by the land-holder under s. 111 of the Madras Estates Land Act for directing the sale of a *raiyat's* holding is a Court subordinate to the High Court and his order is, therefore, revisable under s. 115 of the C. P. C.

Where, however, the Board of Revenue has declined to interfere with the order of the Revenue Officer, the High Court will refuse to interfere in revision, unless its non-interference would lead to a gross miscarriage of justice. **M** MAHARAJA OF JEYPORE *v.* SOBHA SUNDAR DALAI, 49 M. L. J. 540; A. I. R. 1926 Mad. 149 **576**

Civil Procedure Code—1908—contd.

——— **s. 115**—*Remedy, other, open to party—Revision, whether competent.*

Where an applicant possesses any other remedy the High Court will not interfere in revision. O MAKHDOOM BAKHSH SINGH *v.* GANGA PRASAD, 2 O. W. N. 658; A. I. R. 1925 Oudh 666 647

——— **s. 115**—*Transfer of Property Act (IV of 1882), s. 130—Assignment of debt—Writing, whether necessary—Applicability of Act to Punjab—Refusal to recognize oral assignment—Irregularity—Revision.*

Although the equitable principles underlying the Transfer of Property Act are followed in the Punjab, the Act itself, with its technicalities, does not apply.

An assignment of a debt need not necessarily be effected in writing, and where a Court refuses to recognize an assignment which is otherwise proved and admitted by the assignor himself, merely on the ground that it was not made in writing, its action amounts to an irregular exercise of jurisdiction, and is open to correction in revision. L TEJA SINGH *v.* KALYAN DAS-CHET RAM, A. I. R. 1925 Lah. 575; 7 L. L. J. 427; 6 L. 487 778

——— **s. 115 (c)**—*Appeal—Judgment of Trial Court reversed without assigning reasons—Illegal exercise of jurisdiction—Revision.*

Clause (c) of s. 115 of the C. P. C. has been advisedly framed in indefinite language in order to empower the High Court to interfere and correct gross and palpable errors of the subordinate Courts.

Where an Appellate Court reverses the decision of the Court of first instance on a certain point without assigning any reason for such reversal it acts illegally in the exercise of its jurisdiction and its judgment is liable to be set aside in revision. C JOGESH CHANDRA MISRA *v.* RAMANI KANTA MAHINTA 839

——— **s. 115, O. XXVI, r. 5**—*Plaintiff, examination of, on commission, whether should be permitted—Discretion of Court—Revision—Interference by High Court.*

An order for the examination of a plaintiff on commission at his own request is a very strong order to pass in any case. A plaintiff is entitled to choose his own *forum*; and having chosen his *forum* he is not entitled to say, "I reside outside the jurisdiction of the Court, therefore, I ask to be allowed to examine myself on commission."

When an application is made to a Court for the issue of a commission the Court has to exercise its discretion as to whether it should grant the application, and the High Court will be very unwilling to interfere with the exercise of that discretion by the Trial Court. Each case must, however, depend upon its own circumstances and no rule as to the exercise of such discretion can be laid down. If the High Court finds that the discretion has been wrongly exercised, or that the case in all its bearings was not laid before the Court below, or that the Court below misapprehended an important part of the case, for instance where the Trial Court treats an application by the plaintiff to examine himself on commission as if it were merely an application to examine witnesses on commission, the High Court will interfere in revision with the exercise of the discretion of the Trial Court. Pat MUHAMMAD AKBAR ALI KHAN *v.* HERBERT FRANCIS, (1925) Pat. 326 822

——— **s. 115, O. XLIV, r. 1**—*Appeal in forma pauperis—Leave to appeal, refusal of—Revision.*

Civil Procedure Code—1908—contd.

In dealing with an application for leave to appeal as a pauper under r. 1 of O. XLIV of the C. P. C., the Court has to proceed upon a perusal of the application and the judgment and decree appealed from. Where after perusing these documents the Court comes to a decision that the decree appealed from is not contrary to law and rejects the application, the High Court will not interfere with the decision in revision unless it appears that the Appellate Court has failed to exercise a judicial discretion in coming to such a conclusion. O SHAMS-UD-DIN *v.* GUR BAKHSH SINGH, A. I. R. 1926 Oudh 201 96

——— **s. 115, O. XLVII, r. 1**—*Review, order refusing to grant—Revision, whether lies.*

An application to revise an order refusing to grant a review would be entertained only in the most exceptional cases. O NARESH PRATAB SINGH *v.* SITLA PRASHAD TEWARI 334

——— **s. 115, Sch. II, paras. 1, 16**—*Reference to arbitration—Revision—Interference by High Court.*

Where objections are raised to a proceeding before an arbitrator and they are the subject of a decision by the Trial Court, the order of the Trial Court cannot be interfered with in revision. Where, however, an applicant in revision challenges not the propriety of the proceeding before the arbitrator but the proceeding of the Court itself and attacks the reference made by the Court to the arbitrator, it is not merely a question of a wrong decision of the Court but may be one of irregularity or illegality committed by the Court in the exercise of its jurisdiction in referring the matter to arbitration. In such a case it would be open to the High Court to interfere with the order of the Trial Court in revision. A GOPALDAS *v.* BAIJ NATH, 24 A. L. J. 235 930

——— **s. 115, Sch. II, para. 15**—*Arbitration—Award set aside—Revision, whether lies.*

An arbitration proceeding entered upon by the parties in the course of the trial of a suit is a proceeding in the suit itself and does not constitute a separate case, within the meaning of s. 115 of the C. P. C. Therefore, an order of a Trial Court setting aside an award made in the course of an arbitration proceeding entered into during the pendency of a suit is not open to revision. L FATEH ULLAH *v.* ABDUL RAHIM, 2 L. C. 145 10

——— **s. 141, O. IX, r. 13**—*Bengal Tenancy Act (VIII of 1885), s. 95—Common manager, appointment of, application for*—Ex parte *order—Application to set aside order, whether maintainable.*

A proceeding under s 95 of the Bengal Tenancy Act for the appointment of a common manager is in the nature of a suit and r. 13 of O. IX of the C. P. C., therefore, applies to such a proceeding by virtue of the provisions of s. 141 of the Code. C BELAIT ALI *v.* HARI PROSAD MOITRA 741

——— **s. 144**—*Execution of decree—Purchase by party to suit but not decree-holder—Subsequent reversal of decree—Restitution—Sale, whether can be set aside.*

In a suit on a mortgage, the mortgagor was *ex parte* in the Trial Court. A subsequent mortgagee was impleaded as 2nd defendant. A decree was passed in favour of the plaintiff and in execution thereof the hypotheca was sold and purchased by the 2nd defendant. The *ex parte* decree was then reversed on appeal and the mortgagor thereupon applied to have the sale set aside:

Civil Procedure Code—1908—contd.

Held, that the sale was liable to be set aside since the 2nd defendant was a party to the suit and decree, though no relief was granted to him under the decree.

The protection which is given to a *bona fide* purchaser in execution of a decree which is subsequently reversed on appeal should not be extended to a defendant or a party to the suit, even though he gets no benefit directly under the decree; in other words, it is only a *bona fide* purchaser, who is not a party to the suit or proceeding, that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected. **M** CHINNA VAYANAN *v.* CHETTIAPPA CHETTY, 49 M. L. J. 452; 22 L. W. 435; 48 M. 767; A. I. R. 1926 Mad. 78 **16**

——— **s. 145.** *See* C. P. C., 1908, s. 11 **772**

——— **s. 148.**

See C. P. C., 1908, s. 151 **213**

See PROVINCIAL INSOLVENCY ACT, 1920, ss. 27, 43 **467**

——— **s. 151.** *See* LIMITATION ACT, 1908 s. 5 **168**

——— **s. 151**—*Inherent power of Court, scope of.*

Under s. 151 of the C. P. C. a Court has no inherent power to set aside its own orders whenever it chooses to do so. **Pat** ANANT POTDAR *v.* MANGAL POTDAR, 4 Pat. 704; A. I. R. 1926 Pat. 27; 7 P. L. T. 291 **483**

——— **s. 151**—*Court Officer, misconduct of, in executing Court's order—Jurisdiction of Court to remedy injury—Inherent powers of Court.*

When an Officer of Court deputed to execute an order issued by the Court conducts himself dishonestly with the result that one of the parties to the suit in which the order is issued suffers thereby, the Court, on being informed on this fact, has jurisdiction under s. 151 of the C. P. C. to remedy the injury by passing necessary orders, for instance, by directing the officer so conducting himself to refund money misappropriated by him. **M** AMIN MALLIKARJUNA *v.* BANGRA BEERANKUNTI, 22 L. W. 387; (1925) M. W. N. 742; A. I. R. 1925 Mad. 1212 **300**

——— **ss. 151, 148, 149, O. VII, r. 11, O. XLVII, r. 1**—*Order directing payment of deficit Court-fees—Money paid by plaintiff to Pleader's clerk—Failure of clerk to pay Court-fees—Rejection of plaint—Inherent power of Court to restore suit.*

Plaintiff was directed to make up the deficiency in Court-fees payable on his plaint within a certain time. He paid the amount representing his deficiency in the Court-fees to his Pleader's clerk for the purchase of the necessary stamps, but the clerk misappropriated the money and failed to pay it into Court. The plaint was eventually rejected for failure of the plaintiff to make up the deficiency in the Court-fees:

Held, that on the true facts being brought to the notice of the Court the Court had inherent power to set aside its order rejecting the plaint and to restore the case to its original file. **Pat** ADIT PRASAD SINGH *v.* RAMHARAKH AHIR, (1925) Pat. 147; A. I. R. 1925 Pat. 435; 4 Pat. 180 **213**

——— **s. 151, O. XXXII, r. 7, O. XLVII, r. 1**—*Minor plaintiff—Next friend exonerating defendant—Sanction of Court, absence of—Inherent power of Court to safeguard interests of minor.*

A Court has a special responsibility to safeguard the interests of a minor party and where those interests have been overlooked it ought, if possible, to remedy the defect.

Civil Procedure Code—1908—contd.

Once a Court is asked to go back on its own procedure it is not a question whether there is any section in the C. P. C. to warrant the action of the Court in amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled.

A minor cannot be expected to exercise due diligence and as soon as he discovers that the Court has failed in its duty in safeguarding his interests he is entitled to move the Court to remedy the defect under s. 151 of the C. P. C.

Where the next friend of a minor plaintiff exonerates a defendant from liability without obtaining the leave of the Court under r. 7 of O. XXXII of the C. P. C., the Court has inherent power to re-open the matter on the application of the minor plaintiff. **M** KANAPARTHI SRINIVASA RAO *v.* KANAPARTHI VENKATANARASAMMA, 22 L. W. 629; A. I. R. 1926 Mad. 119 **727**

——— **s. 151, O. XXXIII, r. 10, O. XLI, r. 33**—*Pauper suit—Compromise—Withdrawal of suit—Property obtained by pauper under compromise in name of third person—Court, power of, to direct* benamidar *to pay Court-fees—Inherent power of Court.*

Where a plaintiff in a pauper suit compromises the dispute with the defendant and evades the payment of Court-fees by obtaining a conveyance of the property given to him under the compromise in the name of a third person, the Court has no power in a subsequent suit by a transferee of the pauper plaintiff to recover the property from the *benamidar* to direct the latter to pay Court-fees which should have been paid by the pauper plaintiff in the previous suit.

Section 151 of the C. P. C. does not authorize a Court which tries a subsequent suit to pass an order with reference to a previous suit **M** VONNAKOTA VIRAJU *v.* VATSVAYA BANGARAJU **519**

——— **s. 152**—*Amendment of decree, when can be allowed—Intention of Judge—Mortgage suit—Preliminary decree directing payment of interest after due date—Final decree omitting provision for payment of interest—Amendment.*

The test whether a Court can make an amendment under s. 152 of the C. P. C. is whether the order as it stands represents the intention of the Judge at the time he made it.

A preliminary decree, passed in a mortgage suit, allowed interest on the mortgage money at a certain rate after the due date fixed by the Court for payment. A final decree was subsequently passed but the provision with regard to the payment of interest was not entered in the final decree and the decree-holder on discovering this omission applied for amendment of the decree:

Held, that as it was by an omission that the clause regarding the payment of interest was not entered in the final decree and as the intention of the Judge was to allow interest, the omission could be rectified by the Court at any time under s. 152 of the C. P. C. **O** JAGMOHAN SINGH *v* SITAPATRAM **29**

——— **O. I, r. 8.** *See* C. P. C., 1908, O. XXII, R. 2 **558**

——— **O. II, r. 2.** *See* HINDU LAW—JOINT FAMILY **976**

——— **O. II, r. 2**—*Mortgage—Separate provisions for payment of interest and principal—Suit to recover interest—No demand for principal—Insolvency of mortgagor—Application by Official Assignee to declare mortgage inoperative, whether maintainable.*

Civil Procedure Code - 1908—contd.

Where there is a provision in a mortgage-deed for the payment of interest different from that providing for the payment of the principal, making two independent covenants, and a personal action is brought on the covenant for the payment of interest and a decree is obtained, that would not prevent a subsequent suit being brought for the recovery of the principal. To such a case O. II, r. 2 of the C. P. C. has no application. It can apply only if at the date of suit both the principal and interest have become payable.

Under a mortgage-deed, interest was payable every month. The deed also provided for payment of principal and interest whenever demanded, and in default the mortgagee was entitled to proceed against the mortgaged property. A suit was brought in the Small Cause Court for interest due and a decree was obtained. At that time no demand had been made for payment of principal. The mortgagor subsequently became an insolvent, and an application was made by the Official Assignee for a declaration that the mortgage had by virtue of O. II, r. 2 of the C. P. C. become inoperative:

Held, (1) that the principal not having become payable on the date of the suit, O. II, r. 2 had no application to the case;

(2) that the bar arising out of O. II, r. 2 applied only to a second suit by the mortgagee and did not entitle the Official Assignee to make an application in the insolvency proceedings for a declaration that the mortgage had become inoperative. M SAWMY RAO *v.* OFFICIAL ASSIGNEE OF MADRAS, 22 L. W. 17; 49 M L. J. 474; A. I. R. 1925 Mad. 1120; 48 M. 703 **403**

——— **O. III, r. 4**—Vakalatnama, *acceptance of, whether must be in writing*—Vakalatnama *authorizing Pleader to prosecute all litigation in suit—Appeal—Fresh* vakalatnama, *whether necessary.*

Order III, r. 4 (2) of the C. P. C., does not require that the acceptance of *vakalatnama* by a Pleader should be in writing upon the *vakalatnama*. The fact that the Pleader mentioned in the *vakalatnama*, appears and conducts the case in Court shows that he has accepted the *vakalatnama*.

A power-of-attorney authorizing a Pleader to prosecute all the litigation of a suit impliedly confers upon him power to lodge and conduct an appeal up to the High Court. L BUDHU RAM *v.* KALU RAM, 6 L. 461; A. I. R. 1926 Lah. 32 **30**

——— **O. V, rr. 16, 17.** *See* BENGAL TENANCY ACT, 1885, s 49 **184**

——— **O. V, r. 17.** *See* C. P. C., 1908, O. IX, R. 13 **965**

——— **O. VI, r. 4.** *See* C. P. C., 1908, O XXI, R. 90 **426**

——— **O. VI, r. 14**—Plaint, not signed by plaintiff. *See* C. P. C., 1908, s. 99 **87**

——— **O. VI, r. 17**—*Amendment of pleadings—Amendment, whether can be allowed in appeal—Amendment allowed by consent, whether can be objected to.*

Leave to amend a plaint may be granted at any stage of the proceedings, for instance, even in appeal.

Where a party agrees to the amendment of the opposite party's pleadings on certain conditions and the amendment is allowed subject to those conditions the amendment cannot subsequently be objected to. O SECRETARY OF STATE FOR INDIA *v.* HARCHARAN DAS, 3 O. W. N. 45; A. I. R. 1926 Oudh 98; 13 O. L. J. 115 **927**

Civil Procedure Code - 1908—contd.

——— **O. VII, r. 10**—*Interest, claim of—Valuation of suit—Order directing return of plaint for presentation to proper Court—Court, whether entitled to decide material issue in order to determine jurisdiction.*

A Court should not for the purpose of considering whether it has or has not jurisdiction to entertain a suit decide a material issue in the suit.

When a plaintiff comes into Court claiming damages or interest he can put the amount of damages or interest at any figure he likes and the mere fact that the claim is untenable is not a sufficient reason for the Court to say that the claim is an inflated claim and that the suit should have been filed in a Court of lower pecuniary jurisdiction. M RAJAGOPALA IYER *v.* MUTHURAMIER **737**

——— **O. VII, r. 10**—*Plaint presented to wrong Court—Procedure.*

Where a plaint is presented to a Court having no jurisdiction to try the suit the Court ought to return the plaint for presentation to the proper Court, and not to dismiss the suit. M TRUSTEE OF VIJIANAGRAM ESTATE *v.* PAILA ACHANAH, 22 L. W. 522; (1925) M. W. N. 771; A. I. R. 1926 Mad. 110 **280**

——— **O. VII, r. 10**—*Plaint presented in wrong Court—Return of plaint—Presentation in proper Court—Court-fees enhanced during interval—Deficit Court-fees, whether payable.*

Where a plaint which is presented in a wrong Court is returned for presentation to the proper Court and is subsequently presented in a Court of competent jurisdiction, the suit must, for purposes of the computation of Court-fees payable on the plaint, be deemed to have been instituted on the date on which the plaint is presented in the proper Court. If between the date of the presentation of the plaint in the wrong Court and its presentation in the proper Court the Court-fees payable on the plaint have been enhanced, the plaintiff must pay the Court-fees payable on the plaint on the date on which the plaint is presented to the proper Court, after deducting the amount already paid by him as Court-fees on the plaint. C BIMALA PROSAD MUKERJI *v.* LAL MONI DEVI, 30 C. W. N. 90; A. I. R. 1926 Cal. 355 **862**

——— **O. VII, r. 11.** *See* C. P. C., 1908, s. 151 **213**

——— **O. VII, r. 11**—*Court-fee, deficiency in—Procedure.*

Where the Court finds that the Court-fee paid on a plaint is insufficient, it ought to give an opportunity to the plaintiff to value the suit properly and to pay the necessary Court-fees. It is not proper in such a case to dismiss the suit on discovery of the fact that the Court-fee paid is not sufficient. C HIRA LAL BANERJEE *v.* SURENDRA NATH SARBANGA **488**

——— **O. IX, r. 6**—Ex parte *decree, when can be passed—Absence of defendant—Duty of plaintiff to prove claim.*

A decree cannot be passed *ex parte* merely because the defendant does not appear. The plaintiff must prove *prima facie* that his claim is true. O GHULAM HUSSAIN *v.* SINGER SEWING MACHINE CO., A. I. R. 1926 Oudh 192 **119**

——— **O. IX, rr. 6, 7**—*Order declaring defendant ex parte, whether bar to appearance in subsequent proceedings.*

An *ex parte* order under r. 6 of O. IX of the C. P. C only covers the period during which the party is actually absent and does not act as a bar to his subse

Civil Procedure Code—1908—contd.

quent appearance. He is not, therefore, prevented from appearing later and proceeding with the case at the stage at which it then is.

Rule 7 of O. IX of the C. P. C. applies to a party who wishes to be relegated back to the position which he would have been in, if he had appeared at a previous hearing at which he was absent, and who wishes the proceedings, taken in his absence, to be taken over again in his presence, so that he may regain the opportunities of cross-examination, etc., which he has lost by his absence. The words "*ex parte*" in the rule apply only to the hearing on the particular day when that hearing and adjournment *ex parte* is made. There is no ground for extending its operation to all subsequent hearings of the suit **M** GOKARAKONDA VENKATASUBBIAH *v.* DELIPARTHI LAKSHMINARASIMHAM, 49 M. L. J. 273; (1925) M. W. N. 647; A. I. R. 1925 Mad. 1274 **545**

——— **O. IX, r. 13.** *See* C. P. C., 1908, s. 47 **98**

——— **O. IX, r. 13**—Ex parte *decree, application to set aside—Summons not duly served on defendant—Limitation, determination of—Limitation Act (IX of 1908), Sch. I, Art. 164.*

Upon an application to set aside an *ex parte* decree the Court must satisfy itself as to whether the application is within time and whether sufficient cause has been shown for the non-appearance of the defendant on the date of hearing. Where due service of notice on the defendant is not established, the Court must decide whether the application is within time from the date when the petitioner came to know of the *ex parte* decree. **L** MOHLA *v.* KAHNUN, A. I. R. 1925 Lah. 577; 7 L. L. J. 408 **798**

——— **O. IX, r. 13.** *See* C. P. C., 1908, s. 141 **741**

——— **O. IX, r. 13, O. V, r. 17**—*Service of summons—Due and reasonable diligence, meaning of—Summons when may be affixed to a house.*

In an application to set aside an *ex parte* decree where it is found that the summons was served by affixing it to the outer door or some conspicuous part of the defendant's house, it is necessary for the Court to be satisfied that the provisions of the second part of r. 17 of O. V of the C. P. C. were really complied with. The Court must see whether in fact the serving officer had used all due and reasonable diligence with a view to finding the defendant before the process of affixing the summons to the outer door or some conspicuous part of the defendant's house was resorted to.

Per *Buckland, J.*—Where the fact of service of summons is contested it will be a matter for detailed consideration as to how service purports to have been effected, and in each case it will be necessary to show that the process-server was reasonably and duly diligent in his attempts to effect personal service due regard being had to the particular circumstances of the case.

Provided the process-server goes to a place on a day and hour when he may expect to find the defendant there and does all that is required under r. 17 of O. V of the C. P. C., if he cannot find the defendant and could not find him whatever further steps he may have taken, by reason of the defendant's absence, it is not necessary for him to repeat his attempt to effect personal service. **C** BALDEODAS LOHEA *v.* SHUBCHURNDAS GOENKA, 30 C. W. N. 104; A. I. R. 1926 Cal. 327 **965**

——— **O. XIV, rr. 3, 5**—*Issues, how to be framed—Procedure.*

Civil Procedure Code—1908—contd.

The materials on which a Court should frame issues in a suit are laid down in r. 3 of O. XIV of the C. P. C., and the Court has no power to take the case out of the hands of the parties and to make for any of them a case which he has no intention of making for himself. In framing issues the Court should not travel outside the pleadings and averments of the parties.

Per *Fawcett, J.*—A Court has power under r. 5 of O. XIV of the C. P. C. to frame additional issues, but the additional issues authorized by this rule are such as may be necessary for the determination of the matters in controversy between the parties, and it is not the intention of the Legislature that the Judge should travel outside the actual averments and counter-averments of the parties. But the Court must consider the case made by a party and not the case as moulded by the astuteness of the Judge. The mere fact that the parties are given an opportunity of adducing additional evidence in regard to the issues framed by the Court itself which are not based upon the pleadings of the parties does not suffice to validate the procedure adopted by the Court. **B** DODBASAPPA DHURMAPPA *v.* PRADHANAPPA VENKAPPA, 27 Bom. L. R. 1318; A. I. R. 1926 Bom. 33 **426**

——— **O. XXI, r. 2**—*Decree—Composition between decree-holder and judgment-debtor to accept percentage of debt, whether adjustment—Agreement, whether can be recorded.*

An agreement by a decree-holder in a composition by his judgment-debtor with his creditors generally to accept a percentage of his decree debt in full satisfaction of the whole debt amounts to an adjustment of the decree which can be recorded under O. XXI, r. 2, C. P. C., as an adjustment of the decree. **M** THUTTA VENKATASWAMI *v.* VISSAMESETTI KOTILINGAM, 49 M. L. J. 730; 22 L. W. 853; (1926) M. W. N. 29; A. I. R. 1926 Mad. 184 **1051**

——— **O. XXI, r. 2**—*Decree—Oral adjustment, validity of.*

The words "otherwise adjusted" in r. 2 (1) of O. XXI of the C. P. C. are wide enough to cover an oral adjustment of a decree. **C** ANANDA PRIVY BAISHNAVE *v.* BIJOY KRISHNA RAY **705**

——— **O. XXI, r. 2**—*Execution of decree—Payment not certified within time prescribed, whether can be recognized—Evidence to prove payment, whether admissible.*

A payment made by the judgment-debtor to the decree-holder which is not certified within the time allowed by law cannot be recognized by the Execution Court, and evidence is not admissible to prove the fact of such payment. **O** KEDAR NATH *v.* CHANDIKA PRASAD **979**

——— **O. XXI, r. 11**—*Execution of decree—Application presented by Pleader retained in suit, validity of.*

Proceedings in execution of a decree are proceedings in continuation of the suit and a fresh authority is not required for a Pleader to appear, act and plead on behalf of the decree-holder in execution proceedings if he was so authorized by a *vakalatnama* in the suit itself. An application for execution filed by such a Pleader on behalf of the decree-holder is a good application in law and can be entertained. **Pat** GOBIND PRASAD *v.* HRIDAY THAKUR, (1925) Pat. 234; A. I. R. 1925 Pat. 692; 6 P. L. T. 220 **211**

——— **O. XXI, r. 22.** *See* C. P. C., 1908, s. 47 **711**

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——— O. XXI, r. 48 (1). *See* C. P. C., 1908, s. 42 1043

——— O. XXI, r. 50—*Decree against partnership—Execution against partner, leave for—Liability, dispute as to—Deputy Registrar, power of, to determine dispute—Procedure.*

Under the Rangoon High Court Original Side Rules the Deputy Registrar is given powers to deal with applications for leave to execute a decree under O. XXI, r. 50 (2) of the C. P. C. Where, however, the person against whom the decree is sought to be executed disputes his liability under the decree, the Deputy Registrar has no power to try and determine the question and the matter must be determined by the Court. R LIM KAR CHANG *v.* T. S. CHETTY FIRM, A. I. R. 1925 Rang. 317; 4 Bur. L. J. 116 778

——— O. XXI, r. 50, O. XXX, r. 3—*Partnership—Suit against firm—Execution of decree—Leave to execute decree against partner—Denial of liability—Procedure—Lunacy of partner.*

Where a decree has been obtained against a firm and the decree-holder desires to execute the decree against any person other than those mentioned in cls. (*b*) and (*c*) of sub-r. (1) of r. 50 of O. XXI of the C. P. C., alleging that the person against whom he desires to proceed is a partner in the firm, he must apply for leave to execute the decree against such person under sub-r. (2) of r. 50 of the Order. The intention of the latter sub-rule is that when an application for leave is made it should be on notice to the person who is alleged to be liable as a partner; he is to be served with a summons to answer the application. Then if the Court finds that the liability is not disputed, the Court may grant leave to execute the decree against the person who does not dispute the liability. If the liability is disputed, then an issue is to be tried in any manner in which any issue in a suit may be tried and determined.

Clauses (*b*) and (*c*) of sub-r. (1) of r. 50 of O. XXI of the C. P. C. refer to persons who have appeared or who have been individually served as partners in the suit itself and have failed to appear. A person, therefore, who has been served with the writ of summons in the suit itself is not one of the persons contemplated by sub-r. (2) of r. 50.

The effect of sub-rr. (2) and (4) of r. 50 of O. XXI of the C. P. C. is that a decree obtained against a firm cannot be enforced, except as to partnership property, against a person alleged to be a partner, and against whom an application has been made under sub-r. (2), unless he has been served with a summons to appear and answer the application specified in sub-r. (2), and has had an opportunity of disputing his liability as a partner, if he desires to do so.

Per *Buckland, J.*—Under O. XXI, r. 50 (2) of the C. P. C. the question of liability should be tried and determined like an issue in a suit on the evidence, oral or documentary, which may be produced by the parties. It is desirable that the issue to be tried should be framed and recorded and that any admissions made by the parties which may be held to render oral evidence unnecessary, either in whole or in part, should also be recorded. C JAGAT CHANDRA BHATTACHARYYA *v.* GUNNY HAJEE AHMED, 30 C. W. N. 11; A. I. R. 1926 Cal. 271; 53 C. 214 824

——— O. XXI, r. 58—*Execution of decree—Claim proceedings—Petition for sale subject to mortgage and for stay of sale pending disposal of petition—Order directing sale with notice of mortgage, whether refusal to investigate—Procedure.*

During the course of an execution proceeding petitioner made an application under O. XXI, r. 58 of the C. P. C., to declare his mortgage right over the properties sought to be sold and to sell them subject to his rights and to stop the sale pending disposal of the petition. The Court in its order stated that the decree-holder opposed the petition as having been made too late and directed the sale to take place with notice of the mortgage and that the decree-holder disputed it:

Held, (1) that the order did not itself amount to a refusal to investigate within the meaning of the proviso to r 58 of O. XXI of the C. P. C.;

(2) that the order was simply a refusal to stop the sale and did not relieve the Court of the necessity of either investigating the claim or of refusing an investigation under the proviso;

(3) that the petition must, therefore, be disposed of according to law.

The practice of Courts selling property with notice of unascertained claims deprecated. M MUTHURAMAN CHETTI *v.* UPPALURN SETHARAMAYYA, 49 M. L. J. 706; A. I. R. 1926 Mad. 216; 23 L. W. 308 985

——— O. XXI, rr. 58, 60, s. 47—*Execution of decree—Attachment—Claim proceedings—Scope of enquiry—Property liable under decree, effect of—Omission to implead party—Notice, want of, effect of—Appeal—Prejudice.*

The enquiry under O. XXI, r. 58 of the C. P. C. is designed to cover cases where a third party comes forward with a claim to the property attached on the ground that it is not attachable as the property of the judgment-debtor or liable for the decree.

In such an enquiry the Court can release the property from attachment only if the conditions laid down in r. 60 of O. XXI of the C. P. C. are found. Where, however, a party admits that the property attached is the property of the judgment-debtor in his hands and liable for the decree, he cannot maintain an application under r. 58 of O. XXI. An attachment cannot be raised at the instance of such a person merely on the ground that the decree-holder by a mistake omitted his name from the execution petition where it is found that in prior proceedings he had been made a party and had admitted the liability of the property in his hands.

In considering whether the legal representative of a judgment-debtor is entitled to maintain an appeal under s. 47 of the C. P. C. against an order of the Executing Court merely on the ground of want of notice, the Court must consider whether that want of notice has in any way prejudiced the appellant. M LINGAM VEERA RAGHAVA RAO *v.* MALLAPRAGADA GURUNATHA RAO 414

——— O. XXI, r. 66, s. 47—*Execution of decree—Sale proclamation—Duty of Executing Court—Particulars with regard to property to be sold, necessity of—Dispute as to valuation—Valuation suggested by judgment-debtor, whether may be entered in sale proclamation—Order settling terms of sale proclamation—Appeal, whether lies.*

An Executing Court is bound to execute the decree as it stands and has no power to go behind it. But it is always open to an Executing Court to insist that the correct description of the properties and everything which is material for a purchaser to know in order to judge the nature and value of the properties

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to be sold should be supplied so that it may be inserted in the sale proclamation.

Where there is a wide difference between the valuation placed by the judgment-debtor upon the property to be sold and that placed upon it by the decree-holder, the valuation given by the judgment-debtor should also be inserted in the sale proclamation.

An order under r. 66 of O. XXI of the C. P. C. merely fixing the value of the property to be sold is not as such open to appeal. Where however, the Court has to decide other questions relating to the sale proclamation in addition to the valuation of the property, an order passed under r. 66 of O. XXI may also amount to an order under s. 47 of the Code, and in such a case the order would be open to appeal. **C** BASANTA KUMAR *v.* BAIKUNTA NATH CHAKRAVARTY **819**

——— **O. XXI, rr. 66, 90**—*Execution of decree—Sale proclamation, non-publication of—Irregularity—Waiver.*

Non-publication of the sale-proclamation is not an illegality but is an irregularity which can be waived by the judgment-debtor.

In order to be bound by waiver, a person must be aware of what exactly he is waiving and what right he is giving up. **C** NRIPATI NATH BHATTACHARJEE *v.* JATINDRA KUMAR DAS **407**

——— **O. XXI, r. 89.** *See* C. P. C., 1903, s. 110 **93**

——— **O. XXI, r. 90.** *See* C. P. C., 1908, s. 47 **218**

——— **O. XXI, r. 90, O. VI, r. 4**—*Execution of decree—Sale—Suit by auction-purchaser to recover possession from judgment-debtor—Fraud, plea of, whether can be raised in defence—Particulars of fraud—Pleadings.*

A judgment-debtor who has allowed an auction sale of his property in execution of the decree passed against him to be confirmed is not debarred from setting up a defence of fraud in the conduct of the sale in answer to a suit brought against him by the auction-purchaser to recover possession of the property. He must, however, give full particulars of the fraud alleged by him and on which he relies.

A person who is charged with fraud should, when he is examined in Court as a witness, be cross-examined in regard to the allegations of fraud and his explanation taken into consideration in arriving at a decision upon the point.

Obiter dictum.—The charge against a bidder at an auction-sale that he and those who have acted in concert with him have acted in such a manner as to prevent the best price being obtained for the property does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale to him. **B** DODBASAPPA DHARMAPPA *v.* PRADHANAPPA VENKAPPA, 27 Bom. L. R. 1318; A. I. L. 1926 Bom. 33 **426**

——— **O. XXI, r. 92.**

See C. P. C., 1908, s. 104 **213**

See EXECUTION OF DECREE **443**

——— **O. XXI, rr. 92, 89, 90 91, O. XLIII, r. 1 (j)**—*C. P. Land Revenue Act (II of 1917), s. 151—Execution of decree—Sale—Pre-emption, right of, whether can be enforced in execution—Order confirming sale—Appeal, whether lies—Revision, whether competent.*

An Executing Court is bound to confirm an auction sale under r. 92 of O. XXI of the C. P. C., unless the conditions specified in rr. 89, 90 or 91 of the Order are fulfilled.

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Where a sale is held under the provisions of O. XXI of the C. P. C., s. 151 of the C. P. Land Revenue Act cannot be made applicable to such sale.

An order confirming an auction sale under r. 92 of O. XXI of the C. P. C. is open to appeal under O. XLIII, r. 1 (*j*) of the Code, and an application to revise such an order cannot, therefore, be entertained. **N** SITARAM *v.* KANIRAM, 21 N. L. R. 157; A. I. R. 1926 Nag. 193 **962**

——— **O. XXI, r. 95.** *See* LIMITATION ACT, 1908, SCH. I, ART. 180 **485**

——— **O. XXII, r. 2, O. I, r. 8**—*Suit for declaration against village proprietors—Second appeal—Omission to bring on record legal representatives of deceased proprietors—Abatement—Permission to implead some only of proprietors, effect of.*

A second appeal in a suit by the non-proprietors of a village for a declaration to the effect that a particular piece of *shamilat* land is a grazing ground for the cattle of all the inhabitants and is not liable to partition among the proprietors, abates if the appellants fail to make an application within time to bring on the record the legal representatives of some of the defendants-respondents who have died, notwithstanding that the plaintiffs-appellants have obtained permission under O. I, r. 8, C. P. C., from the second Appellate Court to sue only a few out of the defendants-respondents on behalf of all the proprietors. **L** RIKHI RAM *v.* DURGA DASS, 1 L. C. 427 **558**

——— **O. XXII, r. 3.** *See* C. P. C., 1908, O. XXX, R. 4 **573**

——— **O. XXII, r. 4**—*Appeal—Death of respondent not concerned with point in dispute—Legal representatives, substitution of, absence of—Abatement.*

The failure of an appellant to bring on the record the legal representatives of a deceased respondent who was not in any way concerned with the point in dispute in appeal does not operate to cause an abatement of the appeal. **L** THAKUR DAS *v* DAULAT RAM, 2 L. C. 147 **32**

——— **O. XXII, r. 4**—*Appeal—Party not interested not impleaded—Death of respondent not interested—Legal representatives, failure to bring on record, effect of.*

The failure of an appellant to implead as a respondent or to substitute the legal representatives of a deceased respondent persons who are not interested in the result of the appeal does not affect the maintainability of the appeal. **C** MADHUSUDAN CHAKRAVARTY *v.* SATISH CHANDRA NAG **620**

——— **O. XXII, r. 4**—*Death of defendant—Legal representatives not brought on record—Abatement, extent of—Decree against several defendants—Application after decree to bring legal representatives of deceased defendant on record—Procedure.*

Where one of several defendants in a suit dies during the pendency of the suit and his legal representatives are not brought on the record within the prescribed period, the determination of the question whether the suit abates *in toto* or only to the extent of the interest of the deceased defendant depends upon the question whether the deceased defendant was such a necessary party to the suit that the suit cannot proceed owing to his absence from the record.

Plaintiff brought a suit for recovery of possession of certain property and for mesne profits against three defendants. Defendant No. 1 had sold the property in dispute to defendants Nos. 2 and 3 long prior to the suit. Defendant No. 3 alone contested the suit

and a decree in favour of the plaintiff was eventually passed against the defendants, the decree for mesne profits purporting to be against all the defendants. Defendant No. 3 filed an appeal against the decree and during the pendency of that appeal the plaintiff discovered that defendant No. 1 had died a few days before the passing of the decree by the Trial Court. Thereupon he made an application that the legal representatives of defendant No. 1 may be brought upon the record, and that the case may be re-opened. The Trial Court set aside the whole decree and re-opened the case against all the defendants. Defendant No. 3 applied to the High Court in revision on the ground that he was content to seek his remedy against the decree of the Trial Court in the appeal which he had filed and that the Trial Court should not have re-opened the case as against him and defendant No. 2:

Held, that in the circumstances of the case the re-opening of the case should be confined to the legal representatives of defendant No. 1 and that the order of the Trial Court so far as it affected the defendants Nos. 2 and 3 should be set aside. M MARAPPA GOUNDAN *v.* SUBRAMANIA IYER 991

——— O. XXII, r. 4—*Suit for possession by several plaintiffs—Decree—Appeal—Death of one respondent—Legal representatives not brought on record—Abatement, extent of.*

In a suit for joint possession of property brought by a number of plaintiffs it is possible in appeal to dismiss the claim of some plaintiffs and to uphold the decree in favour of the others. The decree passed in such a suit is a joint decree, but the rights of the claimants are distinct and can be considered individually and disposed of separately. Where, therefore, during the pendency of an appeal against such a decree, one of the plaintiffs-respondents dies and his legal representatives are not brought on the record within the prescribed period, the appeal abates only as against the deceased respondent and not as against all of them. A NARAIN DAS *v.* SHEO DIN, 24 A. L. J 300 859

——— O. XXII, r. 5—*Plaintiff, death of—Rival claimants—Order of substitution not passed separately—Substitution embodied in judgment and decree—Appeal by unsubstituted claimant, whether competent.*

If a Trial Court instead of deciding the question of substitution between rival claimants to a deceased plaintiff by a separate order disposes it of in the judgment and embodies it in the decree, the procedure does not warrant an appeal by the unsuccessful claimant, as the order of substitution, if passed properly as an interlocutory order, would not have been open to appeal, and consequently the claimant being not party to suit, would have had no right to appeal from the decree as well. O LALTA SINGH *v.* LACHHMI KUER, 2 O. W. N. 857; A. I. R. 1926 Oudh 158 366

——— O. XXII, rr. 5, 10—*Death of party—Legal representative, question of—Appeal, whether lies.*

An order passed under r. 5 of O. XXII of the C. P. C. determining the question as to whether a certain person is or is not the legal representative of a deceased party is not open to appeal.

Rule 10 of O. XXII of the C. P. C. is a residuary rule governing only those cases which are not provided for by the preceding rules. L SAHEB SINGH *v.* [illegible] 166

——— O. XXII, r. 9—*Abatement of suit—Death of defendant—Ignorance of death—Sufficient cause—Abatement, setting aside of.*

In an application to set aside an abatement of a suit, the question of sufficient cause is to be determined with reference to the facts of the particular case.

A plaintiff who did not substitute on the record the legal representatives of the defendant, who died, within time, applied to set aside the abatement on the ground of his ignorance of the death of the defendant. It appeared, that the plaintiff was in service at a place about a hundred miles away from the place of the defendant and, also that owing to temporary arrangements at the Court where the suit was pending there was no Judge for many months by whom the plaintiffs' case could be taken up:

Held, that, on the facts of the case, some latitude may be allowed, and the abatement set aside. O MOHAMMAD MOHSIN *v.* MUHAMMAD ABID 560

——— O. XXII, r. 10—*Mortgage by party to suit after decree—Mortgage attacked as usurious and without consideration—Mortgagee, whether can be added as party.*

Order XXII, r. 10 of the C. P. C., applies only to pending suits whereby a person who derives title from a party will be entitled to be brought on the record of the suit if it is shown that he has secured a good title from that party and that it is to his interest to be brought on record of the suit.

Where after the passing of a decree in a suit, a person obtains a mortgage over the interest of the decree-holder, but the mortgage is attacked by the mortgagor as being an usurious transaction and also on the ground that the consideration recited in it did not actually pass, a Court would not be justified in making him a party to the suit and thereby preventing the person from whom he derived title from disputing his right to receive the amount. M SRINIVASA AIYANGAR *v.* PRATAPA SIMHA RAJAH SAHEB, 49 M. L. J. 704; 22 L. W. 860; A. I. R. 1926 Mad. 214 820

——— O. XXIII, r. 1. *See* C. P. C., 1908, s. 11, EXPLN. IV 280

——— O. XXIII, r. 1.—*"Other sufficient grounds," whether* ejusdem generis *with "some formal defect"—Leave to withdraw, when can be given.*

The words "other sufficient grounds" for allowing the plaintiff to institute a fresh suit in O. XXIII, r. 1 (2) (*b*) of the C. P. C. must be taken to be *ejusdem generis* with the words "some formal defect" in cl. (2) (*a*) of the rule.

A plaintiff who is not prepared to go on with his case with the evidence available to him and before the Court is not entitled to apply under r. 1 of O. XXIII of the C. P. C., for leave to withdraw his suit, with liberty to bring a fresh suit. M NAIMATHULLA KHAN *v.* ABDU RAZACK, 22 L. W. 535; A. I. R. 1925 Mad. 1268 292

——— O. XXIII, r. 1 (3), s. 35—*Withdrawal of suit—Costs, award of.*

The general law as to costs is laid down in s. 35 of the C. P. C. Under that section the Court is invested with a discretion in the matter of awarding costs, and sub-r. (3) of r. 1 of O. XXIII of the C. P. C. has not the effect of divesting the Court of that discretion. That sub-rule does not impose any unavoidable obligation on the Court to award costs in all

cases in which the suit is withdrawn. The word "shall" as used in that sub-rule is merely directory and not mandatory. O RAM BHAROS *v.* RAMPAL SINGH, 2 O. W. N. 901; A. I. R. 1925 Oudh 699 111

——— **O. XXIII, r. 3.**

See C. P. C., 1908, s. 96 620
See C. P. C., 1908, s. 96 (3) 294
See CONTRACT ACT, 1872, s. 74 790, 794

——— **O. XXIII, r. 10.** *See* C. P. C., 1908, s. 151 519

——— **O. XXVI, r. 5.** *See* C. P. C., 1908, s. 115 822

——— **O. XXVI, r. 12**—*Accounts, examination of—Commissioner, appointment of—Instructions—Duty of Court.*

Where a Commissioner has to be appointed in a suit to examine books of account, it is better for the Court itself to settle the exact terms of the order to the Commissioner and ask him to report on certain definite lines and not to leave those points for decision by the Commissioner, that is, not to make him a sort of inferior Judicial Officer.

It is generally the business of the Court itself to ascertain which books are true or false, which party is or is not keeping back the books, what documents are relevant and the like, and it is desirable that these matters should be decided before a Commissioner is appointed. S ASSARMAL *v.* HUNDOMAL, A. I. R. 1925 Sind 265 766

——— **O. XXVI, r. 14 (3)**—*Partition suit—Commissioner appointed to make partition—Report, order varying—Appeal, whether lies.*

No appeal lies against an order by a Court passed under O. XXVI, r. 14 (3), C. P. C., confirming or varying the report of a Commissioner appointed to make a partition. O PIRTHIPAL *v.* BHASKOR, A. I. R. 1926 Oudh 195 317

——— **O. XXX, r. 1.** *See* C. P. C., 1908, SCH. II, PARAS. 1, 16 930

——— **O. XXX, r. 3.** *See* C. P. C., 1908, O. XXI, R. 50 824

——— **O. XXX, r. 4, O. XXII, r. 3**—*Contract Act (IX of 1872), s. 45—Suit by persons jointly entitled to sue—Death of plaintiff pending suit—Legal representatives not brought on record within statutory period—Abatement of suit.*

Order XXX, r. 4 of the C. P. C. applies to suits which not only *may* but *are*, as a matter of fact, instituted in the name of a firm. The rule has no application to suits instituted in the names of individual partners.

All partners living at the time of the institution of a suit contemplated by s. 45 of the Contract Act should join as co-plaintiffs and the failure to bring on the record all such partners within the statutory period prescribed for institution of the suit would result in its dismissal.

Failure to bring on the record within the statutory period the legal representatives of a necessary party to a suit who was on the record and who dies pending the suit would result in the abatement or dismissal of the suit. S DOST MAHOMED *v.* MOHANDAS LALCHAND 573

——— **O. XXXII, r. 7.** *See* C. P. C., 1908, s. 151 727

——— **O. XXXII, r. 7**—*Minor plaintiff—Compromise by next friend, whether binding on minor—Failure to take technical plea—Gross negligence.*

Plaintiff sued for a declaration that he was the adopted son of one *B* and that a gift by the latter of certain properties in favour of his wife was invalid and for recovery of the property. A previous suit had been instituted by the natural father of the planitiff as his next friend during his minority for the same reliefs. That suit was compromised by the next friend of the plaintiff accepting a small portion of the property for the minor and surrendering the rest of his claims. The Court had given leave to the next friend to enter into the compromise upon the certificate of his Pleader that the terms were beneficial to the minor. It was contended in the present suit that the next friend of the minor plaintiff had been guilty of gross negligence in not pleading in the prior suit the invalidity of the gift in favour of *B*'s wife on the ground that a certain item of property had been improperly included in the deed of gift so as to give jurisdiction to a particular Sub-Registrar to register the deed, and that consequently the deed was not duly registered, and also, that the plaintiff a naturel father had no right to represent the plaintiff in the former suit and to compromise the suit on his behalf:

Held, (1) that since the prevailling view of the law at the time of the compromise decree was not to regard the registration of a deed in the circumstances recited as being invalid there was no negligence on the part of the next friend in not putting forward that plea and that, in any case, there was a fair settlement of the matters in dispute which was binding on the plaintiff;

(2) that the natural father of the plaintiff was the proper person to assert his rights as adopted heir against the adoptive parents.

Per *Spencer, J.*—The next friend of a minor palintiff cannot be accused of negligence in not knowing the law better and in failing to take a point which is not obvious.

Per *Odgers, J.*—It is a question of fact whether the next friend of a minor was justified in entering into a compromise.

The next friend of a minor cannot be charged with gross negligence in that he did not foresee that the law would change. M GARIMELLA ANNAPURNAYYA *v.* MUNSUNURI VENKATASUBRAHMANYAM, 49 M. L. J. 549; 22 L. W. 560; A. I. R. 1925 Mad. 1285 742

——— **O. XXXII, r. 7**—*Partition suit—Minor plaintiff—Compromise between some of the parties to suit, whether for benefit of minor—Sanction of Court—Party other than next friend or guardian, whether can apply for sanction.*

In a suit for partition brought by a minor plaintiff all the parties, except one of the defendants, entered into a compromise. The next friend of the minor was also a party to the compromise but he subsequently changed his mind and refused to apply for the sanction of the Court, under r. 7 of O. XXXII of the C. P. C. One of the defendants thereupon applied to the Court for its sanction:

Held, that one of the defendants having withheld his consent to the compromise it would be open to that defendant to agitate the matter and claim a partition of the properties in dispute afresh and on a different basis and that as this would not be in the interests of the minor, the compromise was not for the benefit of the minor and should not be sanctioned.

Quære.—Whether a Court can sanction a compromise on behalf of a minor on the application of a

Civil Procedure Code—1908—contd.

party other than the next friend or guardian of the minor? M MUHAMMAD MARACAYAR *v.* MUHAMMAD AMMAL 521

——— **O. XXXII, r. 7, Sch. II, paras. 15, 16**—*Reference to arbitration—Minor plaintiff not interested in relief—Sanction of Court, absence of, effect of—Award—Objections—Decree in accordance with award—Appeal, whether lies.*

Where a suit is referred to arbitration and on the award being made the Court considers the objections made against the award and overruling the objections pronounces judgment according to the award, no appeal lies against the decree on any of the grounds which would go to establish the invalidity of the award. The only ground on which such a decree can be objected to in appeal is that it is in excess of the award and the appeal must be directed only against that part of the decree which is open to such objection.

Where a minor plaintiff is not in any way interested in the relief claimed in a suit, a reference of the dispute to arbitration is not rendered invalid by reason of the fact that the sanction of the Court under r. 7 of O. XXXII of the C. P. C. is not granted to the minor's joining such reference. Pat SAGAR MULL *v.* HIRA MAHARAJ, (1925) Pat. 324; 7 P. L. T. 264; A. I. R. 1926 Pat. 164 799

——— **O. XXXIII, r. 10.** *See* C. P. C., 1908, s. 151 519

——— **O. XXXIII, rr. 10, 3, 5**—*Limitation Act (IX of 1908), s. 3—Pauper suit, institution of, date of—Court-fee payable—Enhancement of Court-fees after application, effect of.*

Where an application to sue *in forma pauperis* is granted, the suit is deemed to have been instituted on the date when the application was made.

When the pauper plaintiff succeeds in the suit, the Court-fee leviable from him under r. 10 of O. XXXIII of the C. P. C. is that payable under the law in force on the date on which the application for leave to sue as pauper was made and not the law in force on the date of the decree.

The Limitation Act is in *pari materia* with the C. P. C., and the rule laid down in s. 3 of the Limitation Act with regard to the date of institution of a pauper suit must be read along with O. XXXIII, r. 8 of the C. P. C. M KAMAN MADA *v.* MALLAI, 49 M. L. J. 538; 22 L. W. 732; A. I. R. 1926 Mad. 159 302

——— **O. XXXIV, r. 1**—*Redemption suit—Person in possession, whether can be impleaded—Mortgagee in possession, duties of.*

The relief claimed in a suit for redemption is against the mortgaged property, and persons who are in possession of the property and claim an interest therein may be impleaded as parties thereto. S SULEMAN *v.* ESSO 87

——— **O. XXXIV, r. 3**—*Limitation Act (IX of 1908), Sch. I, Art. 181—Final foreclosure decree, application for—Limitation.*

An application for preparation of a final decree for foreclosure under O. XXXIV, r. 3, C. P. C., is governed by Art. 181 of Sch. I to the Limitation Act, and limitation for such an application begins to run from the date of the passing of the preliminary decree. O. RUDRA PRATAB SINGH *v.* SURAJ KUER, 2 O. W. N. 842; A. I. R. 1926 Oudh 12 617

——— **O. XXXIV, r. 4.** *See* C. P. C., 1908, s. 47 221

——— **O. XXXIV, r. 7**—*Suit for redemption—Amount declared due by preliminary decree—Mesne profits accruing after date of payment made according to decree—Separate suit, whether maintainable—English practice how far to be followed in India.*

Mesne profits accruing after the date of payment made according to a decree passed under O. XXXIV, r. 7, C. P. C., can be the subject of a separate suit.

A mortgagor suing for redemption must bring into account all the monies due to either party in connection with the mortgage up to the day fixed under r. 7 of O. XXXIV of the C. P. C., though he is neither obliged, nor is he entitled, to have any items of later date brought into account. The date so fixed is superseded by the actual payment if there is any payment. The day fixed is what is called in English Law the date of default. Either there is payment, which may be on that date or earlier, or there is default. In either case the relation of the parties is changed, in the one direction by payment, the plaintiff being then entitled to possession or at least to a final decree for possession, in the other direction by default, the plaintiff being then deprived of his right to redeem.

Therefore, a separate suit lies for any items which are received after the mortgagor has paid into Court the full amount declared due by the preliminary decree.

In India the Courts are to be guided by the C. P. C. and not by the English practice. O ABU JAFAR *v.* RAGHOINDRA PARTAB SAHAI, 2 O. W. N. 826; A. I. R. 1926 Oudh 113 258

——— **O. XXXVIII, r. 10, s. 73, O. XXI, r. 52**—*Attachment before judgment, effect of—Creditor obtaining decree prior to that of attaching creditor—Priority between decree-holders.*

A mere attachment before judgment does not invest the person at whose instance the attachment is made, with a preferential right to have his decree satisfied out of the property attached as against other decree-holders against the same judgment-debtor.

Where a plaintiff obtains an attachment before judgment of the defendant's property but before he obtains a decree another decree-holder having a decree against the same judgment-debtor applies for execution of his decree against the property held under attachment at the instance of the former, he is entitled to have his decree satisfied out of the property so attached in preference to the creditor at whose instance the property was attached before judgment. R CASSIM *v.* ABDUL KADER 93

——— **O. XXXIX, r. 1**—*Temporary injunction—Waste or damage, findings of—Notice, necessity of.*

An injunction restraining the defendant from interfering with the possession of the plaintiff over the property in suit should not ordinarily be granted on the *ex parte* statement of the plaintiff that he is in possession of the properties and without issuing notice to the defendant or giving him an opportunity of being heard.

Before granting a temporary injunction restraining a party from interfering with the possession of the other party the Court must find that the property is in danger of waste or damage and there must also be a finding as to which of the parties is in *prima facie* possession of the property. M DEVABHAKTUNI BUTCHAMMA *v.* DEVABHAKTUNI PUNAMMA, 21 L. W. 698; A. I. R. 1925 Mad. 896 307

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——— O. XXXIX, rr. 1, 2—*Temple—Suit to restrain defendant from interfering with usages of temple—Temporary injunction, whether can be granted—Order based on opinion of Judge, validity of.*

It is undesirable for an Appellate Court in an appeal from an interlocutory order to decide that the plaintiff has no cause of action.

Judicial matters cannot be decided on the private opinion of the Judge, nor can such opinion be substituted for a decision on evidence, even though the taking of that evidence may involve much time and trouble.

Where an act of the defendant which the plaintiff seeks to restrain by an *interim* injunction is alleged to be an innovation on the established usages of an institution, the proper course for the Court to adopt is to maintain the *status quo ante* until the disposal of the suit.

The head of the Thengalai *Mutt* at Srirangam brought a suit against the *Jeer* of the Ahobilam *Mutt* restraining the latter from bringing into the temple at Srirangam certain paraphernalia and emblems pertaining to his office bearing *vadagalai namams* when entering the temple for purposes of worship, on the ground that such entry was opposed to the usage of the temple which was exclusively *Thengalai* in character and was offiensive to the worshippers and that the plaintiff's own position and sanctity were likely to suffer in the eyes of the ordinary worshippers by defendant's action. The Trial Court on the application of the plaintiff granted a temporary injunction restraining the defendant from committing the acts complained of during the pendency of the suit. On appeal, the lower Appellate Court dissolved the injunction on the ground that in its opinion the introduction of the *jeer's* paraphernalia with *vadagalai namams* into the temple for a short time could not alter the ritual of the temple or go counter to its usage. On revision:

Held, that the order of the lower Appellate Court being based upon the opinion of that Court and not upon a judicial consideration of the case, was not a judicial order and must, therefore, be set aside with a direction that the appeal against the order of the Trial Court should be re-heard. **M** PARAMAHAMSA SRIRANGA NARAYANA *v.* PARAMAHAMSA AHOBILA, 22 L. W. 837; A. I. R. 1926 Mad. 166 **651**

——— O. XL, r. 1. *See* C. P. C., 1908, s. 92 **106**

——— O. XLI, r. 1—*Appeal filed by Vakil—Vakalatnama signed by appellant and Vakil—Omission to state name of appellant and Vakil in body of* vakalatnama, *effect of.*

An appeal presented by a Vakil acting under a *vakalatnama* signed by the appellant and by the Vakil but which omits to state the name of the appellant and the name of the Vakil in the body, is not properly presented and is not a good appeal. **A** RAM RUP AGRAHRI *v.* NAIK RAM **865**

——— O. XLI, rr. 17, 19. *See* LIMITATION ACT, 1908, s. 5 **168**

——— O. XLI, r. 19, *scope of.*

Rule 19 of O. XLI of the C. P. C. has no application to the dismissal of an appeal for default of the appellant, otherwise than by non-appearance. **Pat** ANANT POTDAR *v.* MANGAL POTDAR, 4 Pat. 704; A. I. R. 1926 Pat. 27; 7 P. L. T. 291 **483**

——— O. XLI, rr. 20, 22—*Appeal—Party not interested in result of appeal, whether can be impleaded by Court—Cross-objections against party not impleaded as respondent, whether can be maintained.*

Rule 22 of O. XLI of the C. P. C. does not contemplate the filing of cross-objections against a person who is not a party to the appeal.

A defendant against whom a suit is dismissed and who is not made a party to the appeal preferred by the other defendants against the decree passed against them, is not interested in the result of the appeal within the meaning of r. 20 of O. XLI of the C. P. C., and cannot, therefore, be impleaded as a respondent under that rule.

Rule 20 of O. XLI of the C. P. C. contemplates a person being made a party to the appeal at the time of the hearing of the appeal, inasmuch as the Court must be in full possession of the facts, so that it may be in a position to say whether or not any person is interested in the result of the appeal. The rule does not contemplate that a person should be made a party to an appeal simply in order to enable one of the respondents to prefer a cross-objection against him. **C** RAJENDRA NATH CHATTERJEE *v.* MOHESHATA DEBI **649**

——— O. XLI, r. 23. *See* C. P. C., 1908, s. 105 **666**

——— O. XLI, rr. 23, 25, 27—*Suit decided on merits—Appeal—Remand, whether permissible—Procedure.*

Where a suit has not been disposed of upon a preliminary point, the Appellate Court has no power to remand the suit under r 23 of O. XLI of the C. P. C. The Court should decide the issues arising in the suit itself or if it requires further evidence it should proceed under r. 25 or r. 27 of O. XLI of the Code. **L** MAYA RAM *v.* TULSI RAM, 1 L. C. 13 **351**

——— O. XLI, r. 31—*Appellate judgment, contents of.*

In a judgment of affirmance it is not necessary for an Appellate Court to deal with the matter in dispute at the same length as would be necessary in a judgment of reversal. All that is necessary is that the Appellate Court should properly appreciate the point for determination on appeal and should apply its mind to that point. **C** MAHENDRA NATH BHUNIA *v.* ASHUTOSH PRADHAN **478**

——— O. XLI, r. 33, *scope of.*

Where a subordinate Court passes an improper order and the matter is taken up on appeal to a Court which is empowered to hear appeals from the orders of such subordinate Court, the Appellate Court has jurisdiction to set matters right by passing the appropriate order. **M** VONNAKOTA VIRJU *v.* VATSVAYA BANGARAJU **519**

——— O. XLIII, r. 1 (j). *See* C. P. C., 1908, O. XXI, R. 92 **962**

——— O. XLIII, r. 1 (m). *See* C. P. C., 1908, s. 96 **620**

——— O. XLIV, r. 1. *See* C. P. C., 1908, s. 109 **96**

——— O. XLVII, r. 1.

See C. P. C., 1908, s. 115 **334**

See C. P. C., 1908, s. 151 **213**

——— O. XLVII, r. 1—*Appeal—Non-payment of printing costs—Dismissal for default—Application to set aside dismissal, nature of—Review—Inherent power of Court.*

An application to set aside the dismissal of an appeal for failure of the appellant to pay the printing costs within the prescribed period must be regarded as one for review under r. 1 of O. XLVII of the C. P. C., and does not fall within the purview of r. 19 of O. XLI of the Code.

The expression for "any other sufficient reason" in r. 1 of O. XLVII of the C. P. C., would cover a case where an appellant whose appeal has been dismissed for failure to pay the printing costs within the time prescribed, is able to show that there was good ground for not paying the printing costs within the prescribed period. **Pat** ANANT POTDAR *v.* MANGAL POTDAR, 4 Pat. 704; A. I. R. 1926 Pat. 27; 7 P L. T. 291 **483**

—— **O. XLVII, r. 1**—*Succession Act (X of 1865), ss. 234, 261—Consent order—Advocate, consent of, effect of—Consent based on misapprehension—Power of Court to disregard consent—Letters of Administration, proceeding for—Order based on erroneous consent of Counsel—Review, power of.*

A Court is not deprived of its general authority over justice between the parties by an unauthorized act of Counsel. It is open to a party to a proceeding to ask the Court not to proceed to decide a matter on the basis of the consent expressed by his Counsel where such consent is given under a misapprehension and has not been authorized by the party himself and the Court has power in such a case to disregard the consent.

The right of review is an entirely different right from that given by s. 234 of the Succession Act to revoke a grant of Letters of Administration. The power to review conferred by the C. P. C., is a general one and can be exercised by a Court which has been dealing with a contentious proceeding for the grant of Letters of Administration.

Where an order for the grant of Letters of Administration is made on the basis of the consent of Counsel of one of the parties to the proceeding and the Court subsequently finds that the consent was based on a misapprehension, the Court has power to review its previous order, inasmuch as there is a sufficient reason for review analogous to the discovery of new or important matter or evidence or a mistake apparent on the face of the record. **R** KYONE HOE TSEE *v.* KYON SOON SUN, 3 R. 261; A. I. R. 1925 Rang. 314 **509**

—— **Sch. II, para. 1, s. 115**—*Reference to arbitration*—Ex parte *defendant not party to reference—Award, validity of—Revision.*

To constitute a valid reference to arbitration under para. 1 of Sch. II to the C. P. C. all the parties interested in the suit whether *ex parte* or otherwise must agree that the matters in difference between them should be referred to arbitration.

Where a Court refers a case to arbitration without the consent of some of the parties interested in the suit who are *ex parte*, it exercises a jurisdiction not vested in it by law and no decree ought to be passed in terms of the award made by the arbitrator on such a reference. A decree so passed is liable to be set aside in revision by the High Court under s. 115 of the C. P. C. **M** PARASURAMA MUDALIAR *v.* MUTHUSWAMY PILLAI, 22 L. W. 395; (1925) M. W. N. 744; A. I. R. 1925 Mad. 1209; 50 M. L. J. 100 **313**

—— **Sch. II, paras. 1, 16, O. XXX, r. 1**—*Suit against firm—Reference to arbitration—All partners not parties to reference—Award, whether binding.*

Under para. 1 of Sch. II of the C. P. C. it is imperative that all parties interested should agree that a matter in difference between them be referred to arbitration. It is not necessary that *pro forma* defendants must also join nor is it necessary that persons who are not interested in the matter in difference between those joining in the reference should join the reference, but it is necessary that all persons who are interested in the matter which is in difference between the parties and which is going to be referred to arbitration should join in the reference, although it is not absolutely necessary that they should all sign the application made to the Court.

Rule 1 (2) of O. XXX of the C. P. C., does not empower one partner to refer a case to arbitration so as to bind the other partners who have not agreed to or joined in the application for reference. An agreement for refrence to arbitration by only one of the persons in a firm is not binding on the other persons merely because the suit is against the firm as such.

Where a party interested in the subject-matter of a reference does not join in the reference, it is not bound by the award merely because it did not choose to put in an appearance and contest the suit.

Where all the parties interested in the subject-matter of a reference do not agree to the reference, subsequent agreement cannot make the reference itself valid, though under certain circumstances it may amount to estoppel.

Per *Mukerjee, J.*—The object of enacting O. XXX of the C. P. C., was not to give any one of the members of a partnership any higher authority than he possessed under the law before the enactment of the Code.

When a reference is made to arbitration in a suit in which a firm is a party all the members of the firm who are sought to be bound must join in making the reference. **A** GOPAL DAS *v.* BAIJ NATH, 24 A. L. J. 235 **930**

—— **Sch. II, paras. 14, 15**—*Arbitration—Power conferred on arbitrators to sell property—Rules for conduct of sale, power to make—Dispute as to interpretation of rules—Arbitrators, whether entitled to adjudicate on dispute—Misconduct—Award made without jurisdiction, validity of—Procedure—Award, whether must be remitted to arbitrators.*

Where a reference to arbitration confers a power upon the arbitrators to sell the properties belonging to the parties, such power would naturally carry with it the power to make rules for the conduct of the sale and such rules subscribed to by the bidders, would, in the case of such parties to the reference as subscribed to these rules, extend to the arbitrators authority to sell according to these rules, but would not extend to them any power to act outside these rules, or, any power to decide in a case of controversy whether or not these rules had been complied with.

Where the terms of the reference or of the sale do not imply any consent by the parties to submit to the arbitrators the decision of their own conduct of the sale or re-sales, such consent cannot be considered to be inherent in a consent to have the sale or re-sale conducted according to the rules laid down by the arbitrators.

On an application to set aside an award made by an arbitrator in a pending suit the finding of the Judge as to whether there has been misconduct on the part of the arbitrator or not is final and cannot be attacked in appeal or revision.

But a party to a reference is entitled to be protected by the law against a decision by the arbitrators on points not referred to them at all, as well as against a decree of Court based on such a decision.

Misconduct in respect of the existence of which the Judge's decision is final must be misconduct in carry-

ing out the terms of the reference and within the scope of it. Anything beyond that is action without jurisdiction whether or not it may amount also to misconduct.

If an award is beyond the jurisdiction of the arbitrators, and, therefore, made without jurisdiction, the decree which embodies it is also made without jurisdiction.

Where an award is beyond the jurisdiction of the arbitrators the duty of the Court is to remit the award to the arbitrators under the terms of para. 14 of Sch. II to the C. P. C. **M** RAMASWAMI CHETTIAR *v.* VENKATARAMA IYER, 49 M. L. J. 523; A. I. R. 1926 Mad. 201 **745**

——— **Sch. II, para. 15.** *See* C. P. C., 1908, s. 115 **10**

——— **Sch. II, para. 15**—*Reference to arbitration —Misconduct—Private enquiry made by arbitrators —Award, validity of.*

A Court must not be over-ready to set aside an award unless it finds that there has been something radically wrong and vicious in the proceeding of the arbitrators.

The question of the misconduct of an arbitrator is a question of fact in each case which must be ascertained from the facts of the proceeding itself.

The mere fact that the arbitrators have made private enquiries concerning the dispute referred to their decision does not amount to misconduct on the part of the arbitrators so as to vitiate the award, unless they have, as the result of their enquiries, rejected the evidence regularly taken before them. **R** MAUNG SHWE HPU *v.* U MIN NYUN, 3 R. 387; A. I. R. 1925 Rang. 383 **659**

——— **Sch. II, paras. 15, 16.** *See* C. P. C., 1908, O. XXXII, R. 7 **799**

Civil Rules of Practice (Mad.), r. 278 (b)—*Costs—Suit, dismissal of, for default to pay stamp duty—Scale of taxation.*

Where a suit is dismissed for default of payment of stamp duty and there is no trial of the suit, although the pleadings are filed and issues framed, the case comes under r. 278 (*b*) of the Madras Civil Rules of Practice and the fees should be calculated in accordance with that rule. The costs cannot be taxed as if the suit had been dismissed after contest. **M** PARANKUSAM VENKAYYA *v.* BANDARU SATYANARAYANAMURTHI, 49 M. L. J. 271; 22 L. W. 208; A. I. R. 1925 Mad. 1235 **303**

Companies Act (VII of 1913), ss. 109, 87—*Money borrowed by Company—Charge created on existing and future property—Registration, absence of, effect of—Person allowed to act as Director, authority of —Outsider dealing with Company, whether bound to search register.*

A limited Company which carried on the business of newspaper proprietors, printers, publishers, advertisers and contractors negotiated a loan with the respondent and executed an agreement which recited that the borrowers were possessed of, or otherwise well and sufficiently entitled to, "the unexpired residue of the term of 20 years in the land and building thereon situate at Dalal Street, Fort, Bombay, and more particularly described in the Schedule hereto and the engine, boiler, machinery, plant, printing presses, foundary types, implements, tools specified

in the list hereto annexed and marked B and all furniture, papers, stock-in-trade and other moveable property fixed now lying and being or which may hereafter be fixed and lying and being on the said premises." The agreement then went on to recite the advance of the loan at a demand promissory note and provided that on the Company executing within two months from the date of the agreement a first mortgage "of the said property" the lender shall extend the time for re-payment to one year. It was also provided that pending the execution of the mortgage-deed the Company shall put the lender in possession of all its property (except the lease-holds and the goodwill) and that the Director or governing Director of the Company shall hold possession of the same on behalf of and as agent of the lender, and that the borrowers shall not sell, assign, transfer, hypothecate or otherwise deal with the same or any part thereof or with the business of the Company or the lease-hold premises or any of them without the consent in writing of the lender personally :

Held, that the agreement did not operate to create a pledge of the Company's existing properties but was intended to create a floating charge on all the properties of the Company, present and future, except the lease-holds and the goodwill, within the meaning of s. 109 of the Companies Act, and, that the charge not having been registered in accordance with the provisions of that section was void for want of registration.

Persons contracting with a Company are bound to know the constitution of the Company and its powers as given by Statute and the Memorandum and Articles of Association. The appointment of the Directors, however, is a part of the indoor management of the Company, and outsiders dealing with the Company are not under a duty to search the register of Directors kept under s. 87 of the Companies Act to find out whether a person who has been permitted to act as a Director of the Company for a certain length of time is also a Director *de jure*. **B** PUDUMJEE & Co. *v.* N. H. Moos, 27 Bom. L. R. 1218; A. I. R. 1926 Bom. 28 **334**

——— **ss. 169, 207, 215**—*Voluntary liquidation —Suit instituted by Company before liquidation— Decree for costs against Company after liquidation— Execution of decree, stay of—Power of Court.*

The Court has power, under s. 169 of the Companies Act, read with ss. 207 and 215 of the Act, to make an order staying proceedings taken in execution of a decree against a Company which is in the course of voluntary liquidation.

Where in a suit instituted by a Company long before it goes into liquidation, a decree for costs is made against the Company after it goes into liquidation, the liability of the Company in respect of such decree should not ordinarily be treated in a different way from the other liabilities of the Company and the decree-holder should not be allowed to execute the decree against the Company and must prove for his claim with the other creditors of the Company in the liquidation proceedings. **O** NATIONAL BANK, UPPER INDIA LD. *v.* GOPAL DAS, 28 O. C. 197; A. I. R. 1925 Oudh 630 **1053**

Compromise decree—*Consent decree—Instalments —Forfeiture in case of default—Power of Court to relieve against forfeiture—Equitable jurisdiction.*

Compromise decree—concld.

It is the privilege of a High Court to administer equity and, in following the principles of equity, to relieve against forfeiture, if it considers the nature of the case requires it. In the exercise of its equitable jurisdiction the Court may depart from the terms of a consent decree when justice and equity demand it.

Plaintiff obtained a compromise decree which provided for the payment of the decretal amount by certain instalments and directed that in case of default in the payment of two instalments the plaintiff would be entitled to take possession of certain property belonging to the defendant. Defendant made default in the payment of two instalments but subsequently paid up the amount of the instalments which was accepted by the plaintiff. Thereafter the plaintiff took out an application for execution of the decree on the ground that the defendant had committed default in the payment of two instalments:

Held, that the plaintiff having accepted the payments after the due dates the default was merely technical and that the Court had power to relieve the defendant against the consequences of his default and that this was a fit case in which that power ought to be exercised. **B** NARAYAN BAPUJI KSHIRSAGAR *v.* RAJIMAL MOTIRAM MARWADI, 27 Bom. L. R. 1453; A. I. R. 1926 Bom. 81 990

Consideration.
See PROMISSORY NOTE 879
See TRUST 914
See VENDOR AND PURCHASER 917

Construction of deed — Settlement deed. *See* HINDU LAW—DAUGHTER 973

Construction of document.
See REGISTRATION ACT, 1908, s. 17 360
See REGISTRATION ACT, 1908, s. 17 (1) (*d*), (2) (*v*) 320
See TRANSFER OF PROPERTY ACT, 1882, s. 59 1021
See WILL, CONSTRUCTION OF 423

——— *Agreement to sell or mere offer—Specific performance.*

A person executed a document in the following terms: "if it so happens that I have to sell it (the property) out of necessity, I will sell it to you for Rs. 60 and I bind myself to take the money from you and convey the land to you. I will give you ten days' time from the date of my proposing to sell it, within which time you should pay me the money and take the sale-deed from me. But if you fail to pay the money within the ten days I will overlook your right and claim and I will be at liberty to sell it as I like":

Held, that the document could not be treated as a contract to sell since there was nothing in it to compel a purchase of the property on the terms set out in it. It would only amount to an offer and until that offer were perfected by acceptance there was no binding contract resulting, though when once the offer were accepted, there would be a binding contract. **M** GOVINDASWAMI PILLAI *v.* DORAISWAMI MUDALI, (1925) M. W. N. 609; A. I. R. 1926 Mad. 120 181

——— *Hindu Law—Partition—Arbitration for division of property.*

Four brothers executed a document called a *mukhtiarnama*, appointing certain persons as arbitrators to effect a final division of their properties. The document was as follows:—"Already, three years ago, not having been in good terms among ourselves, we were living separately and the lands and the debts due by us to outsiders were, however, held in common; but dispute having arisen among us thereby, we have appointed you this day for the purpose of putting a stop to our dispute and for finishing the division of our assets and liabilities. Therefore, we shall abide only by the decision given by you":

Held, that, on a construction of the document, there was a severance of interest between the executants *inter se*. **M** LAKSHMAKKA *v.* BALA RANGAPPA 285

——— *Landlord and tenant*—Kabuliyat *providing for payment of rent in kind—Money value of rent stated in* kabuliyat, *effect of—Default in payment—Landlord, whether entitled to market value, or value stated in* kabuliyat.

A *mourasi mokarrari kabuliyat* provided that the tenant would pay certain fixed quantities of paddy and straw (the then value of which was stated in the *kabuliyat*) without variation and that in case of default he would pay *bari* (*i. e.*, addition as interest) at a certain rate in kind, the money value of the *bari*, however, was not stated in the *kabuliyat*:

Held, (1) that the parties intended that only paddy and straw should be paid as rent and that it would be inconsistent with their intention to hold that a fixed sum, which might be a wholly inadequate value of the paddy at the date of the suit, was agreed upon to be paid in the event of non-delivery of the paddy and the straw in order to avoid any question as to their value;

(2) that, therefore, in default of payment of the paddy and straw mentioned in the *kabuliyat* the landlord was entitled to their market value at the date on which they should have been paid and not merely to the sum mentioned in the *kabuliyat* as the value of the paddy and straw. **C** HEM CHANDRA JELIA *v.* SATYA KINKAR SEN, 43 C. L. J. 171 935

Contract—*Breach of contract—Advance, whether liable to be forfeited—Intention of parties.*

Where a sum of money is paid in advance on account of a contract as a deposit and the person making the deposit commits a breach of contract, the other party is entitled to retain the full amount of the deposit as damages for breach of contract. Every payment, however, made by a party to a contract as an advance towards the contract is not in the nature of a deposit and is not liable to be forfeited if the party making the deposit violates the contract. It is incumbent upon the Court to endeavour to ascertain the real intention of the parties from all the terms of the contract. Whether an advance is given as security for performance of the contract or merely in part-payment is a question of the intention of the parties and where it is found that the advance is not in the nature of a deposit or a security for performance of the contract, the party to whom the advance has been made is not entitled to retain the amount of the advance unless it has suffered damage to an equivalent or greater sum owing to the default of the party making the advance. **M** PASUMARTI SEETHANNA *v.* THAMANDRA YASIKALLAPPA, 22 L. W. 634; (1926) M. W. N. 64; A. I. R. 1926 Mad. 117 765

———, C. I. F. *See* SALE OF GOODS 568

Contract Act (IX of 1872), s. 23—*Motor Vehicles Act (VIII of 1914), s. 11—Statutory rules, r. 28—Contract for running motor lorry at night, legality of—Illegal contract—Deposit, whether can be recovered.*

The running of a heavy motor lorry at night in contravention of r. 28 of the statutory rules made under s. 11 of the Motor Vehicles Act being an offence,

Contract Act—contd.

an agreement in respect of the same is illegal and as such void.

It is not open to either of the parties to an illegal contract to plead that he was ignorant of the provisions of the law making the contract illegal.

In case of the failure of an illegal contract, a party paying a certain amount as a deposit at the time of the contract is not entitled to its refund under the principles underlying the maxim *in pari delicto potior est conditio possidentis.* **N** AUTOMOBILE ENGINEERING Co. *v.* RAMCHANDRA VISHWANATH **1029**

——— **s. 23**—*Stifling prosecution, what amounts to—Dispute between parties—Complaint, presentation of—Reference to arbitration, validity of—Award, whether binding.*

The essential element in what is described as "stifling a prosecution" is the tampering with the administration of justice by a private individual.

An award was objected to by one of the parties to the reference on the ground that its consent to the reference was obtained under coercion inasmuch as at the date of the reference a complaint had been filed against that party in respect of a criminal offence and was pending in the Court of a Magistrate. It was found that the complaint was based on allegations which were obviously untenable and that the reference to arbitration was made before the accused were summoned in the criminal proceedings. It was further found that the mode adopted by the parties to obtain a settlement of the dispute out of which the criminal complaint had arisen was an eminently satisfactory one:

Held, that it could not be said that the consent of the party objecting to the award had been obtained by pressure being brought to bear upon it as the result of the criminal complaint or that the consideration for the reference was the stifling of the criminal prosecution and that consequently the award was perfectly valid. **C** BIRENDRA NATH BASU *v.* BASANTA KUMAR BASU **624**

——— **s. 28**—*Policy of insurance—Condition that all rights under policy would be forfeited unless suit is brought within certain period after rejection of claim, validity of.*

A condition in a contract which clearly and distinctly limits the period within which a suit may be brought is void by reason of the provisions of s. 28 of the Contract Act. But there is a distinction between a condition which so limits the time within which a suit may be brought to enforce a right and one which provides that after the lapse of a certain period there shall no longer be any right to enforce. A condition of the latter kind is not affected by the provisions of s. 28 of the Contract Act.

A policy of insurance provided that if a claim was made and rejected and an action or suit was not commenced within three months after such rejection, all benefit under the policy would be forfeited:

Held, (1) that the meaning of the condition was that the parties contracted that after the expiry of a certain period from the date of the rejection of a claim the assured would have no right at all under the contract of insurance and that any suit brought after that date would be brought on account of a cause of action which had become non-existent, and would, therefore, not be maintainable;

(2) that the condition was not, therefore, void under the provisions of s. 28 of the Contract Act. **R** RAINEY *v.* BURMA FIRE & MARINE INSURANCE CO. LD., 3 R. 383; A. I. R. 1926 Rang. 3 **622**

Contract Act—contd.

——— **s. 30**—*Wagering contract—Intention of parties—Circumstantial evidence—Appeal, second—Finding of fact.*

In order to determine whether a contract is a wagering contract what the Court is concerned with is the intention of the contracting parties, but in order to find what the intention was, the Court is entitled to consider the position of the parties, the history of the dealings between them and the surrounding circumstances of the case.

A contract for the sale of a certain quantity of salt was entered into by the Salt Department with one *K* and the Salt Department issued a cheque promising to deliver the salt at a certain time. *K* transferred this cheque to *S* on receipt of profits calculated according to the market price, and similar transactions were entered into by various transferees of the cheque and on the occasion of each transfer each transferee paid the profits on the basis of the prevailing market rate. In a suit by the last transferee to recover from the last transferor the amount of profits paid to the latter and also the amount of loss incurred by the plaintiff on the transaction, the lower Appellate Court arrived at the finding that it was not intended by the parties that actual delivery of the salt should take place and that the contract was a wagering contract:

Held, that the finding as to the intention of the parties being one of fact based upon the circumstantial evidence in the case, was binding on the High Court in second appeal. **L** GURDAS MAL-RAM LAL *v.* RAM LAL, A. I. R. 1925 Lah. 564; 7 L. L. J. 402 **782**

——— **s. 35, Ch. III**—*Transfer of Property Act (IV of 1882), s. 58—Construction of document—Sale or mortgage—Contingent sale—Circumstances surrounding transaction, whether can be considered—Consideration, inadequacy of, effect of.*

Plaintiff borrowed Rs. 100 from the defendant and executed a deed in favour of the defendant which was described as a sale-deed and which recited that the plaintiff had borrowed the money and promised to repay it within two months together with interest and that if he failed to re-pay it during the stipulated time, then certain property belonging to him would be considered to have been sold to the defendant in full satisfaction of the amount due and that no right or interest in that property would remain to the plaintiff:

Held, that the deed executed by the plaintiff evidenced a contingent sale of the kind contemplated in Ch. III of the Contract Act, that is to say, it operated as an actual sale subject to the condition that it was not enforceable if the plaintiff paid a certain sum within a certain time; if he made that payment the sale would be void under s. 35 of the Contract Act: if he did not make that payment the sale would become enforceable under that section.

For the purpose of determining the question whether a document is a deed of mortgage or a deed of sale the Court must consider the terms of the document itself and the surrounding circumstances, so far as they appear in evidence and are relevant, in order to determine whether the real intention of the parties in executing the document was to enter into a mortgage transaction or a sale transaction. One of the main tests in considering the question is the relation of the consideration mentioned in the document to the real value of the property transferred. If the for-

mer sum is grossly inadequate then it affords an indictation that the vendor did not intend to sell the land out and out. But before this view can be taken there must be reliable ground for holding that there has been an inadequacy of price. B ASVATH NARAYAN ASTAPUTRE *v.* CHIMABAI GOPALRAO SADEKAR, 27 Bom. L. R. 1246; A. I. R. 1926 Bom. 107 330

——— **ss. 37.** *See* REGISTRATION ACT, 1908, s 17 360

——— **s. 39**—*Contract for purchase of goods—Notice of arrival—Failure to take delivery—Default to give notice of later arrivals—Refusal of part performance of contract, whether amounts to implied repudiation of whole.*

Plaintiffs agreed to sell 25 bales of yarn to the defendants to be delivered at the plaintiffs' godown. No time was fixed for performance of the contract but the terms of the contract were that the plaintiffs were to intimate the arrival of the bales from the mills and the defendants were to take delivery next day. Defendants accepted delivery of three bales out of the total consignment of 25 bales. As regards 7 of the remaining bales, the plaintiffs gave notices in their letters, but the defendants failed to take delivery. In respect of the remaining 15 bales the plaintiffs gave no notice of arrival, but in a letter relating to the delivery of the 7 bales, plaintiffs stated that if the defendants failed to take delivery of the 7 bales within two days, they would be deemed to have broken the contract even as regards the remaining 15 bales which were yet to arrive. Defendants did not answer this letter. In a suit for damages by the plaintiffs for breach of contract as to the 22 bales of goods :

Held, (1) that due notice of the arrival of the goods having been given to the defendants, the defendants had committed a breach of contract in respect of the 7 bales ;

(2) that the plaintiffs' failure to give notice with respect to the remaining 15 bales amounted to a breach of contract on their part, and that they could not claim damages as they had failed to perform the first step in the performance of their part of the contract, and the defendants' conduct did not amount to a repudiation of the whole contract so as to render the giving of notice of the arrival of the remaining goods unnecessary.

Per *Ramesam, J.*—For a plaintiff to succeed in an action for breach of contract he must prove first his readiness and willingness to perform the contract which includes his capacity to perform the contract.

In this case, in respect of the 7 bales, the presence of the goods in the godown was not a condition precedent to the plaintiffs' intimating to the defendants asking them to take delivery of the goods. It was enough if the plaintiffs had practically the goods at their disposal in the custody of the mills.

An implied repudiation by the defendants of the whole contract ought not to be inferred merely from their refusal to perform a part of the contract. M OBLA K. SUBBIER *v.* VENKATACHALAPATHI AYYAR, (1925) M. W. N. 592; A. I. R. 1925 Mad. 1290 580

——— **s. 40.** *See* REGISTRATION ACT, 1908, s. 17 360

——— **s. 45.** *See* C. P. C., 1908, O. XXX, R. 4 573

——— **s. 62**—*Debtor and creditor—Mortgage, execution of—Loan, contract of, whether superseded—Intention of parties.*

Where a debtor executes a mortgage in favour of his creditor and the debt is included in the consideration for the mortgage, the question whether the mortgage is intended to be a collateral contract or in substitution of the original contract of loan between the parties is a question of fact and intention to be decided in each case with reference to the language of the mortgage-deed and the other circumstances of the case. Where it does not appear that the parties intended to substitute the mortgage contract for the pre-existing contract of loan, the liability of the debtor under the previous contract is not superseded by the mortgage. C RAMLAL MURLIDHAR *v.* JOGENDRA KRISHNA RAY, 30 C. W. N. 58; A. I. R. 1926 Cal 318 790

——— **s. 64**—*Limitation Act (IX of 1908), s. 6 (3)—Hindu Law—Minor—Alienation of minor's property by guardian—Death of minor—Reversioner, suit by, to set aside alienation, whether competent—Reversioner, whether bound to refund consideration.*

The guardian of a Hindu minor sold certain property belonging to the minor in consideration of a cash payment and in exchange of certain properties conveyed by the vendee to the minor. The guardian subsequently sold the properties obtained in exchange. After the death of the minor the next reversioner of the minor brought a suit to set aside the alienation of the minor's properties by the guardian :

Held, (1) that inasmuch as the guardian of the minor had sold away the properties obtained in exchange for the minor's properties and the benefit of the exchange had not been obtained by the reversioner, the latter could not be compelled to refund the value of such properties to the defendant as a condition precedent for obtaining possession of the properties of the minor;

(2) that after the death of the minor the reversioner was entitled to enforce the minor's right to set aside the alienation of his property by his guardian. M BAPANNA SITAYYA *v.* PARUCHURI RAMASWAMI, (1925) M. W. N. 587; 22 L. W. 476; A. I. R. 1925 Mad. 1288 758

——— **s. 65**—*Agreement discovered to be void—Suit to recover consideration—Cause of action, when arises.*

In the absence of special circumstances, the time at which an agreement is discovered to be void, so that cause of action to recover the consideration arises under s. 65 of the Contract Act, is the date of the contract. O RAM SAMUJH SINGH *v.* MAINATH KUER, 2 O. W. N. 853; A. I. R. 1925 Oudh 737 176

——— **s. 65**—*Charter party—Ship chartered for particular venture—Venture frustrated—Advance freight, whether can be recovered.*

A chartered ship is not a common carrier and a contract in respect thereof is not excluded from the operation of the Contract Act.

Whether a chartered ship is a common carrier or not, advance freight paid in respect of such a ship can be recovered back by the shipper on the frustration of the venture for which the ship was chartered.

The liability in England to recover advance freight on the frustration of the venture is derived from the general principles of the Common Law and not from any supposed peculiar incident attaching to maritime contracts of affreightment, so that matters relating to the recoverability of freight paid in advance although they happen to occur in a charter party which is a maritime document of affreightment are nevertheless to be regarded as being regulated by the ordinary Common Law or Statute Law, whether English or Indian.

The plaintiff chartered two steamers belonging to the defendant for the carriage of rice from Akyab to

the Coromandel coast. It was within the knowledge of both parties that the importation of rice was at the time permitted only if and when a certificate for importation could be obtained from the Food Controller. The certificate could not be obtained and the execution of the contract became impossible. In a suit by the shipper for recovery of monies paid to the shipowner as advance freight under the charter party:

Held, that the venture for which the ship had been chartered having been frustrated plaintiff was entitled to recover the advance freight paid by him to the defendant. M GANDHA BORLIAH *v.* JANOO HASSAN, 49 M. L. J. 738; 22 L. W. 842; A. I. R. 1926 Mad. 175; 49 M. 200 780

——— s. 69—*Co-sharers—Purchase by one of share of other—Vendor continuing in possession—Payment of dues to* zemindar *by purchaser—Suit to recover amount from vendor, maintainability of.*

Plaintiff and defendant were co-sharers in certain property on which certain dues had to be paid to the *zemindar*. Plaintiff purchased defendant's share in the property but the latter continued in possession. Plaintiff paid the dues to the *zemindar* for the whole property, and sued the defendant to recover from him the portion of the dues payable in respect of the defendant's share in the property:

Held, (1) that after the sale of his share to the plaintiff the defendant was a mere trespasser and was not a person bound in law to pay the dues to the *zemindar* within the meaning of s. 69 of the Contract Act and that the plaintiff was not, therefore, entitled to maintain the suit;

(2) that the remedy of the plaintiff was to sue the defendant for mesne profits. M PAYIDA RAMAKRISHNAYYA *v.* BARREY NAGARAZU, 22 L. W. 836; A. I. R. 1926 Mad. 152 608

——— s. 74. *See* MORTGAGE 762,

——— s. 74—*Civil Procedure Code (Act V of 1908) O. XXIII, r. 3—Compromise decree—Execution of decree—Court, whether can refuse to enforce penal clause—Plaintiff agreeing to waive portion of claim if remainder satisfied within certain time—Penalty—Default in payment—Power of Court to grant relief.*

Under O. XXIII, r. 3 of the C. P. C. where the parties to a suit arrive at a lawful agreement or compromise the Court is bound to record such agreement or compromise and to pass a decree in accordance with its terms. Under the rule no option is left to the Court to examine the terms of the compromise beyond seeing whether the agreement is lawful or not. An agreement of compromise which contains a penal clause, such as may be covered by s. 74 of the Contract Act, is not in any sense of the term unlawful, and a Court cannot refuse to record such an agreement merely on the ground of the inclusion in it of such clause. Where a decree passed on the basis of such an agreement is sought to be enforced by way of execution, it is open to the Court to examine the compromise and if it finds that the compromise falls within the purview of s. 74 of the Contract Act, it has power to refuse to enforce the penalty.

Where a plaintiff agrees to accept a sum smaller than that claimed by him in the suit in satisfaction of his entire claim provided payment is made by certain date and the agreement provides that if the payment is not made by such date the plaintiff would

be entitled to recover the whole of the amount claimed by him from the defendant, the agreement cannot be said to contain a penal clause, inasmuch as the plaintiff after default is made by the defendant in payment of the smaller sum within the time limited merely withdraws the concession granted by him to the defendant and does not seek to recover a penalty by making a demand for the recovery of the full amount of his claim. In such a case time must be regarded as of the essence of the contract and if the defendant fails to pay the smaller amount within the time agreed upon the Court has no power to relieve him from the consequences of such default. A KISHEN PRASAD *v.* KUNJ BEHARI LAL, 24 A. L. J. 210 790

——— s. 74—*Mortgage-bond payable by instalments—Default in payment of instalments—Whole amount due on default—Interest, whether payable after default—Penalty—Compensation.*

The doctrine that the Court will carry out all contracts between parties, is confined to the carrying out of the primary contract, and does not extend to secondary or subsidiary contracts which are to come into operation if the primary contract is broken. In bonds securing the payment of money, the contract regarded as primary is the promise to pay the amount due to the creditor with the interest, if any, agreed upon. Any further contract to be binding on the promisor if he breaks this contract is regarded as a secondary one intended to secure the fulfilment of the primary contract and the Courts are not bound to carry out such a secondary contract apart from its justice and reasonableness.

Under a mortgage transaction interest was added to the principal sum at the inception of the transaction and the total amount of principal and interest was agreed to be paid in certain instalments. The bond provided that compound interest was to be chargeable on any defaulted instalment, while the whole sum was to become due after three consecutive defaults. The mortgagor made default in the payment of three consecutive instalments and the mortgagee sued to recover the total amount due under the bond together with interest at the rate mentioned in the bond payable in case of default in the payment of an instalment:

Held, (1) that the clause in the bond with regard to the consequences of default in the payment of three successive instalments was in the nature of a secondary contract and that, therefore, the Court had full power to re-open the contract and to allow reasonable compensation to the mortgagee under s. 74 of the Contract Act;

(2) that the mortgagee was entitled to compound interest on the defaulted instalments up to the date on which default in the payment of the third instalment took place;

(3) that thereafter simple interest at the rate of 6 per cent. per annum was a reasonable compensation to be allowed to the mortgagee. N PURSHOTTAM *v.* SAHU, A. I. R. 1926 Nag. 90; 9 N. L. J. 34; 22 N. L. R. 23 295

——— ss. 133, 135. *See* C. P. C., 1908, s. 11 772

——— ss. 151, 152, 161—*Railways Act (IX of 1890), s. 72—Goods consigned to Railway for carriage—Loss of goods—Suit to recover damages—Burden of proof.*

Contract Act—concld.

Under s. 72 of the Railways Act the responsibility of a Railway Administration for the loss of goods delivered to it to be carried by Railway is, subject to the other provisions of the Act, that of a bailee under ss. 151, 152 and 161 of the Contract Act.

Under s. 151 of the Contract Act a bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

When goods which have been consigned to a Railway Company for carriage are lost, the burden lies on the Railway Company to show that it has taken as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind and that the loss occurred notwithstanding such care. If the Company fails to satisfy the Court on that point, it is liable for the loss. **L** Firm of Gauri Mal-Narain Das *v.* Secretary of State for India, 1 L. C 487 **963**

——— **s. 254**—*Lunacy of partner, whether dissolves partnership.*

The lunacy of a partner does not of itself dissolve a partnership, but confirmed lunacy is a ground for dissolution of the partnership if the other partners apply to the Court for a decree of dissolution on that ground. **C** Jagat Chandra Bhattacharyya *v.* Gunny Hajee Ahmed, 30 C. W. N. 11; A. I. R. 1926 Cal. 271; 53 C. 214 **824**

——— **s. 264**—*Persons dealing with firm after dissolution—Notice of dissolution, absence of, effect of.*

Section 264 of the Contract Act applies not only to persons who had dealt with a firm before its dissolution but also to persons who deal with a firm after a dissolution or change of partners. **C** Jagat Chandra Bhattacharyya *v.* Gunny Haji Ahmed, 30 C. W. N. 11; A. I. R. 1926 Cal. 271; 53 C. 214 **824**

Contribution, *suit for—Co-judgment-debtors—Decree, form of.*

In a suit by one of three co-judgment-debtors for contribution against the two others, the decree that must be passed is not a joint one against both for the whole amount, but a several one for a moiety against each or his legal representative. **M** Sulaiman Alikhan *v.* Menna Venkatanarayana, 22 L. W. 319; A. I. R. 1926 Mad. 146 **166**

Co-sharers—*Adverse possession—Ouster—Rent, receipt of, absence of, effect of.*

Where it is found that certain property originally belonged to certain co-sharers, the mere fact that one of those co-sharers cannot prove his actual possession over the property by receipt of rent from the others cannot operate to extinguish his title to his share of the property on the ground of adverse possession by the other co-sharers. In order to bar the title of a co-sharer by reason of the exclusive possession of other co-sharers it must be found that there was an ouster of the former. In the absence of any finding that there was an ouster or any allegation which would amount to an ouster of a co-sharer, the latter is entitled to recover possession of his share in the property. **C** Mahammad Wasel Ali *v.* Nainuddin Mandal **614**

——— *Structures raised on portion of joint land—Partition—Other co-sharers, whether can be deprived of their share.*

Co-sharers—concld.

The mere fact that some of the co-sharers in a property are allowed to raise structures on a portion of the joint land, would not deprive the other co-sharers of a share in the land when a general partition is effected. **C** Rasak Ali *v.* Hazi Abdul Rasid **610**

Costs—*Chamber summons adjourned to hearing—Costs, award of—Review of taxation—Procedure—Discretionary charges—Taxing Officer, duty of—Principles applicable.*

When a Chamber summons is adjourned to be dealt with by the Judge at the hearing of the action, the summons becomes merged in the hearing and costs relating to the summons are in the discretion of the Trial Judge.

No increase of charges can be allowed on a review of taxation over those charged in the bill of costs.

On a review of taxation it is open to the party objecting to the taxation to show that the Taxing Officer erred on a question of principle or has omitted to take into consideration all those matters which he is required to take into consideration. The Taxing Officer is not at liberty to lay down a scale for discretionary charges which is out of all proportion for the work done.

Charges in respect of instructions for brief are only discretionary in witness actions. They are principally intended to cover the trouble and expense incurred in collecting evidence for the trial of an action. Nothing beyond a nominal charge is allowed for instructions in matters which are heard on affidavit. The reason is that all the materials for preparing the brief have already been charged for. Under the rules of the Bombay High Court the charge for instructions on motion is discretionary, but the charge for instructions in Chamber matters is not discretionary.

In order to enable the Taxing Officer to exercise his discretion where large sums are charged for instructions it is necessary that attorneys should give him all the necessary particulars so that he may be able to decide what is reasonable to be allowed.

The Taxing Officer should deal himself at first hand with the discretionary charges and he should discourage any tendency on the part of attorneys to enter into their bills amounts far in excess of what they expect to be allowed, because they are afraid that whatever they charge a reduction will be made.

There is no reason why an individual who files suit against a powerful and wealthy corporation like a Bank or a Railway Company should have to pay costs on a higher scale simply because his opponents are wealthy and powerful and defeat would be more disastrous to them than if they had been companies of little importance. To some extent the importance of the result of the action may affect the question of costs, but proper attention must be paid to the difficulty or triviality of the points raised, and the existing means of knowledge in the hands of the defendants to meet the attack. The Taxing Officer must have some sense of proportion, and must form some idea of the actual work done and the actual time taken by the attorneys in preparing the brief, with a view to awarding them reasonable remuneration for the work done, having regard also to the other charges made in the bill for particular items of work. **B** Parashuram D. Shamdasani *v.* Tata Industrial Bank, Ltd., 27 Bom. L. R. 1195; A. I. R. 1926 Bom. 18 **153**

Co-tenants—A co-tenant, whether trustee for the others. *See* MUHAMMADAN LAW 618

Counsel, consent of, effect of—Consent based in misapprehension—Power of Court to disregard such consent. *See* C. P. C., 1908, O. XLVII, R. 1 509

———, *mistake of—Client, effect on.*

The plaintiffs brought a suit in respect of the sale of an entire under-proprietary tenure by the defendants. Their case was two-fold. One that in reality they were owners of 3/5ths of the under-proprietary holding which was wrongly transferred by the defendant vendors without any title, and, secondly, that as regards the 2/5ths they had a right of pre-emption and desired to pre-empt it on payment of a proportionate sum of consideration money. The sale took place in November 1922. In January 1924, the Counsel for the plaintiffs took up the position that he would pre-empt the entire property on payment of the entire price. The position being taken after the expiry of limitation for a pre-emption suit, the suit was dismissed. On second appeal :

Held, (1) that it required neither wisdom nor knowledge of law on the part of the plaintiffs' Counsel to understand that a suit for pre-emption would be time-barred in January 1924;

(2) that this blunder on the part of plaintiffs' Counsel could not deprive them of a decree if in fact the allegations made by them were true, and the suit should be decided in respect of the case of the plaintiffs as originally put forward. O DURGA BAKHSH SINGH *v.* JAGANNATH SINGH 442

Court-fees—Plaint presented in wrong Court—Return of plaint—Presentation in proper Court—Court-fees enhanced during interval—Deficit Court-fees, whether payable. *See* C. P. C., 1908, O. VII, R. 10 862

Court Fees Act (VII of 1870), s. 4. *See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 39 751

——— **s. 7 iv (a),** *as amended by Madras Act (V of 1922)—Hindu Law—Joint family—Alienation of family property by father—Suit by son to set aside alienation—Court-fee payable.*

An alienation of family property by a Hindu father not merely as manager of the family but also as guardian of his minor sons is *prima facie* binding on the minors who must be treated as parties to the alienation. A suit by the sons for a declaration that the alienation shall not affect their share in the family property is in substance one for the cancellation of the alienation so far as the minors' share in the property is concerned and falls within the purview of s. 7, cl. iv (*a*) of the Court Fees Act as amended by Madras Act V of 1922 and Court-fee in such a suit is payable on the amount of the consideration for the alienation which is sought to be set aside. M ALAGAR IYENGAR *v.* SRINIVASA IYENGAR, 22 L. W. 515; (1925) M. W. N. 777; A. I. R. 1925 Mad. 1248; 50 M. L. J. 406 709

——— **ss. 7 iv (a), 12,** *as amended by Madras Act (V of 1922)—Plaint accepted by Trial Court—Deficiency in Court-fees—Appeal—Appellate Court, power of, to demand deficit Court-fees on plaint—Suit for cancellation of sale-deed—Court-fee payable.*

A Court of Appeal, when admitting an appeal is entitled to demand under the provisions of cl. (2) of s. 12 of the Court Fees Act, proper Court-fees payable in the Appellate Court as well as in the Trial Court

Where according to the practice prevailing in a Court, the Chief Ministerial Officer of the Court, whose duty it is to see that proper Court-fee is paid on plaints, receives and files a plaint and the Court acts on the footing that the proper Court-fee has been paid, the act of the Ministerial Officer amounts to a decision of the Court within the meaning of cl. (1) of s. 12 of the Court Fees Act that the Court-fee paid is proper.

Plaintiff purchased some property for Rs. 2,300 under a sale-deed executed by the defendant and paid him Rs. 1,000 in cash and executed in his favour a mortgage-deed for the balance of the consideration for the sale. Plaintiff subsequently brought a suit against the defendant alleging that the defendant had practised fraud upon the plaintiff by suppressing important facts in connection with the sale and praying for a declaration and for a return of the sum of Rs. 1,000 paid to the defendant and for damages:

Held, (1) that, inasmuch as the plaintiff could not demand the return of the cash consideration for the sale paid to the defendant without getting the sale cancelled, the suit must be treated as one substantially for the cancellation of the sale;

(2) that, therefore, the suit fell within the purview of s. 7 iv (*a*) of the Court Fees Act as amended by Madras Act V of 1922 and that Court-fees must be paid on the amount of Rs. 2,300 which was the value of the property conveyed by the sale-deed. M *In re*, LAKSHMI AMMAL, 49 M. L. J. 608; (1925) M. W. N. 823; A. I. R. 1926 Mad. 96 729

——— **s. 7 iv (f)**—*Accounts, suit for—Appeal—Court-fee payable.*

A defendant appealing against a preliminary decree passed against him in a suit for accounts is entitled to put his own valuation on the memorandum of appeal and to pay Court-fees on that valuation and is not bound to accept the valuation given by the plaintiff in his plaint. L THAKUR DAS *v.* DAULAT RAM, 2 L. C. 147 32

——— **s. 7 ix**—*Suit for redemption of* kanom *and* purankadom—*Specified amount and paddy at fixed price treated as principal amount—Value for purposes of Court-fees and jurisdiction, calculation of.*

In a redemption suit Court-fee is to be paid under s. 7 ix, Court Fees Act, according to the principal money expressed to be secured by the instrument of mortgage. Since the Suits Valuation Act has not fixed any method of valuing a redemption suit, the amount of the principal debt must be taken also as determining the jurisdiction of the Court under the Civil Courts Act.

In a suit for redemption of a *kanom* and *purankadom*, by which it was agreed that a particular sum of money and a quantity of paddy valued at a particular rate was fixed as the amount of the *purankadom*, the Court-fee is payable on the amount stated in the document and not on the price of paddy on the date of suit. M SREEDHARAN NAMBUDRI *v.* VATTAKKAVIL KULANGARU, 22 L. W. 408; (1925) M. W. N. 747; A. I. R. 1925 Mad. 1254 81

——— **s. 7 xi**—*Landlord and tenant—Suit against tenant and trespasser, nature of.*

A suit for a declaration of title against certain persons who are treated as tenants of the plaintiff and for a relief against another person on the footing that he is a trespasser, does not fall within the purview of cl. xi of s. 7 of the Court Fees Act. C HIRA LAL BANERJEE *v.* SURENDRA NATH SARBANGA 426

Criminal Procedure Code (Act V of 1898), s. 4, scope of. *See* DIVORCE ACT, 1869, ss. 3 (1), 17 99

——— **s. 4.**

Per *Rupchand, A. J. C.*—It is not the duty of the Court to make the law reasonable but to expound it as it stands.

Section 4 of the Cr. P. C. is an interpretation clause or section. Its legitimate function is to declare that certain words and expressions used in the Code, shall, wherever permissible, not only have the meaning which is generally attached to such words and expressions but such meaning as is assigned by the interpretation clause. It is not intended to annex to such words or expressions every incident which may seem to be attached to them by another Act of the Legislature. **S** WALTER JOHN BROOKS *v.* NEE BARWICK, A. I. R. 1926 Sind 58 99

——— **s. 35**—*Conviction for separate offences—Imprisonment in default of payment of fine—Sentences, whether can run concurrently.*

Where an accused person is convicted in respect of separate offences and is sentenced to pay a fine, or in default, to suffer imprisonment for a certain period for each of the offences of which he has been convicted, the sentences in default of payment of fine cannot be directed to run concurrently. **B** EMPEROR *v.* SUBRAO SESHARAO, 27 Bom. L. R. 1351; 27 Cr. L. J. 111; A. I R. 1926 Bom. 62 543

——— **s. 35**—*Penal Code (Act XLV of 1860), ss. 71, 148, 326—Rioting, armed with deadly weapons—Grievous hurt—Separate sentences, legality of.*

Section 35 of the Cr. P. C. empowers a Magistrate to pass separate sentences in respect of convictions under ss. 148 and 326 of the Penal Code, subject to the provisions of s. 71 of the latter Code. **B** PIRU RAMA HAVALDAR *v.* EMPEROR, 27 Bom. L. R. 1371; 49 B. 916; 27 Cr. L. J. 113; A. I. R. 1926 Bom. 64 689

——— **s. 35**—*Two persons kidnapped in course of same transaction—Separate offiences—Separate sentences, legality of.*

Section 364 of the Penal Code provides for the case of a kidnapper whose object is that the person kidnapped may be murdered or may be so disposed of as to be put in danger of being murdered. The section is not applicable where the object of the kidnapper is to hold the kidnapped person to ransom. In such a case the kidnapper can be convicted properly either under s. 363 or s. 365 of the Penal Code. **L** SUMANDAR *v.* EMPEROR, 1 L. C. 17; 27 Cr. L. J. 64 240

——— **s. 103**—*House search—Failure to invite respectable witnesses, effect of—Search conducted by responsible officers, legality of.*

The object of the Legislature in requiring the presence of two or more respectable witnesses of the locality at a house search is to guard against possible chicanery and unfair dealing on the part of the officers entrusted with the execution of the search warrant and to ensure that anything incriminating which may be said to have been found in the premises searched was really found there and was not introduced by the members of the search party. The failure to call persons of the locality as witnesses to the search does not, however, render the search illegal, especially where the search is conducted by responsible and respectable officers in the presence of a Magistrate and there is an explanation forthcoming of the failure to invite the neighbours to witness the search. **L** ABDULLAH *v* EMPEROR 1 L. C. 5; 27 Cr. L. J. 73 249

Criminal Procedure Code—contd.

——— **s. 110,** *order under, immediately after acquittal of accused on charge of receiving stolen property, propriety of.*

Immediately after his acquittal in a case under s. 411 of the Penal Code an order was passed against the accused under s. 110 of the Cr. P. C.:

Held, that in the circumstances an order under s. 110, Cr. P. C, should not have been made against the accused unless a very strong case was made out against him. **L** ABDULLA *v.* EMPEROR, 2 L. C. 184; 27 Cr. L. J. 190 1006

——— **s. 133**—*Nuisance—Obstruction, old, to public road—Proceeding under s. 133, whether can be taken.*

Section 133 of the Cr. P. C. is not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which has been in existence for a long number of years. **A** GHURAHU DAS *v.* SHAKALRAJ DAS, L. R. 6 A. 190 Cr.; 24 A. L. J. 112; 27 Cr. L. J. 27; A. I. R. 1926 All. 157 59

——— **s. 133**—*Water-course leading to public tank—Catchment area, embankment of, cutting of—Diversion of water—Obstruction—Proceedings under s. 133, whether competent.*

A water-course carrying water to a public tank is a public water-course and any interference with it justifies proceedings under s. 133 of the Cr. P. C.

In the centre of a catchment area there was a water-course flowing into a public tank. The water flowing through the water-course was attempted to be carried away by the petitioners to their own village tank, by building a *bund* and cutting a new channel and by cutting down a portion of the old *bund* of the catchment area which had existed for over thirty years. The effect of the petitioners' act was to make the water falling on the catchment area to flow in a direction different to that of the water-course and to prevent it falling into the public tank:

Held, that the act of the petitioners amounted to an obstruction to the water-course and it was, therefore, competent to a Magistrate acting under s. 133 of the Cr. P. C. to direct the restoration of the embankment of the catchment area to its original condition, closing up of the newly opened channel and the removal of all obstructions to the free flow of water to the tank. **M** RAMASAMI CHETTIAR *v.* RAMANATHAN CHETTIAR, (1925) M. W. N. 663; 22 L. W. 470; 27 Cr. L. J. 105; A. I. R. 1926 Mad. 165 537

——— **ss. 133, 139-A**—*Obstruction to public right—Denial of public right—Procedure—Jurisdiction of Magistrate.*

The first duty of a Magistrate in a case under s. 133 of the Cr. P. C. is to determine whether any public right exists and if the party against whom proceedings have been taken denies that there is any public right, the Magistrate has to determine whether that denial is *bona fide* or a mere pretence. Only when he is satisfied that the denial is a mere pretence can he proceed to make his order absolute. If he finds that the denial is *bona fide*, his jurisdiction is ousted and he has no authority to enquire further. He has no jurisdiction to weigh the evidence and to determine on which side the balance lies.

Per *Ross, J.*—The intent of s. 139-A (2) of the Cr. P. C. is that the Magistrate should neither encroach upon the jurisdiction of the Civil Court, which alone can determine the existence of such a public right as is referred to, nor fail to exercise his own jurisdiction The criterion is that he should find evidence to support the denial which he can pronounce reliable-

Criminal Procedure Code—contd

That is necessary and that is sufficient to oust his jurisdiction. **Pat** THAKUR SAO *v.* ABDUL AZIZ, 4 Pat. 783; 27 Cr. L. J. 9; 7 P. L. T. 136; A. I. R. 1926 Pat. 170 **41**

——— **s. 145,** *proceedings under—Duty of Court to decide question of actual possession.*

The crucial question to be decided in proceedings under s. 145 of the Cr. P. C. is as to who is in actual possession of the subject in dispute and not who has the right to such possession. **O** ABDUL WAHAB *v.* EMPEROR, 27 Cr. L. J. 41 **76**

——— **s. 145,** *proceedings under—Likelihood of breach of peace, absence of—Procedure—Proceedings dropped—Notice to parties, whether necessary—Order concerning disposal of property—Jurisdiction of Magistrate.*

Where after proceedings are started under s. 145 of the Cr. P. C. the Magistrate is satisfied that a likelihood of a breach of the peace either did not exist or that it has ceased to exist, it is his duty to drop the proceedings and to withdraw from interfering with the rights of the parties in the property. An order dropping the proceedings in such a case is not liable to be attacked on the ground that notice was not given to the parties to show the existence of a likelihood of a breach of the peace.

After dropping the proceedings, the Magistrate is *functus officio* and has no jurisdiction to pass any further orders in regard to the disposal of the sale-proceeds of the crops on the property which had been attached pending the proceedings. The proper procedure in such a case is to keep the amount in deposit to enable the party entitled to it to get a decree of a Civil Court establishing his title thereto. **M** DENEPUDI NARASAYYA *v.* CHIGULURI VENKIAH, 22 L. W. 524; (1925) M. W. N. 792; 49 M. L. J. 784; A. I. R. 1925 Mad. 1252; 27 Cr. L. J. 95; 49 M. 232 **399**

——— **s. 145,** *proceeding under—Receiver, appointment of—Remuneration of Receiver, rate of.*

The rate of remuneration fixed for Receivers under the C. P. C. does not necessarily provide the limit of the rate of remuneration to be fixed for a Receiver appointed in a proceeding under s. 145 of the Cr. P. C. The total amount of the Receiver's remuneration, however, should not in any case exceed the amount of the net income realized by the Receiver. **N** YAMUNABAI *v.* EMPEROR, 8 N. L. J. 167; A. I. R. 1925 Nag. 462; 27 Cr. L. J. 22 **54**

——— **s. 145 (1), (4)**—*Preliminary order—Dispossession for more than two months—Presumption, whether can be extended—Magistrates, duty of, before passing preliminary order.*

Section 145 (4) of the Cr. P. C. makes it incumbent on the Magistrate to decide which of the parties was in possession on the date of the preliminary order and the proviso only applies if any other party had been forcibly dispossessed within two months thereof.

The presumption of possession in favour of a particular party raised under the proviso of s. 145 (1) does not arise if the party has been out of possession for more than two months previous to the date of the preliminary order.

The fact that proceedings were first started under s. 107, Cr. P. C. and the Magistrate came to the conclusion that proceedings under s. 145 would be more suitable after a long time, would not extend the time under the proviso.

Criminal Procedure Code—contd.

Though it is competent to a Magistrate to rely on mere Police report in order to pass a preliminary order under s. 145, Cr. P. C., if he came to the conclusion that there is an imminent danger of a breach of the peace, it is advisable that the Magistrate should have and carefully scrutinize other evidence before passing an order under the section, as the misuse of provisions of ss. 107 and 145 of the Cr. P. C. requires to be discouraged. **N** NAGO *v.* ATMARAM, 27 Cr. L. J. 68 **244**

——— **ss. 145, 146**—*Dispute as to possession of immoveable property—Decree of Civil Court in favour of one party, effect of—Magistrate, duty of—Attachment of property, legality of.*

In a proceeding under s. 145 of the Cr. P. C. the Magistrate has no right to compel a party who has obtained a decree from a Civil Court in respect of the property in dispute to go back to the Civil Court and get something else. The Civil Court would refuse to entertain his suit, the matter being *res judicata.* All that such a person can do is to execute his decree and to obtain possession of his property. The Magistrate can only keep possession of the property until a competent Court has determined the rights of the parties, and once that is done the Magistrate has nothing to do but to give effect to the decree of the Civil Court. **O** LACHMI KUER *v.* PARTAB NARAIN, 27 Cr. L. J. 13 **75**

——— **ss. 145, 423 (1) (d), 439**—*Dispute with regard to immoveable property—Order under s. 145—Revision—Receiver, whether can be appointed pending disposal of revision petition—High Court, power of.*

The High Court has no jurisdiction to appoint a Receiver pending the disposal of a criminal revision petition filed against the order of a Magistrate passed under s. 145 of the Cr. P. C. **M** MARUDAYYA THEVAR *v.* SHUNMUGASUNDARA THEVAR, 49 M. L. J. 593; (1925) M. W. N. 772; 22 L. W. 723; 27 Cr. L. J. 126; A. I. R. 1926 Mad. 139 **702**

——— **s. 147**—*Muhammadan Law—Prayers whether can be said on land belonging to another—Right of way over land belonging to another in order to worship at grave, whether can be claimed.*

Under the Muhammadan Law a Muhammadan cannot say his prayers on property belonging to another without an express or implied permission of the owner of the property.

Therefore, a Muhammadan has no right to say prayers at a grave situated in land belonging to another and consequently cannot claim a right of way to go over land belonging to another in order to worship at a grave situated in that land. **Pat** RAMPARTAB MAWARI *v.* SATIF, (1925) Pat. 64; A. I. R. 1925 Pat. 435; 6 P. L. T. 857; 27 Cr. L. J. 44 **76**

——— **ss. 147, 439**—*User of immoveable property, dispute as to—Manager made party on behalf of employer—Irregularity—Order against manager, legality of.*

The fact that the manager of an estate and not his employer, the owner of the estate, has been made a party to a proceeding under s. 147 of the Cr. P. C. is a mere irregularity, or at most an error of law which does not affect the Magistrate's jurisdiction. In such a proceeding it is open to the Magistrate to make an order against the manager who puts forward a written statement on behalf of his employer and sets up a claim of the latter to the user of the immoveable pro-

perty in dispute. Pat CHHAKAURI LALL *v.* ISHER SINGH, 6 P. L. T. 799; 27 Cr. L. J. 142; A. I. R. 1926 Pat. 196 814

——— s. 148—*Costs of proceedings—Person not party, whether can be made liable.*

Under s. 148, Cr. P. C., a Magistrate has no power to saddle a person with costs who is not party to the proceedings. O EMPEROR *v.* CHET KHAN, 27 Cr. L. J. 21 53

——— s. 154—Ruqa *by Police Officer during investigation, whether First Infromation Report.*

A *ruqa* by a Police Officer sent from the spot during the course of investigation, embodying the substance of the complainant's report made previously and some result of the investigation neither signed nor thumb-marked by the complainant is not a First Information Report within the meaning of s. 154, Cr. P. C. L CHOGHATTA *v.* EMPEROR, 1 L. C. 416; 27 Cr. L. J. 121 697

——— s. 162—*Copy of statement made by prosecution witness to Police at investigation, when to be granted.*

The stage in an enquiry or trial at which an accused person is entitled under s. 162 of the Cr. P. C. to ask the Court to furnish him with a copy of a statement made by a prosecution witness to the Police in the course of investigation is when the witness is called for the prosecution; that is, when he is under cross-examination, and has already made the statement which the accused wishes to contradict by proof of his former statements to the Police.

The accused is not entitled to copies of the statements made by prosecution witnesses at the Police investigation before their cross-examination is opened. M *In re* PERAMASAMI RAGUDU, 22 L. W. 784; 27 Cr. L. J. 100; A. I. R. 1926 Mad. 183 532

——— s. 162—*Statement made by accused to Police, whether admissible.*

An investigating Police Officer cannot be questioned as to matters which the accused is alleged to have stated to the Police before his arrest. N SHEOSATYANARAYANLAL *v.* EMPEROR, 8 N. L. J. 217; A. I. R. 1926 Nag. 1; 27 Cr. L. J 161 945

——— s. 165—*Search for property not believed to be stolen, legality of.*

Section 165 of the Cr. P. C. does not authorize a Police Officer to make a search only for what is stolen or believed to be stolen property, but permits him to search for anything necessary for the purposes of an investigation into any offence. A EMPEROR *v.* PARAM SUKH, L R 6 A. 173 Cr.; 23 A. L. J. 1037; 27 Cr. L. J. 11; A. I. R. 1926 All. 147 43

——— s. 179—*Husband of woman who commits bigamy residing in one place—Woman removed to another district—Jurisdiction of Court, where husband resides.*

Where the husband of a woman who re-marries resides at one place but the offence of bigamy and adultery is committed at another, the Court having jurisdiction over the place where the husband resides has jurisdiction to try the case by virtue of s. 179, Cr. P. C. A MUNIR *v.* EMPEROR, L. R. 6 A 209 Cr.; 27 Cr. L. J. 101; 24 A. L J. 155; A. I. R. 1926 All. 189 533

——— ss. 180, 181 (3)—*Penal Code (Act XLV of 1860), s. 412—Possession of stolen property—Place of trial—Jurisdiction of Courts.*

The offence of being in possession of stolen property may be enquired into and tried either in the district

in which the property was stolen or in the district in which it was found to be dishonestly possessed. A EMPEROR *v.* BHIMA, L. R. 6 A. 208 Cr.; 27 Cr. L. J. 21; 24 A. L. J. 148; A. I. R. 1926 All. 167 53

——— s. 195. *See* ALSO CR. P. C., 1898, s. 476.

——— s. 195, *as amended by Act (XVIII of 1923)—Sanction for prosecution—Prosecution begun under old Code—Proceedings after introduction of new Code, validity of.*

The alteration in s. 195, Cr. P. C., as to the procedure relating to the grant of sanction for prosecution introduced by Act XVIII of 1923 cannot invalidate proceedings validly begun under the old procedure. N WASUDEO *v.* EMPEROR, 27 Cr. L. J. 181 997

——— s. 195—*Sanction to prosecute granted by Munsif—Appeal, forum of.*

For the purposes of s. 195 of the Cr. P. C., a Munsif is subordinate only to the Senior Sub-Judge and an appeal from an order of a Munsif refusing or granting a sanction lies to the Senior Subordinate Judge and not to the District Judge. L JAWALA SINGH *v.* MADAN GOPAL, 1 L. C. 7; 27 Cr. L. J. 75 251

——— ss. 195, 476—*Affidavit, false statement in—Prosecution for perjury—Procedure.*

Section 195, Cr. P. C., lays down a rule to be followed by the Court which is to take cognisance of an offence specified therein, while s. 476 of the Code contains directions for the guidance of the Court which desires to initiate a prosecution in respect of an offence alleged to have been committed in, or in relation to, proceedings before it.

Under the Cr. P. C., as amended by Act XVIII of 1923, the Court desiring to initiate proceedings for perjury has no alternative but to prefer a complaint in writing and to forward it to a Magistrate of First Class having jurisdiction to entertain it. L EMPEROR *v.* QADIR BAKHSH SHAH, 1 L. C. 475; A. I. R. 1925 Lah. 312; 6 L. 34; 27 Cr. L. J. 98 530

——— ss. 195, 476—*General Clauses Act (X of 1897), s 6—Sanction to prosecute—Amendment of Code—Right to move superior Court for revocation of sanction, whether taken away.*

A Magistrate granted sanction for the prosecution of the accused for an offence under s. 211 of the Penal Code and a complaint was filed before a competent Magistrate pursuant thereto before the amendment of s. 195 of the Cr. P. C. by Act XVIII of 1923. Thereafter the accused moved the District Magistrate to revoke the sanction under sub-s. (6) of s. 195 of the old Cr. P. C.:

Held, that notwithstanding the amendment of the Code and the re-construction of the whole procedure with regard to sanctions, the District Magistrate had jurisdiction to entertain the application of the accused and to revoke the sanction granted by the lower Court if it appeared to him that on the merits the sanction should not have been granted.

Alterations by a new Act in the form of procedure are always retrospective, unless there is some good reason why they should not be.

But if the new Act touches a right in existence at the passing of the Act, it cannot be held to act retrospectively unless a clear intention to that effect is manifested.

A right of appeal is only by Statute. It is not in itself a necessary part of the procedure in an action but is the right of entering a Supreme Court and in

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voking its aid and interposition to redress the error of the Court below.

The power to apply to a higher Court to revoke a sanction by an inferior Court is not a mere matter of procedure but is a substantive right and by virtue of s. 6 of the General Clauses Act such right is unaffected by a change in the law relating to sanctions. **M** RAMAKRISHNA IYER *v.* SITHAI AMMAL, 19 M. L. J. 223; (1925) M. W. N. 684; A. I. R. 1925 Mad. 911; 48 M. 620; 22 L. W. 879; 27 Cr. L. J. 91 **395**

——— **ss. 195, 476**—*Penal Code (Act XLV of 1860), s. 193—Sanction for prosecution for perjury—Trial, commencement of—Amendment of Code, effect of—Trial, legality of.*

Sanction for the prosecution of an accused person for the offence of perjury was granted to a private individual under s. 195 of the Cr. P. C., and the trial of the accused commenced under the provisions of that Code. Before the trial was concluded the Code was amended and the procedure with regard to sanction for prosecution was abolished :

Held, that the trial was not affected by the amendment of the Code inasmuch as the Court having taken cognizance of the case lawfully its jurisdiction to try the case to its conclusion was not ousted by the subsequent amendment of the Code.

Per *Wallace, J.*—Once a Court is properly seized of a case no amendment of the law except an amendment which takes away its jurisdiction to try the case, can affect the Court's authority to proceed with the trial.

The consequence of an amendment of procedure is not that all matters properly begun under the old procedure collapse and have to be begun again under the new procedure, but that they shall be continued under the new procedure from the time when the new procedure came into force.

The necessity of a sanction order for the initiation of criminal proceedings is a mere barrier which has to be crossed before a Court reaches the stage of trial and once that barrier has been crossed the jurisdiction of the Court to try the case is not taken away by the fact that the procedure with regard to the crossing of that barrier has subsequently been abolished or altered.

Per *Madhavan Nair, J.*—A trial which has been properly begun on a sanction order granted to a private individual under the provisions of the Cr. P. C. before its amendment cannot be regarded as having been vitiated by an alteration in the procedure with regard to the initiation of proceedings laid down in the amended Code. **M** *In re* APPASWAMY IYER, 49 M. L. J. 276; (1925) M. W. N 668; 22 L. W. 554; A. I. R. 1925 Mad. 1122; 27 Cr. L. J. 84 **388**

——— **ss. 195 (1) (b), 476**—*Penal Code (Act XLV of 1860), ss. 109, 211—False charge—Abetment—Complaint against abettor—Jurisdiction of Court—High Court, power of, to make complaint.*

A Court has jurisdiction to make a complaint under s. 476 of the Cr. P C in respect of an offence under s. 211 read with s. 109 of the Penal Code against a person who was not himself a party to the proceeding which forms the subject of the complaint.

Section 476 of the Cr. P C. gives the High Court as a superior Court full powers to lay a complaint in any or every case in which it appears expedient in the ends of justice to do so, and there is nothing in the Code to justify the contention that that power and jurisdiction is taken away because in case of a complaint or refusal to lay a complaint by some subordinate Court under that section, an appeal is allowed. **R** EMPEROR *v.* SYED KHAN, 3 R. 303; A. I. R. 1925 Rang. 321; 27 Cr. L. J. 41 **36**

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——— **ss. 195 (1) (c), 476**—*Penal Code (Act XLV of 1860), ss. 465, 467—Document produced in proceeding—Forgery — Complaint by Court, whether necessary.*

The language of s. 195 (1) (*c*) of the Cr. P. C. is wide enough to include any document produced or given in evidence in the course of a proceeding, whether produced or given in evidence by the party who is alleged to have committed the offence or by any one else. The intention of the Legislature in the framing of the section was to give authority only to the Court in which a proceeding was pending to file a complaint in respect of documents which were produced or given in evidence before it. **B** *In re* BHAU VYANKATESH CHAKORKAR, 27 Bom. L. R. 607; 49 B. 608; A. I. R. 1925 Bom. 433; 27 Cr. L. J. 69 **245**

——— **s. 198**—*Bigamy, abetment of—Complaint by husband, whether necessary.*

The provisions of s. 198, Cr. P. C., do not apply to a charge of abetment of an offence therein referred to and, therefore, no complaint by the person aggrieved is necessary where the charge is one of abetment of and not of the substantive offence of bigamy. **A** MUNIR *v.* EMPEROR, L. R. 6 A. 209 Cr.; 27 Cr. L. J. 101; 24 A L. J. 155; A. I. R. 1926 All. 189 **533**

——— **ss. 202, 203**—*Complaint against Police Officer—Witnesses of complainant, examination of—Procedure.*

Complaints against Police Officers should be handled with the greatest care and the complainant in such cases should be given every facility to prove his allegations. The complaint should not be dismissed without examining the witnesses whom the complainant wishes to produce. **M** DEVASIKAMANI MUDALIAR *v.* NARAYANA PRASAD, 27 Cr. L. J. 107; A. I. R. 1926 Mad. 288 **539**

——— **ss. 209, 213**—*Case triable by Sessions Court—Evidence disbelieved by Magistrate—Discharge, order of, whether proper—Procedure—Duty of Magistrate.*

If a Magistrate hearing a charge triable by the Court of Session comes to the conclusion that the evidence before him is totally untrustworthy and that there is no reasonable possibility of the case resulting in a conviction, he is entitled, and it is, indeed, his duty, to discharge the accused under s. 209, Cr. P. C. The same result follows if he comes to a similar conclusion after framing a charge and hearing witnesses for the defence under s. 213 (2) of the Code. This discretion must, however, be carefully exercised, and wherever there is a possibility that different Courts might take different views of the evidence, the Magistrate, even though he may himself not think the evidence sufficient for a conviction, should leave it to the Sessions Court to pronounce finally upon the matter.

Per *Sulaiman, J.*—The policy of the Legislature is that serious offences should be tried by Sessions Judges who are ordinarily more experienced than Magistrates. They are the proper Courts for pronouncing an opinion as to the guilt or innocence of accused persons in cases triable exclusively by the Sessions Court. Where, however, the evidence is wholly untrustworthy and the Magistrate is satisfied that it cannot lead to a conviction, he would be perfectly justified in discharging the accused, even though he has already

Criminal Procedure Code—contd.

framed his charge. The Magistrate has to see whether there are sufficient grounds for commitment or not. If he is satisfied that the evidence is altogether untrustworthy and not fit to be acted upon he may discharge the accused. He should not, however, try to weigh the probabilities of the case and then after balancing the evidence on both sides decide whether the guilt of the accused has or has not been conclusively proved. A AKBAR ALI *v.* RAJA BAHADUR, A. I. R. 1925 All. 670; L. R. 6 A. 185 Cr.; 27 Cr. L. J. 2; 24 A. L. J. 133 34

——— **s. 211.** *See* CR. P. C., 1898, s. 291 806

——— **s. 215**—*Commitment, whether can be questioned in appeal against conviction.*

A commitment once made stands, unless quashed by the High Court, and if it is not quashed the trial of the person committed must take place in pursuance thereof. After a trial has ended it is not open to the accused to impugn the commitment, inasmuch as a commitment can be quashed with only one object, namely, that the trial of the person committed may not take place, and where a trial has already taken place it serves no purpose to impugn the commitment. L NAZIR SINGH *v.* EMPEROR, A. I. R. 1925 Lah. 557; 7 L. L. J. 428; 27 Cr. L. J. 134 806

——— **s. 221**—*Charge, form of—Murder, charge of.*

The charge-sheet corresponds to the English indictment, and it is very much more than a mere form. An accused person is entitled to be informed with the greatest precision what acts he is said to have committed, and under what sections of the Penal Code those acts fall.

A charge of murder should set forth whether the blows inflicted were inflicted with the intention of causing death, or they were sufficient in the ordinary course of nature to cause death and were intentionally inflicted. A charge under s. 302, Penal Code, should follow the language of s. 300 of the Code, which contains the definition of murder. O SHEO SHANKAR *v.* EMPEROR, 2 O. W. N. 862; 27 Cr. L. J. 62; A. I. R. 1926 Oudh 148 238

——— **ss. 227, 221**—*Charge, contents of—Sessions Judge, duty of—Amendment of charge.*

A Sessions Judge when he receives an indictment should compare the charge-sheet with the language of the section under which the charge has been drawn up and, when necessary, amend the charge-sheet, using so far as possible the words of the section.

A charge sheet should never contain more than what it is necessary for the prosecution to prove. O BHULAN *v.* EMPEROR, 27 Cr. L. J. 57 233

——— **ss. 227, 237.** *See* POLICE ACT, 1861, s. 34 888

——— **s. 234**—*Penal Code (Act XLV of 1860), s. 411—Receiving stolen property—Ingredients of offence—Charge relating to several items forming subject-matter of separate thefts, legality of.*

The offence of receiving stolen property under s. 411 of the Penal Code is an offence of receiving a particular article of stolen property or property stolen in a particular theft and it is necessary that the particular article stolen should be alleged to be stolen and, if possible, traced to its origin.

A charge under s. 411 of the Penal Code of having received six specific animals belonging to five specific persons and stolen by five different acts of theft is illegal and wholly vitiates the trial. S HYDER *v.* EMPEROR; 27 Cr. L. J. 32 64

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——— **ss. 234, 235**—*Penal Code (Act XLV of 1860), ss. 366, 420—Offences committed by accused in distinct and separate transactions—Joint trial, legality of—Kidnapping and cheating.*

The operation of ss. 234 and 235 of the Cr. P. C. cannot be combined.

Where different offences have been committed by the same accused in two sets of separate and independent transactions, the offences cannot be tried together in one trial.

Two girls were kidnapped by the accused on different dates and were falsely passed off as *Chhatri* girls on receipt of money from the complainant who wanted a wife for himself and a wife for his brother. The accused was charged with and tried for separate offences of kidnapping and cheating in respect of each girl in the same trial:

Held, that the trial was bad on account of misjoinder of charges inasmuch as the case did not in its entirety come either under s. 234 or under s. 235 of the Cr. P. C. A FAUJDAR MAHTO *v.* EMPEROR, 27 Cr. L. J. 143; 24 A. L. J. 239 815

——— **s. 237.** *See* POLICE ACT, 1861, s. 227 888

——— **s. 244 (2)**—*Witness, refusal of, to appear, effect of—Magistrate, power of, to compel attendance.*

Under sub-s. (2) of s. 244 of the Cr. P. C. the Court cannot compel a witness to appear before it, if the witness refuses to appear. In such a case, the witness may be liable for disobedience of the summons, but a complainant or accused is not entitled to ask the Court, as a matter of right, to compel attendance of a witness, who does not care to attend in obedience to a summons.

A Magistrate, therefore, is not bound to re-issue the summons in such a case. It is in his discretion to issue a fresh summons if he likes, but the Code does not compel him to do so. M SELVAMUTHU *v.* CHINNAPAN CHETTIAR; 27 Cr. L. J. 76 252

——— **s. 250**—*Compensation, order directing payment of—Notice to complainant, absence of, effect of—Complainant absent at time of announcement of judgment—Procedure.*

Where at the time of announcing judgment in a criminal case the complainant is absent and the Magistrate proposes to make an order directing the payment of compensation under s. 250 of the Cr. P. C. the proper procedure is to issue a summons for the attendance of the complainant and to give him an opportunity of showing cause why an order under s. 250 should not be made against him. An order under that section made without giving the complainant an opportunity of showing cause against the order is illegal and cannot be allowed to stand. A KALKA *v.* RANJIT SINGH, 27 Cr. L. J. 128; 24 A. L. J. 170 704

——— **s. 250**—*Complainant directed to pay compensation exceeding Rs. 50—Appeal, whether lies.*

Where the total amount of compensation ordered to be paid by a complainant in one particular case exceeds Rs. 50, there is a right of appeal under cl. (3) of s. 250 of the Cr. P. C., even though the amount of compensation to be paid to each individual accused person may not exceed the sum of Rs. 50. A SUMARIA *v.* EMPEROR, 27 Cr. L. J. 146; 24 A. L. J. 167 882

——— **s. 250**—*Offences triable by Magistrate and Sessions Court—Discharge of accused—Compensation, whether can be awarded.*

An order passed under s. 250 of the Cr. P. C.

Criminal Procedure Code—contd.

awarding compensation to an accused person must be confined to Summons Cases.

Where a complaint is filed against an accused person in respect of offences some of which are triable exclusively by a Magistrate and some by the Sessions Court and the accused after trial by a Magistrate, is discharged in respect of all the offences, an order for compensation against the complainant under s. 250 of the Cr. P. C. cannot be passed. **A** HARIHAR DAT *v.* MAKSUD ALI, L. R. 6 A. 188 Cr.: 23 A. L. J. 1056; 27 Cr. L. J. 6; A. I. R. 1926 All. 159; 48 A. 166 **38**

——— **s. 250**—*Report made to Police—Acquittal of accused—Case held to be false and frivolous—Compensation, award of, legality of—Order awarding compensation signed separately, effect of.*

Where a proceeding taken by a Magistrate to award compensation to the accused under s. 250 of the Cr. P. C. is a continuation of the original proceeding against the accused, no objection can be taken to the proceeding merely on the ground that the Magistrate has signed two separate orders, one in respect of the acquittal of the accused and the other directing payment of compensation to him.

Where a report is made to the Police which is false, frivolous or vexatious with the intention that action should be taken against the persons mentioned in the report, there is nothing to prevent the Magistrate who tries the case to award compensation to the accused under s. 250 of the Cr. P. C. against the person who made the report. **A** JAIRAJ SINGH *v.* BANSI, L. R. 6 A. 193 Cr.; 23 A. L. J. 1051; 27 Cr. L. J. 35; A. I. R. 1926 All. 165 **67**

——— **s. 288**—*Sessions trial—Statement made before Committing Magistrate, portions of, whether can be transferred.*

Where a Sessions Judge wants to rely upon the statement made by witness before the Committing Magistrate, the whole of it should be filed and it would then be open to the Court to come to a conclusion after weighing the evidence. It is irregular to mark only portions of the statement made before the Magistrate and to use such portions for the purpose of contradicting the statement made before the Judge by the witness. **M** *In re* AYYAPERUMAL PILLAI, (1925) M. W. N. 319; A. I. R. 1925 Mad. 879; 22 L. W. 405; 27 Cr. L. J. 18 **50**

——— **ss. 291, 211**—*List of defence witnesses not filed till late stage—Absence of witness—Adjournment, right to.*

Where an accused person does not file a list of witnesses under s. 211 of the Cr. P. C., he is not as of right entitled to an adjournment of the trial by reason of the fact that one of the witnesses summoned at his request at a late stage has not turned up. **L** NAZIR SINGH *v.* EMPEROR, A. I. R. 1925 Lah. 557; 7 L. L. J. 428; 27 Cr. L. J. 134 **806**

——— **ss. 297, 296, 367**—*Charge to Jury—Heads of charge, record of—Duty of Judge—Formulation of questions for Jury, whether proper.*

In a Sessions trial the Judge should charge the Jury as soon as possible after the case for the defence and the prosecutor's reply, if any, are concluded. It is undesirable that the Jury should separate prior to the charge.

Where heads of the Judge's charge to the Jury are written out before the charge is delivered they should be placed on the record by the Judge as soon as he may find it possible to do so and whilst what he said is fresh in his recollection.

Criminal Procedure Code—contd.

The record of the heads of charge to the Jury need not be meticulous or lengthy but it must give accurately the substance of what the Judge said to the Jury so that the High Court may, if the occasion arises, be able to ascertain from the record whether the law and the facts relative to the case were fairly and properly put to the Jurors. A charge which states that certain sections of the Penal Code were read over and explained to the Jury is quite unsatisfactory and cannot be approved of.

The object of the heads of charge is to inform the High Court, should occasion arise, of what direction the Judge gave in law to the Jury and the nature of his summing up of the evidence not only for the prosecution, but also for the defence. The heads of charge are not intended to be an exhaustive detail of every particular which the Judge may have addressed to the Jury. The Judge is not bound to address himself in every particular and in every detail to every suggestion put forward by the defence. It is the duty of the Judge fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence, respectively. In doing so he is entitled to take into consideration the speeches made upon both sides by the Crown and by the prisoner's Counsel in considering his presentation of the evidence to the Jury. The heads of charge should record in an intelligible form and with sufficient fulness the points of law and the directions given by the Judge to the Jury, and the record should represent with accuracy the substance of the charge by the Judge.

Where a record of the heads of the charge to the Jury shows insufficient material to enable the High Court to judge what the Sessions Judge told the Jury and there are serious omissions in directing the Jury on the facts and the law which may have occasioned a verdict different to that which would have been otherwise given, the verdict cannot be upheld in appeal.

An appellant who seeks to set aside the result of a trial by Jury has a task of considerable magnitude and must, to be successful, present a case of real substance.

In a complicated case the formulation of specific questions for the Jury's reply at the conclusion of the delivery of the Judge's charge is helpful to the Jury and is useful in deciding the legal effect of the Jury's findings: but the formulation of such questions requires great care and the questions should be confined within the narrowest possible compass: in a large number of cases such procedure is not requisite as a simple finding of guilty or not guilty serves all necessary purposes.

Per *Kulwant Sahay, J.*—In a complicated case the Judge in his charge to the Jury ought not only to explain the law but should also draw the attention of the Jury to the evidence in the case and explain how they should apply the law as explained by him to the particular facts of the case. He should explain to them what are the points which they ought to take into consideration in arriving at their verdict. **Pat** RUPAN SINGH *v.* EMPEROR, 4 Pat. 626; A. I. R. 1925 Pat. 797; 27 Cr. L. J. 49; 7 P. L. T. 239 **225**

——— **ss. 297, 298, 423**—*Charge in favour of defence—Verdict of guilty—Misdirection—Defence case not adequately put—Evidence, inadmissible, admission of, effect of.*

Where a charge is, as a whole, distinctly favourable to the defence, it is a matter of great difficulty to say

that there was any misdirection which has misled the Jury into giving a verdict of guilty. It is not enough for the purpose of establishing a misdirection to show that the Judge might have laid much more stress than he has laid on the defects in the prosecution case.

Where, however, the defence case is not adequately put before the Jury and evidence is admitted which should have been excluded, the verdict of the Jury cannot be maintained. **M** *In re* VOLLAYAN AMBALAM, 23 L. W. 90; 27 Cr. L. J. 176 960

——— **s. 337**—*Approver—Discrepancies introduced into statement intentionally—Pardon, forfeiture of.*

When a pardon has been tendered to any person under s. 337 of the Cr. P. C. he should not be tried for the offence in respect of which the pardon has been tendered unless the prosecution establishes a breach of the condition on which the pardon was tendered and there is proof that the accused has either wilfully concealed material facts or given false evidence. Mere trifling discrepancies elicited in cross-examination are not sufficient to justify the forfeiture of the pardon tendered and accepted. Where, however, the person to whom the pardon has been tendered purposely introduces discrepancies into his statement in order that the Court might hold that he is not a reliable witness he forfeits his pardon and is liable to be prosecuted for the offence in respect of which the pardon was granted. **L** AHMED *v.* EMPEROR, 1 L. C. 33; 27 Cr. L. J. 77 253

——— **s. 342.** *See* PENAL CODE, 1860, s. 193 530

——— **s. 342**—*Examination of accused—Accused examined after examination of some witnesses for prosecution—Examination, absence of, after close of prosecution case—Trial, legality of.*

The word "shall" in s. 342 of the Cr. P. C. makes the duty imposed on the Court of questioning the accused generally on the case, after the witnesses for the prosecution have been examined and before he is called on for his defence, mandatory and not merely discretionary.

Where an accused person is examined after only a part of the prosecution evidence has been recorded and is not examined again after all the witnesses for the prosecution have been examined, there is no compliance with the provisions of s. 342 of the Cr. P. C. and the whole trial is vitiated. **L** GHAZA ALI *v.* EMPEROR, 1 L. C. 12; 6 L. L. J. 618; A. I. R. 1925 Lah. 288; 27 Cr. L. J. 87 391

——— **s. 342**—*Examination of accused, object of—Cross-examination of accused, legality of—Consultation between several accused, whether permissible.*

There is no provision of law under which two persons who are being tried jointly for the same offence are debarred from making a consulted statement in their examination under s. 342 of the Cr. P. C.

The object of the examination of an accused person under the provisions of s. 342 of the Cr. P. C. is to enable the accused in his own interests to give an explanation of the circumstances appearing in the evidence against him. It is not open to the Court to examine an accused person for the purpose of filling up gaps in the evidence for the prosecution. An examination of an inquisitorial nature is both improper and illegal. The examination of the accused must not be conducted in the manner of cross-examination of an adverse witness by Counsel. Such examination seriously prejudices the accused in his defence and vitiates the trial. **N** MAHADEOSINGH *v.* EMPEROR, 8 N. L. J. 190; A. I. R. 1925 Nag. 403; 27 Cr. L. J. 66; 22 N. L. R. 1 242

——— **s. 342**—*Examination of accused—General question, whether sufficient.*

A formal question in general terms is a sufficient compliance with the mandatory provisions of s. 342, Cr. P. C., relating to the examination of the accused after the cross-examination of the prosecution witnesses, although in a particular case, it may be open to and advisable for the Court, in the exercise of its discretion, to put more specific questions. **N** WASUDEV *v.* EMPEROR, 27 Cr. L. J. 181 997

——— **s. 342**—*Summons case—Failure to examine accused, effect of—Illegality.*

The omission in a summons case to comply with the provisions of s. 342 of the Cr. P. C. constitutes an illegality which vitiates the trial and not a mere irregularity. Such an illegality cannot be waived by the consent of the accused or his legal representative. **B** GAMADIA *v.* EMPEROR, 27 Bom. L. R. 1405; 27 Cr. L. J. 165; A. I. R. 1925 Bom. 57 949

——— **s. 367.** *See* CR. P. C., 1898, s. 297 225

——— **s. 367**—*Appellate Court, judgment of—Failure to discuss facts—Revision.*

A judgment of an Appellate Court which neither discusses the facts of the case nor disposes of the grounds of appeal is not in accordance with law and is liable to be set aside by the High Court in revision. **L** HURMAT ALI *v.* EMPEROR, 1 L. C. 399; 27 Cr. L. J. 114 690

——— **ss. 367, 16**—*Bench of Magistrates—Chairman differing from majority—Judgment of Court, how to be written—Procedure.*

Where the Chairman of a Bench of Magistrates is opposed to the majority of the Bench, and is not prepared to write a judgment for the majority, one of the majority ought to write the judgment and that should form part of the record, so that, the High Court in revision may know the reasons for the opinion of the majority. **M** *In re* DYTA SEETHARAMAYYA, 27 Cr. L. J. 90; 23 L. W. 537 394

——— **s. 369**—*Judgment, what is—Criminal appeal, dismissal of, for default—Fresh appeal, maintainability of—Review, power of.*

Once a criminal appeal has been dismissed, another appeal cannot be heard at the instance of the same appellant on the ground that on the previous occasion owing to some mistake, Counsel did not appear for the appellant.

The word "judgment" in s. 369, Cr. P. C., means and refers to the judicial act of the Court in finally disposing of the case and indicates the order of the Court when it is read out and signed by the Judge and not the formal order on the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officer of the Court. When the Court delivers and signs the judgment it becomes final and it has no power thereafter to review its order or alter the judgment in any manner or to any extent. **M** *In re* ARUMUGA PADAYACHI, 23 L. W. 56; 27 Cr. L. J. 184; 50 M. L. J. 51; (1926) M. W. N. 147 1000

——— **ss. 370, 342**—*Presidency Magistrate—Judgment, contents of—Examination of accused, particulars of, record of—Reasons for conviction, whether must be recorded.*

Where in a trial before a Presidency Magistrate the accused is examined under s. 342 of the Cr. P. C., it is the duty of the Magistrate to record the substance

Criminal Procedure Code—contd.

of the examination of the accused and his plea in the judgment. In a case in which such Magistrate inflicts imprisonment or fine exceeding Rs. 200 or both, a brief statement of the reasons for the conviction must also be recorded. Where these particulars are omitted the judgment is not in conformity with the requirements of s. 370 of the Cr. P. C. and is liable to be set aside. **C** ISMAIL SHA *v.* EMPEROR, 27 Cr. L. J. 110 **542**

——— **s. 408 (b)**—*Assistant Sessions Judge, trial by—Sentence of imprisonment exceeding four years inflicted on one accused—Smaller sentences inflicted on others—Appeal, forum of.*

Where an accused person has been sentenced by an Assistant Sessions Judge to imprisonment for more than four years, all other accused persons convicted at the same trial must appeal against their convictions to the High Court even though they themselves have received sentences of less than four years and even if the accused who has been awarded more than four years does not choose to appeal. **A** DEBI DIN *v.* EMPEROR, 27 Cr. L. J. 175; 24 A. L. J. 151; A. I. R. 1926 All. 160 **959**

——— **ss. 421, 561A, 369**—*Appeal, dismissal of, in absence of appellant—Dismissal, whether can be set aside—Review, power of.*

An appeal can be rejected under s. 421 of the Cr. P. C. without any formality. No judgment need be recorded in such a case and no reason of any description need be given.

Where an appeal is dismissed in the absence of the appellant and his Pleader after giving them a reasonable opportunity of being heard in support of the appeal, the dismissal must be taken to be under s. 421 of the Cr. P. C., and is not open to review.

Obiter dictum.—Section 561A of the Cr. P. C. which is of a very general nature does not empower the High Court to review its judgment. **L** NAZAR MUHAMMAD KHAN *v.* HARA SINGH BEDI, 2 L. C. 103; 27 Cr. L. J. 23 **55**

——— **s. 423 (1) (d).** *See* CR. P. C., 1898, s. 145 **702**

——— **s. 423 (2)**—*Sessions trial—Prosecution witnesses not present—Adjournment, refusal to grant—Discretion of Court—Jury directed to record verdict of "not guilty"—Misdirection—Appeal—Verdict, whether can be set aside.*

On the date fixed for the trial of a Sessions case no witnesses for the prosecution were present and the hearing was adjourned to the next day. Again there were no witnesses present and the Judge refused to grant any further adjournment and called upon the accused to plead and empanelled a Jury. He then directed the Public Prosecutor to open the case, and the latter did so under protest and informed the Court that he had no witnesses present to support the case for the prosecutin. Therupon, the Judge directed the Jury to return a verdict of "not guilty", and after that verdict had been returned acquitted the accused. On appeal :

Held, (1) that the Judge had exercised his discretion unwisely both on the first and second day and that he should have ascertained the cause of the absence of the prosecution witnesses and should have granted a reasonable adjournment in order to enable them to be re-summoned ;

(2) that in the circumstances of the case it was a misdirection for the Judge to tell the Jury that there was no evidence for the prosecution and direct them to return a verdict of "not guilty" ;

(3) that the verdict of the Jury and the order acquitting the accused must, therefore, be set aside under sub-s. (2) of s. 423 of the Cr. P. C., and the accused must be re-tried. **C** SUPDT. AND REMBR. OF LEGAL AFFAIRS, BENGAL *v.* SADER SAIK, 30 C. W. N. 190; 27 Cr. L. J. 125 **701**

——— **ss. 435, 438**—*Revision petitions—Sessions Court—High Court—Exceptions.*

Unless special grounds exist which justify an immediate resort to the High Court, all revision applications should ordinarily be made to the Sessions Judge who has under ss. 435 to 438 of the Cr. P. C. jurisdiction concurrent with the High Court to entertain them.

The mere fact that the case is one in which the Sessions Judge has no power to pass final orders but will have to refer the case to the High Court for such orders, should he see cause to do so, does not furnish any sufficient reason for departing from this rule of practice. **N** BAJIRAO *v.* DADIBHAI, 27 Cr. L. J. 71 **247**

——— **s. 438**—*Reference to High Court—Admission before Sessions Judge, effect of.*

Where in a proceeding before a Sessions Judge upon which a reference is made to the High Court, admissions of fact are made by either party, such admissions ought to be accepted by the High Court for the purposes of the reference. **C** SHAIKH GARIB HAJI *v.* MUCHIRAM SAHU, A. I. R. 1925 Cal. 1020; 27 Cr. L. J. 133; 30 C. W. N. 359 **805**

——— **ss. 439.** *See* CR. P. C., 1898, s. 145 **702**

——— **s. 439**—*Interlocutory order—Jurisdiction of Magistrate—Revision.*

Ordinarily there is no justification for a Supreme Court or any other Court to take up in revision what is really an interlocutory matter in a Criminal Court.

Therefore, no interference in revision is ordinarily justified with the order of a Magistrate holding that he has jurisdiction to try the case before him. **O** KASHI RAM KHOSLA *v.* R. L. DISKSHIT, 3 O. W. N 104; 27 Cr. L. J. 191 **1007**

——— **s. 439**—*Revision—Findings of fact, interference with.*

In a criminal revision the High Court will not interfere with a finding of fact arrived at by the lower Courts. **N** RITHA *v.* EMPEROR, 8 N. L. J. 178; 27 Cr. L. J. 74; A. I. R. 1926 Nag. 127 **250**

——— **s. 471.** *See* PENAL CODE, 1860, s. 84 **78**

——— **s. 476.** *See* ALSO CR. P. C., 1898, s. 195.

——— **ss. 476, 476B**—*Penal Code (Act XLV of 1860), ss. 467, 471—Complaint by Munsif exercising powers of Small Cause Court—Appeal, forum of.*

Where a Munsif invested with Small Cause powers makes a complaint under s. 476 of the Cr. P. C. for the prosecution of persons in respect of offences under ss. 467 and 471 of the Penal Code, an appeal from such an order lies under s. 476B of the Cr. P. C. to the Court of the District Judge and not to the Court of the Subordinate Judge. **O** FATEH BAHADUR *v.* ABDUL RAHEEM, 2 O. W. N. 845; A. I. R. 1925 Oudh 713; 27 Cr. L. J. 83 **387**

——— **s. 489 (2)** *(as amended by Act XVIII of 1923)—Order for maintenance of wife—Subsequent decree for restitution of conjugal rights against wife—Maintenance, cancellation of—Discretion of Court.*

Criminal Procedure Code—contd.

Under s. 489 (2) of the Cr. P. C., 1898, as amended by Act XVIII of 1923, it is competent for a Magistrate to cancel or vary an order of maintenance, if he thinks that it should be cancelled or varied in consequence of any decision of a competent Civil Court. If a Civil Court has given to the husband a decree for restitution and the husband *bona fide* wishes to execute that decree and the wife refuses, that would be a good ground for cancelling the order of maintenance under s. 488; but where the Court is satisfied that the husband did not wish to have his wife back and his object in getting the decree was merely to get the maintenance order cancelled, in the exercise of the Court's discretion under s. 488 (2), it would be wrong for the Court to cancel the order for maintenance.

It is not competent to a husband who obtains against his wife a decree for restitution of conjugal rights to impose terms upon her, that she should be confined to a portion of the house. If the husband wants the wife to come back to him, he must accept her and live with her on the ordinary terms of husband and wife without alloting her only particular rooms in the house. **M** PAVAKKAL *v.* ATHAPPA GOUNDAN, 9 M. L. J. 269; (1925) M. W. N. 645; 22 L. W. 479; A. I. R. 1925 Mad. 1218; 27 Cr. L. J. 30 **62**

——— **s. 491**—Habeas corpus *proceedings, nature of —Jurisdiction of High Court.*

Proceedings by way of *habeas corpus* are proceedings calling upon a person having custody of a prisoner to produce him and demonstrate under what authority he holds him in custody. If the authority be a legitimate authority binding on the officer complying with it, he is bound to obey the order of that authority and the Court cannot interfere. All that the Court can do is to see that there is no patent defect visible in the authority by which the person having custody detains any person. **S** JAMNA *v.* EMPEROR, 27 Cr. L. J. 37 **69**

——— **ss. 498, 439**—*Revision disposed of by High Court—Bail pending application for leave to appeal to Privy Council.*

After the High Court has disposed of an application for revision under s. 439 of the Cr. P. C. an accused person who is undergoing a sentence of imprisonment cannot be let out on bail under s. 498 of the Cr. P. C. on the ground that he intends to apply to the Privy Council for special leave to appeal against the order of the High Court. The case having been completely and finally disposed of by the High Court, there remains no ground on which bail can be granted. **N** HANMANTRAO *v.* EMPEROR, 21 N. L. R. 161; 27 Cr. L. J. 185 **1001**

——— **ss. 503, 506, Chap. XL**—*Civil Procedure Code (Act V of 1908), O. XXVI, r. 1—Commission for examination of witness, when to be issued—Discretion of Court.*

The issue of a commission to examine a witness is not a very satisfactory mode of proceeding either in civil or criminal cases. On the one hand the Court has no opportunity of noting the demeanour of the witness and on the other of controlling irrelevant and unnecessary or harassing cross-examination of the witness.

Chapter XL of the Cr. P. C. confers a wide discretion on the Court to issue Commissions for the examination of witnesses but such discretion should be sparingly exercised and only in cases of real hardship and inconvenience having due regard to the prejudice which is likely to be thereby caused to the opponent.

Regarding the grounds on which a Criminal Court may issue a Commission to examine a witness living within its local limits, in ordinary cases the provisions of O. XXVI, r. 1 of the C. P. C. may be accepted as a safe guide. **S** VISHNOO NAINARAM *v.* DIPCHAND SITALDAS, 27 Cr. L. J. 89 **393**

——— **s. 522**—*Penal Code (Act XLV of 1860), ss. 143, 448—Criminal trespass accompanied by show of force—Restoration of possession, whether can be directed—Order, when can be passed—Revisional Court, powers of.*

Accused came armed in large numbers and forced themselves into the house of the complainant in spite of the remonstrance made by the complainant and succeeded in taking possession of the house. They were convicted under ss. 143 and 448 of the Penal Code and an order was also passed against them under s. 522 of the Cr. P. C. directing restoration of the possession of the house to the complainant:

Held, that the accused having taken possession of the house by means of criminal trespass threatening to use force to the complainant, their act came within the purview of s. 522 of the Cr. P. C. and the order directing restoration of possession was, therefore, perfectly valid.

Under s. 522 of the Cr. P. C. an order directing the restoration of possession of the property must be made by the Magistrate trying the case within one month of the conviction of the accused in the case. By virtue of cl. (3) of the section, however, an order under the section may be passed by a Court of Appeal, confirmation, reference or revision at any time howsoever long after the conviction by the Magistrate. **Pat** RAMESWAR SINGH *v.* EMPEROR, A. I. R. 1925 Pat. 689; 4 Pat. 438; 27 Cr. L. J. 137; 7 P. L. T. 285 **809**

——— **s. 526**—*Transfer of case—Application direct to High Court, whether competent—Intention to apply for transfer notified—Court, whether bound to postpone case—Practice.*

An application under s. 526 (8) of the Cr. P. C. for a transfer of a criminal case pending before a Subordinate Magistrate lies direct to the High Court and it is not necessary that such an application should be made in the first instance to the District or Sub-Divisional Magistrate under s. 528 of the Cr. P. C.

Whenever an intention to make an application under s. 526 of the Cr. P. C. is notified to the Court, the Magistrate is not bound to adjourn or postpone the case unless he is satisfied that the accused person has a *bona fide* intention to make an application to the High Court.

Per *Kennedy, J. C.*—A Magistrate must not, however, refuse an application for adjournment under s. 526 (8) of the Cr. P. C. on conjectural grounds. It is only in a case where the circumstances existing at the time of the filing of applications are such that it is quite clear to the Magistrate that there is no *bona fide* intention of applying for transfer that he can refuse to adjourn. And if he does so refuse to adjourn, he must take care that he passes no final or penal order against the applicant until the applicant has had a reasonable opportunity of demonstrating by making an application for actual transfer that his intention did really exist. A Magistrate should also remember that should he refuse such an application and should the applicant eventually make an application to the

Criminal Procedure Code—concld.

High Court, it is probable that whole of the proceedings subsequent to that application might be held to be void even if the High Court came to the conclusion that there was no ground for transfer. **S** NATHOOMAL *v.* EMPEROR, 27 Cr. L. J. 40 **72**

——— **s. 526**—*Transfer of case—Hostility of Magistrate towards party, whether ground for transfer.*

The complainants in a case applied to the High Court for the transfer of the case from the Court of the Magistrate before whom the case was pending to some other Court. Their application was admitted and further proceedings were stayed. On the date fixed for the hearing of the case before the Magistrate one of the complainants appeared and apprised the Magistrate of the order of the High Court. The Magistrate instead of staying further proceedings issued a warrant for the arrest of the complainant who had not appeared:

Held, that there was no justification for the action of the Magistrate and that the Magistrate's attitude towards the complainants being clearly hostile there was good ground for transferring the case from his Court to the Court of some other Magistrate. **L** FAZAL AHMED *v.* ABDULLAH KHAN, 7 L. L. J. 571; 27 Cr. L. J. 104; A. I. R 1926 Lah. 151 **536**

——— **s. 561A**—*Inherent powers of High Court.*

Section 561A of the Cr. P. C., confers no new powers on the High Court, and the Court cannot by invoking its inherent powers extend the powers given to it by Statute. **M** MARUDAYYA THEWAR *v.* SHUNMUGASUNDARA THEWAR, 49 M. L. J. 593; (1925) M. W. N. 772; 22 L. W. 723; 27 Cr. L. J. 126; A. I. R. 1926 Mad. 139 **702**

——— **s. 561A,** scope of. *See* CR. P. C., 1898, s. 421 **55**

Criminal trial—*Defence Counsel, examination of, as prosecution witness without sufficient notice to accused—Procedure, legality of.*

Where a Magistrate put the defence Counsel into the witness-box on behalf of the prosecution without proper notice to the accused and without allowing the accused an opportunity to engage some other Counsel to conduct the defence:

Held, that the trial was vitiated by the procedure adopted by the Magistrate.

It is opposed to all principles of criminal jurisprudence for the prosecution to deprive the accused suddenly of the service of their Counsel. If the prosecution wants to call the Counsel for the defence as a witness on its side, sufficient notice ought to be given to the accused to engage a competent Counsel. **M** *In re* MANARGAN, 49 M. L. J. 95; (1925) M. W. N. 702; A. I. R. 1925 Mad. 1153; 27 Cr. L. J. 33 **65**

——— *Delay, undesirability of.*

Delay in the disposal of a criminal case only invites evidence which cannot be relied upon. The longer the period allowed to elapse from the time of the event to the time when the witnesses give evidence, the greater is the probability of confusion and of the truth being obscured. **C** THOMAS JAMES HENRY ARNUP *v.* KEDAR NATH GHOSH, A. I. R. 1925 Cal. 1017; 27 Cr. L. J. 129 **801**

——— *Evidence—Witness producing document as containing his evidence—Procedure—Identification parade, value of.*

A Magistrate was called as a witness in a Sessions trial to prove the identification of the accused persons held in the Jail and the methods adopted for the

Criminal trial—concld.

purpose of identification. Instead of stating in Court the details and the results, he merely referred to certain documents which were described as exhibits and in which he stated that his evidence was to be found. These documents were put on the record as his evidence:

Held, that the procedure adopted was not merely contrary to the law, but violated the most elementary principles of evidence.

The mere fact that a witness is able to pick out an accused person from amongst a crowd does not prove that he has identified that accused person as having taken part in the crime which is being investigated. It might merely mean that the witness happens to know that accused person. The principal evidence of identification is the evidence of the witness given in Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which that accused took in the crime in question. The statement made by such a witness at an identification parade might be used to corroborate his evidence given in Court, but, otherwise, the evidence of identification furnished by an identification parade can only be hearsay except as to the simple fact that the witness was in a position to show that he knew a certain accused person by sight. **L** LAL SINGH *v.* EMPEROR, 5 L. 396; A. I. R. 1925 Lah. 19; 27 Cr. L. J. 170 **954**

——— *Presumption against accused, whether permissible.*

In a criminal case the Court cannot proceed upon an assumption that the accused must have done what he was required by the rules of his employment to do, in order to fasten liability upon the accused with regard to his knowledge of certain transactions which form the subject-matter of the charge. **C** PRAFULLA KUMAR ROY *v.* EMPEROR, 30 C. W. N. 94; 27 Cr. L. J. 147; A. I. R. 1926 Cal. 345 **883**

Custom, proof of—Special custom. *See* CUSTOM—SUCCESSION **482**

——— **Succession,** *See* WAJIB-UL-AAZ **583**

——— *Collateral*—Pagwand v. chundawand *—Burden of proof—Special custom, proof of.*

In cases of collateral succession under the Punjab Customary Law, where it appears that the property of the common ancestor was distributed according to the rule of *pagwand*, the burden of proving that the whole blood excludes the half blood is upon the person who asserts it.

A special custom cannot be held to be established merely because the evidence inclines very slightly in favour of the person alleging its existence. **L** GUJAR KHAN *v.* GHULAM KHAN, 1 L. C. 452; A. I. R. 1926 Lah. 163 **482**

——— Khattars *of Attock District—Non-ancestral property—Sister* v. *collaterals—Custom, proof of—Oral evidence, value of—Acquired property, what is.*

Among *Khattars* of the Attock District a daughter or a sister is entitled to succeed to the acquired property of her father or brother in preference to near collaterals of the deceased.

Property which has never been held by the common ancestor cannot be regarded as ancestral property in any sense.

A custom with regard to the rule of succession prevailing in a tribe or family may be proved by

Custom—contd.

general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy. **P C** AHMAD KHAN *v.* CHANNI BIBI, A. I. R. 1925 P. C. 267; L. R. 6 A. (P. C.) 190; 5 L. 502; 3 O. W. N. 93; 52 I. A. 379; 30 C. W. N. 506 **455**

——— **Village abadi**—*Succession to non-proprietor—Distant collateral, whether heir—Pre-emption, right of—Punjab Pre-emption Act (I of 1913), s. 15.*

In the absence of a custom to the contrary, it is only a near collateral who can succeed to the house of a village non-proprietor. Where no such custom is proved, a collateral in the seventh degree cannot pre-empt a sale of a house by a non-proprietor under s. 15 of the Punjab Pre-emption Act. **L** GHULAM NABI *v.* THAKAR SINGH, 1 L. C. 392 **443**

——— **Wajib-ul-arz,** *entry in, construction of—*Pukhta *house, meaning of—Transfer, right of—Previous transfers, whether can be referred to.*

According to a certain clause in a *wajib-ul-arz* a particular class of the inhabitants of a town had the right to transfer *pukhta* houses which they had built at their own expense:

Held, (1) that for the purpose of determining the sense in which the expression "*pukhta*" was used in the *wajib-ul-arz* it was permissible to refer to evidence relating to previous transfers of houses in the town which had taken place without the right of transfer being questioned by the landlord;

(2) that the expression "*pukhta*" did not necessarily imply the use of "kiln-dried" bricks in the building of the house and that it was applicable to a building of a substantial character made of sun-dried bricks. **A** ABDULLAH *v.* BADAR-UL-ISLAM, 24 A. L. J. 176; A. I. R. 1926 All. 127; 48 A. 233 **934**

———, *entry in, value of—Opinion of persons having special means of knowledge, whether relevant*—Dikhat Thakurs *of Unao—Succession—Daughters, whether excluded.*

Settlement Officers in recording customs in *wajib-ul-araiz* have to perform the duties which the Government orders them to perform. One of these duties is to record customs as the Settlement Officer finds them and not as he might think that they ought to be. Where it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom and it does not appear that the statement of the custom is ambiguous the record of custom in a *wajib-ul-arz* is most valuable evidence in support of the custom.

It is not necessary that the existence of a custom recorded in a *wajib-ul-arz* or *riwaj-i-am* should be supported by instances.

The Court can take judicial notice of the existence of a custom which is generally prevalent among a certain class of people.

Among *Dikhat Thakurs* of Unao, daughters and their issue are excluded from inheritance by the collaterals of the last male-holder by virtue of a custom to that effect which is prevalent among them. **O** BAIJ NATH SINGH *v.* BAHADUR SINGH, 2 O. W. N. 872; 12 O. L. J. 571; L. R. 6 A. (O.) 101; A. I. R. 1926 Oudh 101 **583**

——— **Widow**—*Husband's debt—Decree against widow—Ancestral property, alienation of—Necessity—Burden of proof.*

A mortgage of ancestral land of her deceased husband by a widow, to satisfy a decree passed against her for a debt alleged to have been contracted by her late husband, is not binding on the reversioners, unless it is shown that she had sufficient necessity to create the charge, that is, had no other means to satisfy the decree. The burden to prove the necessity lies heavily on the mortgagee. **L** RUR SINGH *v.* NAZAR SINGH, 1 L. C. 474; 26 P. L. R. 15 **479**

Damdupat, rule of. *See* TRANSFER OF PROPERTY ACT, 1882, s. 74 **1010**

DEFINITIONS:—

Nij Jote, *meaning of.*

The word "nij jote," has a special significance in Bengal and means one's own cultivated land and includes a permanent tenure. **C** KIRTIBASH DUBEY *v.* INDIAN IRON AND STEEL COMPANY LTD. **480**

Pukhta house, meaning of. *See* CUSTOM—WAJIB-UL-ARZ **934**

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 12—*Mortgage suit by* benamidar, *maintainability of—Account, mode of taking of.*

So long as a *benamidar's* transaction does not contravene the provisions of any law the Courts are bound to give effect to it and the *benamidar* is entitled to sue upon its basis.

The expression "persons, if any, through whom they claim" in s. 12 of the Dekkhan Agriculturists' Relief Act, covers not merely the legal representatives of a deceased creditor or deceased debtor but also an assignee who has bought, or otherwise acquired the right, title and interest of either the original creditor or the original debtor. Therefore, the section cannot be taken to prohibit a suit on a mortgage by a *benamidar*. On the other hand, the provisions of the section must be observed by the Court in a suit by a *benamidar* just as much as in a suit by the real creditor. It is quite possible for the Court to carry out these provisions in such a case, inasmuch as the actual creditor can be examined and called upon to produce his account as a witness. **B** NARAYAN KESHAV VAGLE *v.* GULAM MOHIDIN, 27 Bom. L. R. 1240, 49 B. 832; A. I. R. 1926 Bom. 115 **353**

Discretion of Court—*Appellate Court, interference by.*

An Appellate Court will not interfere with an exercise of discretion by a lower Court unless the latter has proceeded on a manifestly wrong ground such as the application of an erroneous principle or a misapprehension of facts. So long as the discretion is in fact exercised, an Appellate Court will not interfere simply because it would itself have exercised the discretion differently. **O** RAM BHAROS *v.* RAMPAL SINGH, 2 O. W. N. 901; A. I. R. 1925 Oudh 699 **111**

Divorce Act (IV of 1869), ss. 3 (1), 17—*Court of Judicial Commissioner of Sind, whether High Court—Decree* nisi *passed on Original Side, whether can be confirmed.*

Per *Curiam (Rupchand, A. J. C., dissenting).*—Since the amendment of the Cr. P. C. in 1923 the Court of the Judicial Commissioner of Sind has acquired jurisdiction under s. 17 read with s. 3 (1) of the Divorce Act to confirm a decree *nisi* of divorce passed by the Judicial Commissioner on the Original Side. **S** WALTER JOHN BROOKS *v.* NEE BARWICK, A. I. R. 1926 Sind 58 **99**

——— **s. 10**—*Evidence Act (I of 1872), ss. 17, 18, 21, 58—Admission of adultery by respondent—Corroboration, absence of—Decree, whether can be granted—Duty of Court—Admission, whether relevant.*

Divorce Act—concld.

In divorce cases great care and caution are necessary in dealing with the admissions of the parties and it is only the exceptional circumstances of a given case that could justify the Court in acting upon the admissions of a party as to adultery without any corroboration. As a matter of prudence it is desirable to insist upon evidence corroborative of the admissions.

Per *Marten, J.*—In practice the confession of guilt by a party in a divorce case ought to be treated on somewhat similar lines of caution to those of an accomplice's evidence in a criminal case.

Section 58 of the Evidence Act has in general no application to divorce cases although the admissions of the parties to the case may be proved under ss. 17, 18 and 21 of the Act.

An *ex parte* divorce case is sometimes the most difficult of all cases to decide because there is no Counsel for the respondent to point out the deficiencies in the petitioner's case and consequently it is left to the Court for itself to detect them. **B** OVER *v.* OVER, 27 Bom. L. R. 251; A. I. R. 1925 Bom. 231; 49 B. 368 **20**

Document, *execution of — Execution by agent — Authority, proof of—Recital in document—Power-of-attorney to present for registration—Presumption.*

The special power-of-attorney required under the Registration Act is merely a power to present a document for registration and has nothing to do with the authority of the agent to execute a document on behalf of the principal.

Recital in the document itself that the executant holds a power-of-attorney to execute it, or the Sub-Registrar's endorsement that a special power-of-attorney to present had been produced, is not sufficient to raise a presumption that the executant had the authority he claimed. **O** BHAGWAT PRASHAD *v.* ZAFAR MOHAMMAD **209**

Easement—Customary, proof of. *See* LIMITATION ACT, 1908, s. 26 **712**

——— *User as of right—Long user—Presumption—Rebuttal.*

Where a question of easement arises the nature and character of the servient land, the friendship or relationship between the servient and dominant owners, and the circumstances under which the user had taken place, may induce the Court to hold that the enjoyment was not "as of right," although there is no direct proof that the enjoyment was had with the permission of the servient owner.

The presumption of right from long user is not a presumption "*de jures et de jure.*" It only starts a party with a presumption in his favour which can be rebutted by proof of facts which are inconsistent with or which militate against the inference. **O** MAJID HUSAIN *v.* FAIYAZ HUSAIN **987**

Easements Act (V of 1882), s. 60 (b)—*License to construct building—Construction of building—License, whether can be revoked—Use and occupation, damages for, whether can be recovered.*

Where land is given to a licensee free of rent for building a house thereon and the licensee constructs the house, the license becomes irrevocable under s. 60 (*b*) of the Easements Act and it is not thereafter open to the licensor either to revoke the license or to seek to recover from the licensee damages for use and occupation of the land. **O** RAM DAYAL *v.* NISAR HUSAIN KHAN, 13 O. L. J. 170 **1031**

Eastern Bengal and Assam Disorderly Houses Act (II of 1907), ss. 2, 3—*Proceedings under Act—Procedure—Evidence not recorded—Order, legality of—Duty of Magistrate.*

Proceedings under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act are not governed by the provisions of the Cr. P. C. It is not necessary for a Magistrate in such proceedings to act only on legal evidence and he need not administer an oath to the witnesses. But before passing an order under s. 3 of the Act the Magistrate must not only be satisfied that the houses in question are used as brothels or for the purpose of habitual prostitution or as disorderly houses, but he must further find an additional fact to bring them within the provisions of cl. (*a*) or (*b*) or (*c*) of s. 2 of the Act.

A Magistrate has no power to take action against the keeper of a brothel under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act if the place is respectably conducted, unless it is in the neighbourhood either of an educational institution or of a cantonment so as to attract the operation of cl. (*a*) or cl. (*c*) of s. 2 of the Act.

It is not necessary for a Magistrate who desires to proceed against several persons under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act to draw up separate proceedings and hold separate enquiries in the case of each house, but in deciding the question whether annoyance is caused to the neighbours, the Magistrate must apply his mind to the case of each house separately.

A Magistrate summoned certain persons under the provisions of the Eastern Bengal and Assam Disorderly Houses Act and after questioning them and examining witnesses but without administering any oath to the witnesses or recording their evidence or the statement of the persons against whom the proceedings had been taken, he passed an order under s. 3 of the Act:

Held, that the proceedings taken by the Magistrate had not been conducted within the ordinary rules of fairness and his order must, therefore, be set aside. **C** RAM PADA CHATTERJEE *v.* BASANTA BAISHNABI, 30 C. W. N. 91; 27 Cr. L. J. 145; A. I. R. 1926 Cal. 307 **881**

Ejectment suit—Compensation, right to—General principles. *See* TRANSFER OF PROPERTY ACT, 1882, s. 51 **1**

Election, *Municipal—Local Rules—Election petition—Charges amendment of—Civil Procedure Code (Act V of 1908), provisions of, application of.*

An Election Tribunal should be guided whenever possible in its procedure by the provisions of the C. P. C., and in a proper case with proper safeguards it is competent to an Election Court to entertain an amendment to an election petition adding to the charges originally relied upon. **M** APPASWAMI PADAYACHI *v.* ETHIRAJULU NAIDU **450**

Evidence, *admissibility of—Documents between third parties—Recitals of boundaries, whether admissible—Admission of document without objection in Trial Court, effect of.*

Recitals of boundaries of other lands in documents between third parties are not admissible in evidence either with regard to a question of boundaries or as to the nature of the land in dispute in the suit.

The mere fact that no objection is taken as to the admissibility of a document in the first Court would not make it admissible. **C** DAMODAR PODDAR *v.* JADUNATH DUTT **449**

Evidence Act (I of 1872), s. 6—*Witness proceeding to scene of offence immediately after commission of offence—Statement made by by-standers, whether admissible.*

Shortly after a murder one *C* went to a person and admitted that he had killed the deceased and was prepared to confess. The latter went to the spot immediately and there heard the by-standers talking that four persons including *C* had committed the murder:

Held, that the transaction in which the murder took place having already come to an end, what the witness heard the by-standers say at the time of his arrival on the spot was not admissible in evidence under s. 6 of the Evidence Act. **L** PAKHAR SINGH *v.* EMPEROR, A. I. R. 1925 Lah. 578; 7 L. L. J. 436; 27 Cr. L. J. 140 812

——— **s, 9.** *See* PENAL CODE, 1860, s. 411 690

——— **ss. 11, 13, 32**—*Document relating to land on boundaries of land in dispute, admissibility of.*

A document relating to land on the boundaries of the land in dispute is not admissible in evidence for the purpose of determining whether a certain party was or was not in possession of the land in dispute at the date of the execution of the document. **C** ABDUL KARIM *v.* CHHALE AHAMED, A. I. R. 1926 Cal. 479 688

——— **ss. 17, 18, 21.** *See* DIVORCE ACT, 1869, s. 10 20

——— **ss. 24, 25**—*Confession made under pressure of Police, admissibility of—Confession made to Police Officer, whether can be referred to, to explain discrepancy.*

Where the pressure exercised by a Police Officer on an accused person is sufficient to furnish the latter with grounds which would appear to him reasonable for supposing that by making a confession he would gain an advantage or avoid an evil of a temporal nature, the confession would not only be weak in value, but would be wholly inadmissible under s. 24 of the Evidence Act.

A confession made to the Police is totally inadmissible in evidence and cannot be referred to in order to explain away a discrepancy in a confession subsequently made to the Magistrate. **A** DIP SINGH *v.* EMPEROR, 27 Cr. L. J. 158 394

——— **s. 26**—*Confession made to Magistrate while accused in custody of Police, admissibility of.*

A confession made by an accused person to a Magistrate at a time when he is in the custody of the Police is admissible in evidence under s. 26 of the Evidence Act. **L** NAZIR SINGH *v.* EMPEROR, A. I. R. 1925 Lah. 557; 7 L. L. J. 428; 27 Cr. L. J. 134 806

——— **s. 27**—*Several accused in Police custody—Confessional statement by one—Similar statements by others—Discovery of evidence—All statements, whether admissible.*

Section 27 of the Evidence Act must be very strictly construed.

Where one of several accused in Police custody has agreed to point out a place, where a fact would be discovered in pursuance of his statement to point out that place, the section does not cover similar statements of the other accused in Police custody. **N** KUDAON *v.* EMPEROR, 21 N. L. R. 86; A. I. R. 1925 Nag. 407; 27 Cr. L. J. 60 236

——— **s. 30**—*Self-exculpatory confession of co-accused, admissibility of—Presumption—Recovery of weapon—House occupied by others besides accused.*

The principle underlying s. 30 of the Evidence Act is that unless the parties are admittedly *in pari delicto* and unless the confessing prisoner implicates himself to the full as much as the co-prisoner, whom he is incriminating, it would be highly unsafe to rely on such confession so far as the co-prisoner is concerned.

In the absence of evidence connecting the accused with a weapon found in a house in which other people besides him reside or to which others have access, no presumption can be drawn against the accused from its recovery from the house. **N** DIWAN DHIMAR *v.* EMPEROR, 27 Cr. L. J. 186 1002

——— **s. 35**—*Pedigree-table prepared for purposes of settlement, whether relevant.*

A pedigree prepared for the purposes of a settlement which is the basis of the entries in the *khewat* is relevant under s. 35 of the Evidence Act. **O** RAIJ NATH SINGH *v.* BAHADUR SINGH, 2 O. W. N. 872; 12 O. L. J. 571; L. R. 6 A. (O.) 101; A. I. R. 1926 Oudh 101 583

——— **s. 49.** *See* CUSTOM 583

——— **ss. 50, 65**—*Relationship, proof of—Family conduct—Repute, evidence of, whether admissible—Secondary evidence—Pedigree, proof of.*

A statement by a person that he derived his information about the relationship existing between certain persons from a pedigree prepared by his father is inadmissible in evidence without the pedigree being produced or a foundation being laid for admitting secondary evidence of the contents of the pedigree.

Section 50 of the Evidence Act enacts a rule different from that prevailing in England. According to English Law "general reputation is admissible to establish relationship." But s. 50 of the Evidence Act is limited to opinion as expressed by conduct, and there is no other provision in the Act under which evidence of general repute would be receivable in evidence to prove relationship. **M** SESHAMMAL *v.* KUPPANAIYYANGAR 462

——— **s. 58.** *See* DIVORCE ACT, 1869, s. 10 20

——— **s. 58**—*Criminal trial—Fact admitted by accused, whether must be proved.*

Section 58 of the Evidence Act applies equally to criminal as well as to civil trials and the Criminal Courts in India as a matter of practice do not insist on every fact which is admitted by the accused being proved by the prosecution. But, under the proviso to the section the practice is to insist on proof of all really essential facts. **O** BHULAN *v.* EMPEROR, 27 Cr. L. J. 57 233

——— **s. 68**—*Unattested document—Admissibility for collateral purposes.*

No distinction should be drawn between documents which are the basis of the suit, and those whose production is required for collateral purposes, so far as their admissibility in evidence is in question. **O** BHARATH SINGH *v.* SHEODAT SHARMA 189

——— **s. 90**—*Execution of document—Agent, authority of, proof of—Presumption.*

No presumption arises under s. 90 of the Evidence Act as to an agent's authority to execute a document which must always be proved in the usual way. **Pat** MIDNAPUR ZEMINDARI CO. *v.* RAM KANAI SINGH DEO, 1925 Pat. 254; 7 P. L. T. 188; 5 Pat. 80; A. I. R. 1926 Pat. 130 169

——— **s. 91.** *See* REGISTRATION ACT, 1908, s. 17 (1), (*d*) (2) (v) 320

——— **s. 92**, *applicability of.*

Section 92 of the Evidence Act applies only to

Evidence Act—contd.

what are known as "dispositive documents" and has no application to a decree. **C** ANANDA PRIYA BAISHNAVI *v.* BIJOY KRISHNA RAY 705

——— **s. 92**—*Partition lists, non-production of—Oral evidence, admissibility of.*

Where in a partition between two Hindu daughters, two lists were drawn up for the properties as divided and mention was made in them of the right of survivorship having been extinguished and on a question arising whether the right of survivorship was extinguished or not, the lists were not produced:

Held, that the lists constituted only a piece of evidence and though non-production of them might go to shake the weight of the evidence, it did not prevent other and oral evidence being given. It was not a case to which s. 92 of the Evidence Act applied. **M** NELAKANTI SUNDARASIVA ROW *v.* IVATUARY VIYYAMMA, 49 M. L. J. 266; (1925) M. W. N. 643; 22 L. W. 398; A. I. R. 1925 Mad. 1267: 48 M. 933 401

——— **s. 92**—*Registration Act (XVI of 1908), s 17—Mortgage, discharge of—Payment—Release—Oral evidence to prove release, whether admissible.*

A mortgage is discharged either by payment of the full amount of the debt or by release of the debt itself. A discharge of the debt by payment may be proved by oral evidence. A release may also be effected by parol, but if it is in writing it should be registered, if it falls within the provisions of s. 17 of the Registration Act. There is, therefore, nothing in law which excludes oral evidence of the discharge of a mortgage-bond when it is pleaded that the discharge was effected partly by payment of money and partly by release of the debt. **C** MAHIM CHANDRA DEY *v.* RAMDAYAL DUTTA, 42 C. L. J. 582: 30 C. W. N. 371; A. I. R. 1926 Cal. 170 757

——— **s. 92, proviso (1)**—*Deed—Consideration, recital of, receipt of—Oral evidence, admissibility of, to prove incorrectness of recital—Rebuttal.*

Where one party to a deed alleges and proves that the whole of the consideration, the receipt of which is acknowledged in the deed, did not pass, the case falls within the first proviso to s. 92 of the Evidence Act, and the other party is at liberty to show what the real consideration is and parol evidence can be given of the real nature of the transaction. What the first party tries to prove in such a case is failure of consideration and that brings the case within the first proviso to the section, the second party can then prove in rebuttal of the first party's case that there was in truth no failure of consideration and for that purpose show what the real consideration is. **M** RAMASWAMI CHETTIAR *v.* LODD GOVINDOSS KRISHNADOSS, 49 M. L. J. 414; 22 L. W. 848; A. I. R. 1926 Mad. 35 612

——— **s. 114.** *See* PENAL CODE, 1860, s. 411 690

——— **s. 114, ill. (a)**—*Penal Code (Act XLV of 1860), s. 412—Possession of stolen property—Presumption—Defence, falsity of.*

Possession of stolen goods several months after the theft and at a place several miles away from the scene of theft, does not raise any presumption that the person in possession is either the thief or a receiver of stolen property.

In such a case there is no onus on the accused to explain how he got the property and the prosecution cannot succeed by proving the defence to be false. **L** ALIA *v.* EMPEROR, 1 L. C. 471; 27 Cr. L. J. 112 544

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——— **s. 114, ill (e).** *See* POLICE ACT, 1861, s. 31 56

——— **s. 114, ill (g)**—*Account books, non-production of, effect of—Presumption.*

Where entries in certain account books would be relevant for the determination of a question which the Court is called upon to decide, the failure of the party in whose possession the account books are to produce the account books would lead to the inference that if the books had been produced they would not have supported the case of that party. **O** HASAN BAQAR *v.* SHEO NARAIN SINGH, 3 O. W. N. 25; A. I. R. 1926 Oudh 81; 31 O. L. J. 178 917

——— **s. 116**—*Landlord and tenant—Estoppel—Tenant, eviction of, by true owner—Attornment to true owner—Suit in ejectment by landlord*—Jus tertii, *plea of, whether can be taken.*

No tenant can set up a *jus tertii* in a third person in answer to a suit by the person who let him into possession. But where the true owner ejects the tenant from the possesison of the land, the tenancy ceases and after the eviction the tenant can attorn to the true owner and set up his title in answer to a suit in ejectment by the landlord who let him into possession. In such a case the landlord cannot rely upon the law of estoppel as contained in s. 116 of the Evidence Act as preventing his former tenant from pleading a *jus tertii* in a third person.

The eviction of the tenant by the true owner need not, however, be by actual dispossession of the tenant. If the true owner is armed with a legal process for eviction which cannot be lawfully resisted, even though the tenant is not put out of possession, the threat to put him out of possession amounts in law to eviction.

Defendant was let into possession of certain lands by the plaintiff's predecessor-in-title. Notice was served upon the defendant by the Government under s. 7 of the Madras Land Encroachment Act of 1905 on account of alleged unauthorised occupation of Government land. The defendant then attorned to Government and accepted a *patta* from them. In a suit by the plaintiff in ejectment under the original lease:

Held, that the plaintiff could not plead estoppel under s. 116 of the Evidence Act and could not succeed against the defendant unless he was able to make out a title against the Government. **M** ALAGA PILLAI *v.* RAMASWAMY THEVAN, 49 M. L. J. 742; (1925) M. W. N. 878; A. I. R. 1926 Mad. 187; 23 L. W. 296 1024

——— **ss. 145, 155 (3)**—*Statement made by witness before Police and reduced to writing, whether admissible.*

A statement made by a witness in a criminal case to the Police which has been taken down in writing is admissible in evidence at the trial under s. 155 (3) of the Evidence Act for the purpose of contradicting such witness, provided the provisions of s. 145 of the Act are complied with in the matter of putting the specific parts of the statement which are to be relied upon to the witness in his cross-examination. **C** THOMAS JAMES HENRY ARNUP *v.* KEDAR NATH GHOSH, A. I. R. 1925 Cal. 1017; 27 Cr. L. J. 129 801

——— **s. 155 (3).** *See* EVIDENCE ACT, 1872, s. 145 801

——— **s. 157**—*First Information Report, whether substantive evidence.*

A First Information Report is not a substantive piece of evidence. It can only be used as a previous state-

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ment to corroborate or contradict a statement made subsequently in Court. L CHOGHATTA *v.* EMPEROR, 1 L. C. 416; 27 Cr. L. J. 121 697

Execution of decree - *Application for execution —Duty of Court - Dismissal of application, when justified.*

An Executing Court can dismiss an application for execution only if the creditor does not take proper steps or does not help the Court in executing the decree.

An order made by an Executing Court such as "Proceedings closed" or "petition lodged" or "the matter is held over," for statistical purposes is improper. M RAMANATHAN CHETTI *v.* NALLA VEERAPPA PILLAI, 22 L. W. 815; A. I. R. 1926 Mad. 272 880

———*Auction sale—Non-transferable property—Judgment-debtor, failure of, to object—Confirmation of sale—Purchaser, rights of—Judgment-debtor, whether bound—Judgment-debtor, whether can resist purchaser as defendant—Civil Procedure Code (Act V of 1908), O. XXI, r. 92.*

After a judgment-debtor, with full knowledge of the execution proceedings and full opportunity of raising an objection to the effect that the property sought to be sold in execution is non-transferable, has failed to raise that objection at the time of the sale, it is not open to him, or to a person claiming through him, after the confirmation of the sale, to show that the property was inalienable. As between the purchaser and the judgment-debtor, the property vests in the purchaser on the date of the sale.

In such a case as the above, it is immaterial whether the judgment-debtor impeaches the sale as a plaintiff, or resists the suit of the purchaser as a defendant.

Under O. XXI, r. 92, C. P. C., where no application is made to set aside a sale or where such application is made and disallowed, the Court is bound to make an order confirming the sale and it thereupon becomes absolute. Under s. 65 where property is sold in execution of a decree and the sale has become absolute, the property vests in the purchaser. If the judgment-debtor objects under s. 47 to the sale and his objection is overruled, he is bound by the decision of the Executing Court. If being aware of the execution proceedings and having an opportunity to object, he fails to do so, he is likewise bound by the order confirming the sale; in other words, he is, in effect, in either case a party to the order by which the sale is confirmed equally with the auction-purchaser, and he cannot get behind it. M VUPPULURY SOMASUNDARAM *v.* BHIMISETTI KONDAYYA, 49 M. L. J. 401; A. I. R. 1926 Mad. 12 443

——— Compromise decree—Court, whether can refuse to enforce penal clause. *See* CONTRACT ACT, 1872, s. 74 790

———*Executing Court, whether can go behind decree—Decree directing payment out of certain fund—Fund, whether can be exempted in execution.*

A Court executing a decree must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree. Where a decree directs that the decretal amount should be recoverable from a certain fund, the Executing Court cannot go behind the decree and it is not open to the judgment-debtor to say that a particular portion of the fund indicated in the decree out of which the decretal amount is made recoverable should be excluded from the operation of the decree.

In a suit against the trustees of a *kattalai* called *ulturai katalai* in a temple, the decree provided for recovery of the decretal amount from the income and assets of the *kattalai*. In execution of the decree objection was raised against the attachment of the *mohini* allowance due to the *kattalai* on the ground that it was ear marked for a certain specific purpose. There was no evidence to show that the debt in respect of which the decree was passed was not incurred for a purpose which would be a legitimate charge on the *mohini* allowance:

Held, that the Executing Court could not go behind the decree and it was not open to the trustees to contend that any particular item of income or assets of the *kattalai* should be excluded. M BAVA C. VAITHILINGA MUDALIAR *v.* CHIDAMBARAM PILLAI, 49 M. L. J. 520; (1925) M. W. N. 771; A. I. R. 1926 Mad. 113 720

———*Judgment-debtor, whether entitled to scrutinize validity of previous applications—Failure to raise objections, effect of*—Res judicata.

There is nothing in law absolutely prohibiting a judgment-debtor from examining the validity of all the previous applications for execution made by the decree-holder; but in practice he will often find that he is barred by *res judicata*.

Where a judgment-debtor is appraised of proceedings in execution, it is incumbent on him to raise all legal objections to their sustainability and if he omits to do so it is not competent to him to make an application subsequently to have it declared that certain prior execution proceedings were invalid or that a previous execution petition was barred by limitation. M VEMULAMANDA BHADRAYYA *v.* PENUMETCHA JAGGARAJU, 22 L. W 747; (1926) M. W. N. 33; A. I. R. 1926 Mad. 177 1017

———*Transfer of decree for execution—Application to bring legal representatives of deceased judgment-debtor on record—Dispute, determination of—Limitation, plea of—Jurisdiction of Court that passed decree.*

Questions relating to a dispute as to who are the legal representatives of a deceased judgment-debtor and whether the decree is barred by limitation must be determined by the Court which passed the decree before it transfers the decree to another Court for execution. M MUTHUVEERASWAMI NAYDU *v.* ANNAMALAI CHETTIAR, 23 L. W. 92; (1926) M. W. N. 120 1056

Extradition Act (XV of 1903), s. 18—*Extradition for offence not mentioned in treaty, legality of.*

There is no derogation of the rights of the parties to a treaty by allowing one Government with the consent of the other to obtain extradition of a criminal who has committed an offence not mentioned in the treaty.

A Government or a State is entitled, if it so wishes, to hand over persons subject to the law of another State at the request of that State. There is, in such a case, no derogation to the Sovereign rights of either party. All that s. 18 of the Extradition Act provides is that the Act shall not work against the will of either party so as unduly to impose any liability on such party. It does not prevent their co-operation in a friendly action according to the comity of nations. S JAMNA *v.* EMPEROR, 27 Cr. L. J. 37 69

Factories Act (XII of 1911), ss. 20, 41 (a)—*Partition between room containing feed-end of cotton-opener and press room, nature of—Door in partition, effect of—Offence.*

An occupier of a factory means a person who is in actual possession and control of the factory.

The intention of s. 20 of the Factories Act is that there should be a separation of women and children from the room in which the main body of the cotton-opener is and that there should not be a direct means of access to that room. The partition intended by the section is one which should prevent the access of a woman or a child from the room in which the feed-end of the cotton-opener is at work to the adjacent room in which the rest of the cotton-opener is. Where there is a door made in such a partition and that door is shown to open at a particular time or even although it is shut, yet it is not locked or other effective means taken to prevent its being opened by a woman or child wishing to get into the press room, then the partition is on the same footing as if it had a gap in it which would not effectively separate women and children from the press room; and there would be a contravention of the provisions of s. 20 of the Factories Act.

Per *Madgavkar, J.*—An owner of a factory who takes the risk of inserting a door in a partition which separates the room in which the feed-end of a cotton-opener is from the press room, must safeguard himself by so arranging it that the door would not enable women or children at their will or at the will of the person who supervises their working, to pass from the room where the feed-end is situated in the mixing room to the press room. **B** GAMADIA *v.* EMPEROR, 27 Bom. L. R. 1405; 27 Cr. L. J. 165; A. I. R. 1926 Bom. 57 **949**

Fishery, *right of—River bed, shifting of*—Beel *formed in old bed—Grantee, right of, to fish in* beel.

The bed of a river is that portion of the river which is in the ordinary and regular course of nature covered by the water of the river. It need not be constantly covered, if in the ordinary course of things it is habitually covered.

The grantee of a fishery right in a river is entitled to fish in all waters comprised within the banks of the river, and the fact that a particular sheet of water may, during a part of the year, be disconnected from the flowing stream or permanent current does not affect the rights of the grantee. A *jalkar* so situated in the river bed is an essential part of the river, and the fish contained therein may properly be deemed fish of the river. Where the right of fishery is in a river, the Court has to decide on a consideration of all the material facts and conditions whether it can fairly and reasonably be said that the waters over which the fishery is claimed are a part of the river.

When a river shifts its course and a *beel* forms in the old river-bed, the question whether the right of fishery in the *beel* remains the property of the grantee of the exclusive right of fishery in the river, depends upon whether the *beel* forms part of the river. If the *beel* is so separated from the river that it no longer forms part of it, the fact that during the rains the *beel* overflows and joins the river does not give the grantee of the exclusive right of fishery in the river any right of fishery in the *beel*. But if the *beel* remains part of the river the right of fishery in the *beel* belongs to the owner of the fishery rights in the river even though the *beel* is disconnected from the river except in the rains. **C** SECRETARY OF STATE FOR INDIA *v.* NEMAI CHAND MUKHERJEE **752**

Fraud.

See BENGAL PUBLIC DEMANDS RECOVERY ACT, 1913, s 36 **796**

——— *Party guilty of fraud, whether can recover property conveyed to third person.*

Where a person obtains a conveyance of certain property in the name of another with the object of cheating two people and successfully cheats one of them, this is a sufficient ground for the Court refusing to help him in recovering the property from the person in whose name the conveyance was obtained. **M** VONNAKOTA VIRAJU *v.* VATSVAYA BANGARAJU **519**

——— *Suit to declare a decree obtained by fraud not binding—Suit by junior members to set aside mortgage-decree against manager—Cause of action—Fraud, allegations of, whether must relate to conduct of suit.*

In a suit by certain junior members of an Aliyasanthana family for a declaration that a decree passed on a mortgage executed by the managers and certain other members of the family was not binding on the plaintiffs, the plaint alleged that the mortgage on which the decree was obtained was executed fraudulently and collusively :

Held, that if the plaintiffs established fraud in the execution of the mortgage, the decree would be equally vitiated by fraud and would not bind the plaintiffs, but that it would have been different if the parties to the mortgage suit had not been the same as those to the mortgage, in which case a further allegation of fraud in the conduct of the suit would have been necessary to sustain the suit. **M** DURGAMMA *v.* KECHAMAYYA, (1925) M. W. N. 162; 48 M. L. J. 351; A. I. R. 1925 Mad. 792 **717**

——— *Suit to recover property—Defendant, whether can allege his own fraud.*

Where it is found that both the parties to a suit have been guilty of fraud in connection with the transaction in respect of which relief is claimed, that party fails who has first to allege the fraud in which he participated, irrespective of the fact whether he is plaintiff or defendant in the suit.

In a suit by a plaintiff to recover possession of property to which he alleges title by purchase, it is not open to the defendant to show that the funds for the purchase were provided by him by means of a fraud practised on a third person to which he and the plaintiff were both parties. In such a case as the defendant cannot succeed without alleging his own fraud, the plaintiff's suit must succeed. **M** PACHAYAMMAL *v.* DEVANAIMMAL, 22 L. W. 313; A. I. R. 1925 Mad. 1016 **776**

General Clauses Act (X of 1897), s. 6. *See* CR. P. C., 1898, s. 195 **395**

——— **s. 25.** *See* PENAL CODE, 1860, ss. 40, 65, 67 **394**

Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107—

See RANGOON MUNICIPAL ACT, 1922, s. 14 **550**

See RANGOON RENT ACT, 1920, s. 15 **627**

Guardian and ward—*Court of Wards, estate managed by—Withdrawal of management—Release of all claims by ward—Suit by ward against employee of Court of Wards to recover loss caused to estate, whether maintainable.*

There is no privity of contract between a ward of Court and the staff employed by the Court of Wards

to manage the estate of the Ward. A ward cannot, therefore, after the Court of Wards has withdrawn from the management of the estate and has handed over the estate to the ward and obtained a release of all claims from him, maintain a suit against a member of the staff employed by the Court of Wards to manage the estate, to recover the amount of loss caused to the estate by the negligence of such employee of the Court of Wards. **A** MOHAMMAD AYUB *v.* SURAJPAL SINGH, 21 A. L. J. 225 **783**

Hindu Law—Adoption *by widow succeeding to estate of her husband's reversioner, effect of—Suit by next reversioner challenging adoption, maintainability of.*

Under the Hindu Law where the widow of a *gotraja sapinda* succeeds to a life-estate in the property of a reversioner of her deceased husband, she cannot by an adoption defeat the rights of the next reversioners in such property, although the adopted son might be entitled to succeed to his adoptive father's estate, as distinct from the estate of the reversioner in which the adoptive mother has a life-interest as the widow of a *gotraja sapinda*.

On the death of a Hindu the widows of his two uncles succeeded to a life-estate in his property and both of them subsequently made adoptions to their respective husbands. A reversioner of the deceased brought a suit for a declaration that an adoption made by one of the widows was invalid and would not affect his reversionary rights. It was contended in defence that as the other widow was the immediate reversioner of the widow who had made the adoption, the plaintiff had no right to maintain the suit:

Held, that both the widows having by making adoptions attempted to defeat the rights of the plaintiff who was in the position of the next reversioner on the death of both the widows, the suit as framed was maintainable. **B** HANMAVVA ADIVEPPA SOMRADDI *v.* VENKAPPA GOVINDAPPA KADEMANI, 27 Bom. L. R. 1331; A. I. R. 1926 Bom. 26 **305**

——— **Damdupat,** rule of. *See* TRANSFER OF PROPERTY ACT, 1882, s. 74 **1010**

——— **Dancing girl** — *Legitimate descendants of her sons—Collateral succession, rule of—Heritable blood, whether exists.*

Under the Hindu Law, in order to have heritable blood between two persons, it is not necessary that inheritance to each other should be traced through the father.

The legitimate descendants of the sons of a dancing woman or a prostitute have heritable blood between them, even though the parentage of the sons is unknown and they are not the sons of one man.

The principle of collateral succession is applicable to them and is not confined to agnatic relations.

All people born in India and of the Hindu faith whose customs and manners are those of Hindus are governed by the Hindu Law in the absence of proof of any special or local custom. Accordingly persons whose paternity is unknown and who are the descendants of Hindu mothers are governed by the Hindu Law, and if the ordinary Hindu Law is applicable, unless there is some prohibition, statutory or otherwise, the whole of that law is applicable and not merely portions thereof.

Per *Wallace, J.*—The usage and custom of succession to a dancing girl and *inter se* of male offspring of a dancing girl are those of such succession of the

male illegitimate offspring of a degraded married woman.

Illegitimate children of a dancing girl *inter se*, when there is no contest between them and legitimate children, inherit to their mother and to one another. If there is heritable blood between any two illegitimate children that heritability carries with it all the adjuncts of heritability under Hindu Law, so that the legitimate male descendants of one branch can claim as reversioners to oust the legitimate widows and legitimate descendants of the other branch. The rule rests on the common maternity of the illegitimate sons. **M** VISWANATHA MUDALY *v.* DORAISWAMI MUDALY, (1925) M. W. N. 613; 49 M. L. J. 684; 48 M. 944; A. I. R. 1926 Mad. 1 & 189; (1926) M. W. N. 182 **193**

——— **Daughter**—*Settlement deed, construction of—Gift in favour of daughter—Nature of estate taken—Intention, vague expression of, whether can control clear dispositive words.*

Clear and unambiguous dispositive words used in a Will or deed are not to be controlled or qualified by any general expression of intention and technical words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense.

A deed of settlement by a Hindu recited "I have no male issue. I have only a daughter and my wife. I hereby make the following provisions so that my properties may not pass to the control of others after my lifetime and that they may go to my lawful heirs. The properties mentioned in Sch. I hereof are to be enjoyed by myself and my wife during our lifetime, and after our lifetime my daughter and her husband who is also my sister's son are to perform my funeral, etc., ceremonies and enjoy the aforesaid properties with absolute rights. The properties mentioned in Sch. II hereof are to be enjoyed by my daughter and my son-in-law from this date with absolute rights and with heritable rights in favour of son, grandson, etc.":

Held, that the daughter and her husband took an absolute estate in the properties gifted inasmuch as the clear dispositive words used could not be controlled by the somewhat vague expression of the settlor's intention occurring in the earlier portion of the document that the property should go to his lawful heirs. **M** SANKARANARAYANA REDDI *v.* KOPPAYYA REDDI, (1925) M. W. N. 875; 23 L. W. 81; A. I. R. 1926 Mad. 236 **973**

——— **Debts.** *See* HINDU LAW—JOINT FAMILY—ALIENATION **1023**

——— ——— incurred by widow. *See* HINDU LAW—WIDOW **125**

——— ———, *antecedent—Mortgage by father—Personal remedy barred—Mortgage, whether antecedent debt.*

The fact that the personal remedy under a mortgage by a Hindu father is barred by limitation does not prevent the mortgage being, at a subsequent sale, regarded as creating an antecedent debt. **O** BHARATH SINGH *v.* SHEODAT SHARMA **189**

——— ——— *Decree against father—Sale of family property—Interest of sons, whether passes.*

In the case of a joint Hindu family which consists of a father and his sons, a sale of family property in execution of a simple money-decree obtained against

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the father in respect of a debt not incurred for immoral purposes, passes the interest of the sons in the property to the purchaser by virtue of the pious obligation on the part of the sons to pay off their father's debts. **B** DE SOUZA *v.* WAMANRAO BHAI THAKUR 27 Bom. L. R. 1451; A. I. R. 1926 Bom 117 **984**

——— **Debts**—*Decree against member of joint family—Execution against sons after death of judgment-debtor, when can be allowed—Civil Procedure Code (Act V of 1908), s. 53.*

The liability of a Hindu son to pay his father's debts not tainted with immorality is the same whether the liability is enforced through Court or is taken advantage of by the father in paying off his antecedent debts by private treaty.

The meaning of s. 53 of the C. P. C. is that where there is a liability under the Hindu Law on the sons to pay their father's debt that liability may be followed in execution as well. The test is that under that section the property which the father could sell in his lifetime is the only property that can be pursued by his creditor on his death in the hands of his sons. The Court must determine with reference to the date of the death of the father what property was at that time liable for the payment of his debts.

The mere fact that property in which a Hindu father had at one time an interest as member of a joint Hindu family has several years after his death passed into the hands of his sons by survivorship would not entitle a person who holds a decree against the father to proceed against such property in execution of the decree under s. 53 of the C. P. C. It must be shown that at the date of the father's death this property was liable for the satisfaction of the father's debts. **A** BINDA PRASAD *v.* RAJ BALLABH SAHAI; 24 A. L. J. 273; A. I. R. 1926 All. 220 **785**

——— *incurred by father jointly with other members of family—Pious duty of sons to pay off debts—Mithila School.*

The Hindu Law of the Mithila School is the Law of the Mitakshara except in a few matters in respect of which the Law of the Mithila School has departed from the Law of the Mitakshara.

Under the Mithila School of Hindu Law a son or a grandson does not escape from his pious duty of paying off debts incurred by the father or grandfather merely on the ground that the debts were incurred by the latter jointly with another member of the joint family. **P. C.** SOURENDRA MOHAN SINHA *v.* HARI PRASAD SINHA, A. I. R. 1925 P. C. 280; 42 C. L. J. 592; 24 A. L. J. 33; (1926) M W. N. 49; 7 P. L. T. 97; 50 M. L. J. 1; 5 Pat. 135; 52 I. A. 418; 30 C. W. N. 482 (P. C.) **1033**

——— **Gift,** in favour of daughter. *See* HINDU LAW—DAUGHTER **973**

——— *Self-acquired property—Maintenance of son's widow.*

A man has absolute right under the Hindu Law to dispose of his self-acquired property in any way he chooses, and his son's widow cannot follow it in the hands of the alienee or donee for her maintenance. **L** BHAGWANTI *v.* THAKUR MAL, 1 L. C. 472 **476**

——— **Guardianship and minority**—*Alienation by guardian—Consideration partly for discharge of mortgage-debt—Prior undertaking of guardian to pay off mortgage—Purchaser acting in good faith—Sale, whether binding—Consideration, major portion of, valid, effect of.*

Certain properties burdened with a mortgage were gifted to a minor and his guardian sold the properties

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to a third person, a portion of the sale consideration being required for the discharge of the said mortgage. It appeared, however, that under an arrangement between the donor and the guardian, the guardian himself had undertaken to discharge the mortgage-debt but it was found that the purchaser was not aware of any such arrangement:

Held, that the consideration relating to the discharge of the mortgage-debt was binding on the minor.

Where an alienation is left unchallenged for a number of years, and the major portion of the consideration for the sale is held to be valid and binding, the alienee should be permitted to retain the property on payment of the amount disallowed with interest. **M** NIQLAKANTA SARMA *v.* GANESHA IYER, (1925) M. W. N 43; A. I. R. 1925 Mad. 469; 21 L. W. 685 **310**

——— **Guardianship and minority**—*Guardian, power of, to refer dispute to arbitration—Award, whether binding on minor.*

Under the Hindu Law all acts of a natural guardian which the infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by the guardian. A natural guardian has, therefore, power to submit a dispute to arbitration on behalf of the minor, if the submission is for the benefit of the minor and the minor would in such a case be bound by the award made by the arbitrators on such submission. **R** PUNUSHWAMI *v.* VEERAMUTH, 3 R. 452; A. I. R. 1926 Rang. 31 **676**

——— *Guardian, natural, power of, to alienate minor's property—Necessity—Benefit of estate.*

The natural guardian of a Hindu minor has power, in the management of the minor's estate, to mortgage or sell any part thereof in case of necessity or for the benefit of the estate. **L** SURAIN SINGH *v.* BABU, 2 L. C. 175 **1054**

——— **Inheritance**—Spindas—*Whole blood, whether excludes half blood—Mitakshara.*

Under the Mitakshara among *spindas* who are members of the same class the whole blood excludes the half blood, and this preference of the whole blood over the half blood is not confined to the case of brothers and their sons. **N** NARAIN *v.* HAMRAJI, 21 N. L. R. 163; A. I. R. 1926 Nag. 218 **989**

——— **Joint family**—*Alienation of family property—Consideration, portion of, applied towards payment of mortgage which cannot be challenged, effect of.*

Where a portion of the consideration for a sale of family property is applied towards the payment of the amount due on a mortgage, the validity of which could not be challenged by the reversioners owing to the fact that none of the reversioners was in existence at the date when the mortgage was made, the sale cannot also be challenged to the extent to which the sale consideration has been applied in paying off the mortgage. **P C** LAL BAHADUR *v.* AMBIKA PRASAD, 2 O. W. N. 913; A. I. R. 1925 P. C. 264; (1925) M. W. N. 852; 47 A. 795; 28 O. C. 371; 12 O. L. J. 649; 23 L. W. 220; 52 I. A. 443 **471**

——— Alienation—Mortgage. *See* HINDU LAW—JOINT FAMILY PROPERTY **976**

——— *Alienation by father—Suit by son for partition and to set aside alienation—Alienee, rights of—Subsequent suit for general partition by alienee, maintainability of—Procedure—Res judicata.*

A purchaser from a Hindu co-parcener of his share in specific family properties is entitled to file a suit for general partition, and to work out his rights and equities either by having the properties sold to him allotted to the share of the alienor, or by getting other properties in substitution.

Where in a suit by a Hindu son to set aside alienations by his father of family properties and for partition of his share therein it is found that the alienations are not binding upon the plaintiff, it is open to the alienees to insist upon the plaintiff's assenting to the results of a suit for a general partition of the family properties and ask, if the undisposed of properties are sufficient for the son's share, that the alienated properties may be allotted to the father's share and through him to themselves. If the purchasers do not defend the suit on this ground of equity or if their plea is disallowed, the decree must be regarded as final and the son gets his share in the alienated properties unconditionally as his separate property.

So far as the properties allotted to the son are concerned the decree operates as *res judicata* against the alienees and the latter cannot in a subsequent suit claim any relief with regard to such properties in order to work out their own rights and equities. With regard to the balance of the properties, however, the alienees are still entitled to claim in a suit for general partition that other properties belonging to the alienor should be allotted to them in substitution of the properties which had been alienated in their favour and which have since been allotted to the son. **M** SOWRIMUTHU *v.* PAVADAI PACHIA PILLAI, 49 M. L. J. 679; (1925) M. W. N. 841; A. I. R. 1926 Mad. 241 **868**

——— **Joint family**—*Alienation by manager to pay off barred debt, validity of.*

A manager of a joint Hindu family, other than the father, has no power to alienate the family property in lieu of any antecedent debt of his own. An alienation by him can only be upheld if the transfer is for legal necessity or for the benefit of the family. The payment of a barred debt is not a necessity and, therefore, an alienation of family property by the manager for the payment of such a debt cannot be upheld. **A** JHABBU RAM *v.* BAHORAN SINGH **1023**

——— ——— *Alienation — Sale by manager of family property—Benefit to family—Future and continuous loss, prevention of.*

A sale of family property by the manager of a joint Hindu family will be upheld not only in cases in which the object of the sale is to relieve the estate of an actual pressure or to avert danger but also in cases where a benefit is to be conferred upon the estate. What constitutes benefit to the estate must vary according to the circumstances of each case. Where, however, a sale of family property is intended to avert future and continuous loss to the family, the sale must be held to be for the benefit of the family. **O** SURAJ NARAIN *v.* GURCHARAN PRASAD, 2 O. W. N. 904; A. I. R. 1925 Oudh 743 **495**

——— *Father, decree against, when can be executed against family property.*

Where a decree is passed against a Hindu father who is the manager of a joint Hindu family and it appears that the decree was passed against him in his capacity as representative and manager of the family, the decree can be executed against the family property. It is not necessary in such a case that the decree should state in express terms that it is passed against the defendant as the manager of the joint family. **S** NARUMAL MULCHAND *v.* JAGATMAL THARUMAL, A. I. R. 1925 Sind 288 **740**

——— **Joint family**—Manager, alienation by, to pay off barred debt, validity of. *See* HINDU LAW —JOINT FAMILY—ALIENATION **1023**

——— ——— *Manager, whether can dedicate family property to temple.*

The manager of a joint Hindu family can lawfully dedicate a small portion of the family property to a temple on the occasion of the funeral of a deceased member of the family. **M** AUDIAPPA NAIDU *v.* MUTHULAKSHMI ACHI, (1925) M. W. N. 653; A. I. R. 1925 Mad. 1281 **610**

——— ——— *Property acquired in name of junior member—Presumption—Test—Dayabhaga School.*

The presumption that all properties acquired by a member of a joint Hindu family must, in the absence of evidence to the contrary, be deemed to be the properties of the family does not apply to a case in which the joint family is constituted only by a father and sons governed by the Dayabhaga School of Hindu Law. In other cases of joint families governed by that School the presumption would apply.

Where the question is whether property standing in the name of a junior member of a Hindu family is a self-acquisition the criterion is to consider from what source the money came with which the purchase-money was paid. In the absence of evidence that the junior member had not separate funds or that the property in question was purchased with money belonging to him, the presumption is clear and decisive that it was acquired by the head of the family in the name of the junior member and that it was not the self-acquired property of the junior member. This presumption applied equally to a family governed by the Dayabhaga School of Hindu Law as also to such a family consisting of a father and his sons. **C** JASODA SUNDARI *v.* LAL MOHAN BASU, 42 C. L. J. 486; A. I. R. 1926 Cal. 361 **681**

——— ——— *Property acquired, nature of—Presumption — Property purchased by joint family —Mortgage of purchased and ancestral property to purchaser—Suit by purchaser to enforce mortgage —Suit by members of family for declaration that mortgage shall not affect ancestral property—Subsequent suit challenging validity of mortgage of purchased property, whether maintainable—Civil Procedure Code (Act V of 1908), O. II, r. 2.*

Where it is found that a joint Hindu family was possessed of a nucleus, the burden of proving that a certain item of property subsequently acquired was the self-acquired property of a particular member of the family, lies upon the person who makes the assertion

Certain property was purchased by a joint Hindu family and the consideration for the sale was paid by the execution of a mortgage in respect of the property purchased as well as of a certain portion of ancestral property belonging to the family. The vendor subsequently obtained a decree for sale on foot of his mortgage, but before the property could be brought to sale some members of the family brought a suit for a declaration that the mortgage and the decree obtained on its basis were not binding on them so far as they affected the portion of the ancestral property of the family included in the mortgage. This suit was decreed and the purchased property was sold in execution of the mortgage-decree. The plaintiffs

Hindu Law—contd.

thereupon brought another suit for a declaration that the purchased property was joint family property and that the mortgage and sale in execution of the mortgage-decree were invalid and were not binding upon the plaintiffs:

Held, (1) that in view of the fact that the plaintiffs wanted a declaration that the property purchased, in consideration for which the mortgage was granted, was joint family property, the mortgage was binding on them;

(2) that the plaintiffs having failed in the previous suit to ask for any relief concerning the mortgage so far as it affected the purchased property, their present suit was barred by the provisions of r. 2 of O. II of the C. P. C. O ABHAIDAT SINGH *v.* RAGHOENDAR PARTAB SAHAI, 3 O. W. N. 40; A. I. R. 1926 Oudh 77; 13 P. L. J. 37 **976**

——— **Maintenance**—Self-acquired property, whether liable. *See* HINDU LAW—GIFT **476**

——— **Marriage**—Asura *form—Payment to bride's parents for expenses of marriage, effect of.*

Where among a particular class of people it is customary for the bridegroom's party to make a payment to the parents of the bride to enable them to meet a substantial part of the expenses of the marriage, the marriage must be held to be in the *asura* form though the bride's father spends the whole amount thus received on the expenses of the marriage. M SAMU ASARI *v.* ANANCHI AMMAL, 22 L. W. 462; 49 M. L. J. 554; A. I. R. 1926 Mad. 37 **561**

——— **Partition** — *Presumption of jointness—Separation of some members, effect of—Definition of shares in revenue papers—Separate dealings with property.*

A Hindu family is presumed to be joint until the contrary is established, but the presumption grows weaker as the relationship becomes more distant and the branches multiply. But no such presumption arises where it is established that before the institution of the suit one or more members of the family had already separated.

A member of a joint Hindu family may separate himself from the other members of the joint family, and would on such separation be entitled to have a share in the property of the joint family ascertained and partitioned off for him, but the remaining co-parceners without any special agreement between themselves may continue to be co-parceners and to enjoy as members of a joint family what may remain after such a partition of the joint family property is made, or live separately from each other.

The definition of shares in revenue papers by itself affords very slight indication of a separation in a Hindu family, such entries are usually made in the Revenue Records by those responsible for their preparation to make the record definite and precise. The acquisition of some property in the name of one member of the family, and of other property in the name of another member would similarly be inconclusive, but where there is a long series of dealings by the different members of the family independently of each other, the same considerations would not be applicable. A DARBARI LAL *v* PARBATI **841**

——— ——— *Separation of one member—Presumption as to others.*

When one member of a joint Hindu family separates, there is no presumption that the remaining members remain joint and an agreement to remain united or to re-unite must be proved.

Hindu Law—contd.

Where on the separation of one member, the shares of other members also are defined in the partition deed, the legal inference is that the latter are to hold the property allotted to them in those shares as separate owners. L TIRKHA MAL *v.* GURJI MAL, 1 L. C. 390 **571**

——— **Religious endowment.** *See* C. P. C., 1908, s. 92 **924**

——— ——— *Succession—Nomination of successor—Shebait, power of.*

In the absence of any terms regulating succession in the trust deed, if any, or the usage of the institution, the management of a Hindu religious endowment passes by ordinary rules of inheritance, unless such devolution is opposed to the purpose of the trust, and the *shebait* or manager is incompetent to nominate a successor by Will. L SHAM DEVI *v.* RAM NATH, 1 L. C. 434 **465**

——— ——— ——— *Temple—Trustee, powers of—License to erect* pandal, *permanent, whether can be granted—Adverse possession.*

The trustee of a temple has no power to issue a permanent license to put up a *pandal* on lands belonging to the temple. No question of adverse possession arises in a case where a person erects a *pandal* over temple property, after applying for and obtaining permission from the trustees to do so. M MARINGANTI RAMANUJCHARYULU *v.* PUDIPROLU BUCHI MANGARAO, 22 L. W. 485; A. I. R. 1925 Mad. 1279 **565**

——— **Widow**, *alienation by—Necessity—Burden of proof—Enquiry by creditor, scope and extent of—Amount of loan in excess of necessity, effect of—Procedure—Interest, high rate of.*

A person taking a mortgage from a Hindu widow of property forming part of the estate of her deceased husband must prove that legal necessity existed for the transfer or that he made proper and *bona fide* enquiries as to the existence of such necessity and satisfied himself by all reasonable means as to its existence. He is not, however, bound to see to the application of the money borrowed by the widow provided the money was lent for legal necessity. The enquiry which he has to make is as to the existence of the necessity and also as to the debts which the widow has incurred for legal necessity and the amount the is in need of for meeting such necessity. In order so uphold the transaction the Court must be satisfied that legal necessity existed and that the sum lent was not unreasonably large. The transaction should be shown to be genuine and free from doubts of collusion between the creditor and the widow for raising a sum larger than is really needed. The interests of the reversioner should be protected but at the same time the widow should not be hampered by unreasonable restrictions in raising money when legal necessity exists.

In cases where it is shown that the amount of the loan is in excess of that which the necessity justified, the Court should find whether the creditor knew or could have known by means of enquiries then available that the money was in excess of the necessity, and if the finding is in the affirmative then the Court should allow the reversioner to recover the property on payment of the sum really justified by the necessity. If, on the other hand, the finding of the Court is in the negative the transaction should be upheld in its entirety. The mere fact, however, that the amount borrowed is to some extent larger than the sum actually needed ought not to vitiate the transaction. In the absence of fraud or collusion between

the widow and the creditor, when the necessity for the loan is established, mere excess of the amount lent should not be held to vitiate the validity of the transaction. Where, however, the excess is disproportionately large, that itself is evidence of collusion and the Court should not uphold the transaction in such a case. In a case where the Court finds that the necessity was inadequate for the entire loan, the reversioner should be put to terms.

Where it is found that the main necessity for the loan was brought about by the wrongful act of the reversioner himself, he may not be heard to complain of the high rate of interest charged for the loan, more especially when he makes no attempt to show that money was available to the widow at a lower rate of interest than is charged in the bond. **C** TARAPRASAD SAW *v.* MADHU SUDAN GIRI, 42 C. L. J. 269; 30 C. W. N. 204; A. I. R. 1926 Cal. 283 **12**

——— **Widow,** *alienation by—Necessity—Burden of proof—Consent of reversioners—Presumption.*

It is for an alienee from a Hindu widow to prove circumstances which would amount to necessity under the Hindu Law justifying the alienation. If he is unable to prove such circumstances he must at least prove that he made *bona fide* enquiries and satisfied himself that such circumstances existed which would amount to a necessity under the Hindu Law. If he is unable to prove such circumstances or to prove that he made such *bona fide* enquiries, the proof that the nearest reversioners consented to the transaction in *prima facie* evidence or presumptive proof that such circumstances existed as would make the transaction one binding on the reversion. It is open to the reversioners to rebut the presumption by adducing evidence, as like all presumptions it is liable to be, displaced by proof of facts. But so long as the reversioners do not adduce any evidence as regards the actual purpose of the alienation to the knowledge of the alienee, the presumption would be quite sufficient to enable the Court to give a decree in favour of the alienee.

It is not necessary that the purpose of the alienation should be mentioned in the document. All that the law requires is that the alienee should prove the existence of circumstances at the time that the transaction was entered into, which would justify a limited owner in passing a full interest in the property in favour of the alienee, in other words, which would entitle a limited owner to bind the reversion by the alienation. **M** RAMASAMI REDDI *v.* RAJAGOPALACHARIAR, 22 L. W. 518; (1925) M. W. N. 789; A. I. R. 1926 Mad. 29 **270**

———, *alienation by—Necessity—Daughter's marriage—Hindu widow's power of alienation—Widowed sister of husband, maintenance of—Purchaser, if bound by widow's mis-management—Pressing necessity.*

The daughter's marriage is a primary duty of a Hindu widow. The texts limiting the extent of the expenses to a fourth part of the father's estate, are not imperative but only directory.

The extent and limit of Hindu widow's power to dispose of her husband's estate depends upon the circumstances of the disposition and must be consistent with the law regulating such disposition.

Debts incurred by a Hindu widow for the maintenance of her mother-in-law and widowed sisters of her husband who were maintained by him in his lifetime, are sufficient to justify a sale by the widow,

The purchaser from a Hindu widow is not bound by any previous act of mis-management by the widow so long as he is satisfied that there was pressing necessity for the sale. **C** SAILABALA DEB *v.* BAIKUNTHA NATH GHOSE **186**

——— **Widow,** *alienation by—Subsequent surrender to reversioner—Reversioner, whether can question alienation.*

Where a reversioner obtains the estate through surrender by a Hindu widow or other life-estate-holder, he is not entitled during her lifetime to question alienations made by her prior to the surrender. Especially where the surrender is effected for the purpose of defeating alienees for consideration, the rule that till the surrenderer dies, her acts cannot be questioned by the surrenderee, is a just and equitable one. **M** NELAKANTI SUNDARASIVA ROW *v.* IVATUARY VIYYAMMA, 48 M. 933; 49 M. L. J. 266; (1925) M. W. N. 643; 22 L. W. 398; A. I. R. 1925 Mad. 1267 **401**

———, *alienation by—Reversioner remote, whether can challenge alienation.*

A suit for declaration that a gift by a Hindu widow is void as against the reversionary heirs of her husband is competent only to the nearest prospective reversioner, and if a more distant relation claims to sue, he can only maintain his suit by showing that the nearer reversioner has precluded himself by his own act or conduct from suing, or has colluded with the widow, or has concurred in the act alleged to be wrongful. **P C** FATEH SINGH *v.* JAGANNATH BAKHSH SINGH, 27 Bom. L. R. 725; A. I. R. 1925 P. C. 555; 48 M. L. J. 64; 2 O. W. N. 25; 12 O. L. J. 117; L. R. 6 A. P. C. 50; 27 O. C. 334; 29 C. W. N. 749; 47 A. 158; 23 A. L. J. 739; 22 L. W. 58; 52 I. A. 100 **280**

———, *debt incurred by, whether binding on reversioners—Necessity, absence of.*

A debt incurred by a Hindu widow which is not shown to have been incurred for legal necessity and which is not charged upon the property of her deceased husband in the hands of the widow, is not binding on the estate and a decree in respect of such a debt cannot be passed against the reversioners after the death of the widow. **O** CHHOTEY LAL *v.* RAM BALI **125**

———, *estate of, nature of—Gift by widow—Surrender in favour of next reversioner—Reversioner, whether can recover gifted property during lifetime of widow.*

Per *Walmsley, J.*—A Hindu widow can make a gift of her husband's estate which would be valid during her own lifetime. Even where the gift uses words of inheritance, it is a valid alienation for the term of the widow's life, and a reversioner would be able to attack the gift as voidable only after the death of the widow. Where the widow after making the gift makes a surrender of the entire estate of her husband in favour of the next reversioner, the act of surrender would not entitle the reversioner to recover the property gifted from the donee during the lifetime of the widow.

Per *Page, J.*—For purposes not authorized under the Hindu Law, a Hindu widow is entitled to alienate property which she inherited from her husband or any part thereof for a term which does not exceed the period during which she remains in the enjoyment of her husband's estate.

Where the widow puts an end to the estate which passes to her by way of inheritance from her husband by a surrender of her entire interest in the inherited

property to the next reversioner, the latter is entitled to recover any portion of the estate of the deceased improperly alienated by the widow even during the widow's lifetime.

A person who is minded to enter into a business transaction with a Hindu widow must be taken to know the law and to be aware of the restricted power of alienation which a Hindu widow possesses. **C** PRAFULLA KAMINI ROY *v.* BHABANI NATH ROY, 52 C. 1018; A. I. R. 1926 Cal. 121 **897**

——— **Widow**—*Reversioners, position of—Suit to challenge act of widow*—Res judicata—*Civil Procedure Code (Act V of 1908), s. 11, Expl. VI.*

Under the Hindu Law the reversioners possess individually what is called a *spes successionis*, that is to say, the bare possibility of succeeding to the estate of the last owner in case the widow dies leaving any one of them surviving entitled to take immediate possession after her, unless the husband has left the power to her to adopt a son. But the *spes* is common to all the reversioners and so is the danger from any act of the widow against the interests of the reversioners. The right to sue to set aside that common danger is given for reasons of policy and convenience to the person, who, if the widow died at the moment, would take the estate. But the result of such a suit, favourable or otherwise, affects the reversioners as a body and operates as *res judicata* in any subsequent suit brought by any of the reversioners to challenge the act of the widow. Explanation VI to s. 11 of the C. P. C. covers a case of this kind and bars fresh litigation on the same cause of action, unless the previous litigation was collusive or was vitiated by fraud or laches on the part of the reversioner then suing in conducting the suit or in asserting his reversionary right. **P C** MATA PRASAD *v.* NAGESHAR SAHAI, 3 O. W. N. 1; A. I. R. 1925 P. C. 272; L. R. 6 A. P. C. 195; 28 O. C. 352; 24 A. L. J. 1; 43 C. L. J. 51; (1926) M. W. N. 83; 47 A. 883; 50 M. L. J. 18; 13 O. L. J. 19; 52 I. A. 398 (P. C.) **370**

——— **Will** *by undivided father—Bequest to daughter—Consent of sons.*

A member of an undivided Hindu family has no power to devise property by Will.

A father in a joint Hindu family can, however, but only with the consent of his adult sons and with the consent of his relations who may be interested in his minor sons, bequeath a portion of his ancestral property to his daughter provided the portion is reasonable in extent. **M** THAYAMMAL *v.* PERUMAL CHETTY, 49 M. L. J. 734; A I. R. 19 6 Mad. 284 **914**

Identification, parade, value of. *See* CRIMINAL TRIAL **954**

Inam—Devadayam *land, whether alienable.*

Devadayam lands granted for the performance of a definite service, for instance, to chant hymns in a temple, are inalienable. **M** LOMADA PEDDA SUBBAYYA *v.* SATHIPALI RAYAMMA, 22 L. W. 225; A. I. R. 1925 Mad. 1046 **666**

——— Karnam *service* inam — *Enfranchisement, effect of—Re-grant—Grant to stranger—Office-holder, rights of.*

The enfranchisement of a service *inam* operates as a re-grant.

There is no presumption that an enfranchisement of a service *inam* land operates for the benefit of the office-holder. Where the title-deed is granted not to the holder of the office but to a stranger, the latter alone acquires title under the grant.

The enfranchisement amounts to a re-grant and Government can do what they like with the land when they are re-granting it. **M** RAMAKRISHNAYYA *v.* PITCHAYYA, 48 M. L. J. 500; 21 L. W. 474; (1925) M. W. N. 480; A. I. R. 1925 Mad. 726 **165**

——— Karnam *service* inam, *enfranchisement of, effect of—Title as against strangers—Adverse possession—Prescription against Government, proof of.*

Ayling and Odgers, JJ.—The grant of a title-deed at the enfranchisement of a service *inam*, unlike the case of a personal *inam*, constitutes a fresh root of title in the grantee good as against all the world. It extinguishes the claims not only of the members of the family of the grantee but of strangers as well.

Where, however, an outsider claims an enfranchised service *inam* it would be open to him to show either that there was no *inam* at all liable to resumption or that he had by prescription acquired a title to the property, good, not only as against the service holder, but also against Government, so that Government's power of disposition was lost, and that the enfranchisement was *ultra vires*. In the latter case he would be bound to prove adverse possession for 60 years.

Phillips and Odgers, JJ.—To prove adverse possession for 60 years as against Government, it is not sufficient to prove possession for a long period, but possession for the whole period of 60 years must be affirmatively proved. **M** KRISHNA SASTRI *v.* SINGARAVELU MUDALIAR, (1925) M W. N. 218; 48 M. L. J. 470; A. I. R. 1925 Mad. 780; 48 M. 570 **130**

Income-tax—*Stock, fall in price of—Loss, calculation of, on fallen price—Opening price for next year, fixing of—Profit and loss.*

An income-tax assessee had a large stock of piece-goods at the beginning of 1921 which he had bought at Rs. 13-8 per piece. At the end of the year the value of these goods fell in the market to Rs. 6 per piece. In submitting his statement to the Income-tax Authorities for the year April 1921 to March 1922, he took into account the fall in price in the market for the whole stock in calculating his loss for the year though he had not sold the whole of it. He treated the remaining stock in his hand at the end of the year as being worth only Rs. 6 a piece and on that footing estimated his loss. In the next year instead of taking that stock as being worth Rs. 6 at which he valued it the day previous to the beginning of the year, he valued it at Rs. 13-8 again and on that footing he estimated his loss. On a question arising whether he was entitled to do so :

Held, that the assessee, having elected in the previous year to value his stock at the market price of Rs. 6 a piece for the purpose of showing his trade loss during that year, was not entitled in the succeeding year to revert to the purchase price figure as representing the value of the goods, but was bound by the market price which he had fixed and been assessed on in the previous year, unless he could show that he made a mistake as to the market-value, and that he was, therefore, bound to put only Rs. 6 as the opening value of the stock for the second year. **M** COMMISSIONER OF INCOME-TAX *v.* CHENGALVARAYA CHETTY, 49 M. L. J. 425; 48 M. 836; A. I. R. 1925 Mad. 1242 **137**

Income Tax Act (XI of 1922), s. 9 (1) (7)—*House furnished and ready for occupation, whether vacant.*

Where a person who owns a house keeps it furnished and ready for his own occupation or for the occupation of his guests, the house cannot be said to have been

vacant during a particular year within the meaning of s. 9 (1) (7) of the Income Tax Act merely because it was not actually occupied by the owner or by his guests at any time during that year. The owner must be deemed to be in occupation of the house and is liable to be assessed in respect of the house. **M** COMMISSIONER OF INCOME TAX, MADRAS *v.* KRISHNA CHANDRA, 22 L. W. 822; 50 M. L. J. 63; A. I. R. 1926 Mad. 287; 49 M. 22 **940**

——— **s. 12**—*Jharia Water Supply Act (III of 1914), s. 45—Bihar and Orissa Mining Settlement Act (IV of 1920), s. 23—Income derived from royalties on mining leases, assessment of—Cesses and rates, amount of, whether to be deducted.*

In arriving at the taxable income derived by an assessee as the owner of royalties under mining leases, the assessee is not entitled to deduct cesses or rates imposed upon him as the owner of such royalties under the Jharia Water Supply Act and the Bihar and Orissa Mining Settlement Act. **Pat** INCOME TAX COMMISSIONER *v.* SHIVA PRASAD SINGH, 4 Pat. 752; A. I. R. 1926 Pat. 109 **476**

——— **s. 13**—*Income, what is—Accounts, method of—Entries in books of account, value of.*

For the purpose of calculating the profits of a business under the Income Tax Act, mere entries in books of account are not by themselves conclusive.

The word "income" signifies what comes in and includes sums which though not actually realized have become due in such a manner that the assessee could at his will and pleasure receive them for reinvestment or otherwise.

The method of accounting regularly employed by an assessee for the purpose of his business should reflect his true income, profits and gains. If it does not, the Taxing Officer must find out the true income of the assessee as income-tax is leviable on income, profits and gains and not on imaginary sums which do not represent the true income of the assessee. **N** PANDURANG RAMCHANDRA *v* COMMISSIONER OF INCOME TAX, 21 N. L. R. 175; A I. R. 1926 Nag. 180 **980**

——— **s. 29**—*Notice of demand, when must be issued—Notice issued 14 months after year of assessment, validity of.*

No period is prescribed in the Income Tax Act within which a notice of demand under s. 29 of the Act must be issued. Such a notice must, however, be issued within a reasonable time. A notice issued nearly 14 months after the expiration of the year in respect of which the assessment is made would not necessarily be too late. **Pat** *In the matter of* RAJENDRA NARAYAN BHANJA DEO, (1925) Pat. 217; A. I. R. 1925 Pat. 581; 5 Pat. 13; 7 P. L. T. 269 **288**

——— **s. 34**—*Deliberate omission to assess property owing to erroneous construction of statutory provision—Property, whether can be assessed in the following year.*

Section 34 of the Income Tax Act applies to a case where the Income Tax Officer has deliberately adopted an erroneous construction of a provision of the Act and has thus failed to assess a particular item of income, just as much as to a case where he has not considered the matter at all and has simply omitted an assessible item from his view and from his assessment.

Where, therefore, an Income Tax Officer proceeding upon an erroneous assumption that certain property is not liable to assessment has failed to assess the income arising from such property in a particular year, such item is liable to be assessed in respect of that year in the following year under s. 34 of the Act. **M** COMMISSIONER OF INCOME TAX, MADRAS *v.* KRISHNA CHANDRA, 22 L. W. 822; 50 M. L. J. 63; A. I. R. 1926 Mad. 287; 49 M. 22 **940**

——— **s. 66**—*Interpretation of entries, whether question of law—Reference to High Court.*

What constitutes receipts for the purposes of the Income Tax Act is a question of law and not a question of fact. The question whether particular entries on the credit side in a profit and loss account constitute income or not, when there is no dispute in regard to the meaning of the entries and the circumstances under which they were made, is, therefore, a question of law within the meaning of s. 66 of the Income Tax Act.

The proper legal effect of a proved fact is a question of law. **N** PANDURANG RAMCHANDRA *v.* COMMISSIONER OF INCOME TAX, 21 N. L. R. 175; A. I. R. 1926 Nag. 180 **980**

——— **s. 66**—*Reference on mandamus application, form of.*

Per *Krishnan, J.*—On an application for *mandamus* to the High Court to direct the Commissioner for income-tax to state a case for the opinion of the High Court, the question should be so framed as to leave to the Court which afterwards hears the reference to decide the matter on the facts stated by the Commissioner of income-tax. It must not be put in such a form that taking the hypothesis involved in it, it would be impossible to give any answer to it except in one way. **M** COMMISSIONER OF INCOME TAX *v.* CHENGALVARAYA CHETTY, 49 M. L. J. 425; 48 M. 836; A. I. R. 1925 Mad. 1242 **137**

Injunction. *See* SPECIFIC RELIEF ACT, 1877, s. 42 **714**

Insolvency—*Official Receiver, position of—Unsecured creditor, right of, to maintain application.*

The proper person to take proceedings under the Insolvency Act on behalf of the unsecured creditors is the Official Receiver or the Special Receiver whosoever is appointed. The Receiver represents all the unsecured creditors and an unsecured creditor cannot move the Court in insolvency unless the Receiver has refused to act in the matter.

Where a Receiver applies to the Insolvency Court to stop a sale of the insolvent's property and the Court refuses the application, it is not competent to an unsecured creditor of the insolvent to maintain a fresh application for the same relief. **M** PONNUSWAMI NAICKER *v.* SUBRAMANIA CHETTIAR, 22 L. W. 404; A. I. R. 1925 Mad. 1216 **460**

Insurance, *marine—Time policy—Warranty of seaworthiness—Premium, non-payment of—Suit to recover losses, maintainability of.*

On a time policy of marine insurance there is no warranty of seaworthiness.

The non-payment of the premium due under a policy of marine insurance affords no defence to the underwriter in answer to a suit by the assured to recover losses. **B** RAMCHANDRA RAMVALLABH *v.* GOMTIBAI, 27 Bom. L. R. 1310; A. I. R. 1926 Bom. 82 **419**

Interest, *suit for, nature of.*

A suit to recover a specific sum of money with accumulated interest cannot be deemed to be a suit for an account. **M** THAYAMMAL *v.* PERUMAL CHETTY, 49 M. L. J. 734; A. I. R. 1926 Mad. 284 **914**

Interpretation of the law. *See* CR. P. C., 1898, s. 4 **99**

Interpretation of Statutes—*Conflicting constructions, preference between.*

Of two alternative constructions of the provisions of a Statute which are both possible, the one which does not lead to absurdity should be accepted especially when such construction is most in accordance with the intention of the Legislature so far as it can be gathered from the provisions of the Act taken as a whole. **S** DOST MAHOMED *v.* MOHANDAS LALCHAND **573**

——— *Construction of Statute in previous judgment, whether precedent.*

An interpretation of a Statute directly necessitated in order to apply its provisions to the facts of a case cannot be described as *obiter dictum* merely because it involves reference to facts other than those before the Court. **C** JAGAT CHANDRA BHATTACHARYYA *v.* GUNNY HAJEE AHMED, 30 C. W. N. 11; A. I. R. 1926 Cal. 271; 53 C. 214 **824**

——— *Penal Statute.*

A penal Statute must be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip or that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, a penal enactment must be construed, like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal Statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.

What the Legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication. **B** GAMADIA *v.* EMPEROR, 27 Bom. L. R. 1405; 27 Cr. L. J. 165; A. I. R. 1926 Bom. 57 **949**

——— *Retrospective operation.*

Vested rights previously acquired cannot be taken away by subsequent legislation unless the latter is expressly retrospective. **N** ATMA RAM *v.* BHAGWAT, 8 N L. J. 175; A. I. R. 1925 Nag. 417 **216**

Jurisdiction—*Consent, whether can exclude jurisdiction.*

An agreement by the plaintiff that a certain Court has not jurisdiction to entertain his suit is not sufficient to oust the jurisdiction of that Court, though it may be a ground for compensating the defendant in costs for proceedings taken with the consent of the plaintiff. **O** GURUCHARAN *v.* KHAGESAR **108**

Jurisdiction of Civil Court. *See* C. P. LAND REVENUE ACT, 1917, ss. 107, 108 (4), 220 **304**

Jurisdiction of Court—*Damages, whether can be awarded in excess of pecuniary jurisdiction.*

A Court has no jurisdiction to award damages in excess of its pecuniary jurisdiction. **C** NABINCHANDRA DHAR *v.* ABDUL GAFUR **436**

—— — *See* MADRAS ESTATES LAND ACT, 1908, s. 131 **264**

——— *See* MADRAS REVENUE RECOVERY ACT, 1864, s. 58 **82**

Jurisdiction of Civil and Revenue Courts. *See* OUDH RENT ACT, 1886, s. 3 (10) **927**

Jurisdiction of Revenue Courts. *See* MADRAS ESTATES LAND ACT, 1908, SCH. A, ART 8 **280**

Land acquisition—*Acquisition of toka lands—Re-assessment, liability to—Compensation, determination of.*

To acquire a piece of land under the Land Acquisition Act is not necessarily the same thing as to purchase the right of fee simple to it, but means the purchase of such interest as clogs the right of Government to use it for any purpose they like. Where, therefore, Government has no proprietary interest in the land to be acquired but has only a right to levy assessment, with the additional right to increase the assessment according to certain conditions, the land can be notified for acquisition and the market-value of the free-hold can be ascertained under the Act, whereupon the value of the tenant's right can be determined and the balance of the compensation money handed back to Government.

When a plot of *toka* land which is liable to be re-assessed by the Government after some years is proposed to be acquired compulsorily, the only question to be determined for the purpose of awarding compensation to the tenant is what proportion of the rack rent of the land would be taken by the Government on a re-assessment. The determination of this question is a matter of speculation but the Court is entitled to presume that the Government would deal fairly with the tenant in occupation who has been paying a comparatively insignificant rent. **B** MOOS *v.* GOVERNMENT OF BOMBAY, 27 Bom. L. R. 1237; A. I. R 1926 Bom. 47 **357**

——— *Valuation of large plot of land—Market-value, ascertainment of—Procedure.*

Where a large area of land is proposed to be acquired in a neighbourhood where there are only scattered buildings and nothing in the nature of a regular residential settlement, although persons have acquired here and there a few small plots fronting on the road either for speculation or for the purpose of putting up buildings of a residential character, it is impossible to fix the value of various portions of the plot proposed to be acquired at different rates on anything approaching an accurate basis. The only way in which the market-value of the plot can be arrived at in such a case is to judge from other sales what the whole land would have been likely to realize in the market at the time of the proposed acquisition. In determining the market-value of the whole plot the Court should not proceed by determining the value of the front land separately and then dividing the interior land into separate portions and valuing them again at different rates. **B** COLLECTOR *v.* RAMCHANDRA HARISHCHANDRA, 27 Bom. L. R. 1276; A. I. R. 1926 Bom. 44 **300**

Landlord and tenant—*Abandonment—Non-payment of rent, effect of.*

The question whether there has been an abandonment of his holding by a tenant is primarily a question of fact depending on a number of circumstances to be proved in each case. Mere non-payment of rent is not sufficient for establishing abandonment of a *jote* by a *raiyat*. That fact, however, when taken with other circumstances may enable the Court to come to a conclusion one way or the other according to the circumstances of a particular case. **C** SHEIKH MOHARAMDI *v.* SHEIKH ASMAT **493**

——— *Construction of document—Lease—Permanent tenancy—Covenant restricting transfer, effect of.*

Where a permanent tenancy at a fixed rate of rent is created but there is a clause in the lease that the tenant would have no right to alienate his interest in the land held under the lease, the covenant restricting the transferability of the tenant's interest is inoperative in the absence of a clause for re-entry in the event of a breach of the covenant. **C** RAJENDRA NATH CHATTERJEE *v.* MOHESHATA DEBI 649

——— *Death of* raiyat*—Recognition by landlord of some heirs of deceased tenant, effect of—Suit for rent against recorded tenants, whether maintainable.*

On the death of a *raiyat* it is the duty of the landlord to recognize all the heirs of the deceased tenant as representing the whole body of the tenants. It is, however, also the duty of the heirs of the *raiyat* to appear before the landlord and get themselves recorded as tenants in the place of the deceased tenant. It is usual that on the death of a Muhammadan *raiyat* only the sons who are in possession of the holding, seek recognition from the landlord as the representatives of the deceased *raiyat*, the daughters having married into different families and having left the village not caring to possess their shares of the holding and to make themselves liable for the rent thereof. In such a case the landlord is entitled to record as his tenants those who take possession of the holding and apply to be recorded as representing the deceased *raiyat*. If the heirs who have been so recorded and who are in possession go on paying rent as the only recorded *raiyats* it does not lie in their mouth afterwards to turn round and set up the rights of the female heirs who have never been in possession and have never cared to apply before the landlord for recognition as the heirs of the deceased tenant. Such a recognition by the landlord only of the heirs in possession does not in any way affect the rights of the absent heirs, but until such heirs assert their rights, the *raiyats* who have paid rent after such recognition cannot refuse to pay the rent which they have agreed to pay on the ground that certain other heirs of the deceased *raiyat* have not been recognized as the tenants of the holding. **C** ADHAR CHANDRA MONDAL *v.* ABDUL RAHMAN 656

———*Death of tenant—Tenancy recorded in name of some heirs of deceased, effect of—Decree for rent obtained against recorded tenants, nature of.*

The question as to whether one heir or some of the heirs of a deceased tenant represent the tenancy is primarily a question of fact.

Where a *raiyat* dies it very often happens that the male members of the family are allowed to represent the tenancy. So far as the landlord is concerned they are recorded as tenants in the landlord's *sherista*. The recorded tenants pay the rent for the whole holding and the landlord recognizes them as the sole tenants of the holding so far as he is concerned. Such an arrangement does not, however, extinguish the right of the other heirs of the tenant. If they are ignored they have a right to establish their rights against the usurpers and may ask the landlord to record them also as joint tenants. But until that is done the landlord has a right to institute suits for rent against the recorded tenants and the decree which the landlord obtains in such a suit would have ahe character of a rent-decree although it is obtained tgainst one or some of the heirs of a deceased tenant, the principle being that the landlord is not bound to go beyond his books to find out who the tenants are. **C.** SURMAN SHAIKH KAZI *v.* NAFAR CHANDRA PAL, A. I. R. 1926 Mad. 517 748

——— *Ejectment*—Wajib-ul-arz *empowering landlord to eject tenant on* "qasur," *effect of—Criminal complaint by tenant against landlord, whether justifies ejectment.*

A custom recorded in a *wajib-ul-arz* that a landlord would be entitled to eject a *raiyat* if the latter was guilty of any *"qasur"* cannot be enforced.

If a tenant who has a grievance against a landlor files a complaint against the latter in a criminal case his act cannot be considered as amounting to a *"qasur"* making him liable to ejectment under such a clause in a *wajib-ul-arz* as the above. **O** MOHAMMA AQIL *v.* SHEO BAKSH 1055

——— *Fruit trees, rent of—Burden of proof—Record of Rights, entry in.*

Ordinarily a tenant has the right to cut, but the landlord has the right to appropriate the timber of trees standing on the holding of the tenant. In the absence of a special contract to the contrary, th landlord has no right at all in the fruit of trees standing on the holding.

In a suit to recover rent the onus is upon the tenant to show that rent is not payable in respect of the land in suit. If the tenant proves that the holding is rent-free and the landlord claims a share in the produce of fruit trees, the onus is shifted on to the landlord to show that there is a special contract by which rent is payable in respect of the fruit trees. **Pat** BHUPAL MISSIR *v.* SARBAN LAL, A I. R. 1925 Pat. 725 735

——— Inam *lands — Ejectment suit —* Kudivaram *right, grant of—Presumption—Burden of proof—Occupancy rights, acquisition of.*

In considering the nature of an *inam* grant, *viz.*, whether it was a grant of the *melvaram* only or a grant of both *melavaram* and *kudivaram*, no presumption can be made in favour either of the grantee or of the cultivator. Each case must be considered on its own facts.

In a suit for ejectment the plaintiff must prove his right to eject the defendant.

In a suit for ejectment of certain tenants from *inam* lands it was found that the defendants and their predecessors-in-interest had been in possession of the suit lands from 1843 onwards and that they had been disposing of their rights in the lands and dealing with them as if they had a right of occupancy. There was no evidence to show that the original grantee of the *inam* had himself been in occupation of the lands before the grant:

Held, that the burden lay upon the plaintiff to prove that he had the right to eject the defendants and that in the absence of proof that the plaintiff owned the *kudivaram* right in the suit lands the defendants must be held to have acquired rights of occupancy and were consequently not liable to ejectment. **M** PERIKARUPPA THEVAN *v.* AIYANARS, 49 M. L. J. 602; 22 L. W. 625; (1925) M. W. N. 821; A. I. R. 1926 Mad. 136 1027

——— Kabuliyat—*Attornment—Title of landlord, whether can be questioned—Burden of proof.*

When either through ignorance of the title of the landlord or by fraud in the matter of the execution of a *kabuliyat*, a tenant attorns to a landlord he is not altogether estopped from showing that the landlord had no title when the *kabuliyat* was executed or

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attornment was made by payment of rent. The burden of establishing the landlord's want of title, however, lies upon the tenant. C CHENGTU SARKAR *v.* JAHERUDDIN MONDAL 669

——— Kabuliyat *describing boundaries of land leased—Land subsequently discovered to belong to landlord, not handed over to tenant—Rent, suspension of—Abatement of rent.*

Plaintiffs granted a lease to the defendant of their interest in a certain *mouza* and the *kabuliyat* executed by the defendants described the boundaries of the *mouza*. The defendants obtained possession of all the lands which at the time of the execution of the *kabuliyat*, in the contemplation of the parties to the demise, formed part of the *mouza* and the rent was fixed on the basis of those boundaries. As a result of Settlement operations it was subsequently found that certain other lands also formed part of the *mouza* and that the plaintiffs had consequently an interest in those lands also. Plaintiffs thereupon began to recover rent from the person who was in possession of this portion of the land. In a suit by the plaintiffs to recover from the defendants the rent reserved in the *kabuliyat* executed by the defendants, the defendants contended that the rent had been suspended inasmuch as the plaintiffs had not been given possession of the whole of the interest which the plaintiffs possessed in the lands of the *mouza*:

Held, that the defendants having been put in possession of the lands described in the *kabuliyat* in respect of which the rent mentioned in the *kabuliyat* was settled, no case of suspension or abatement of rent arose by reason of the fact that certain land was subsequently discovered to have formed part of the *mouza* in addition to the land leased to the defendants. C BINOD KUMAR RAY *v.* RAM KISHORE MISTRY 686

——— "Nij jote," *meaning of—Purchaser of permanent tenure, whether can build permanent structures—Appeal, second—Injunction granted on findings of fact, whether can be interfered with.*

The word "*nij jote*" has a special significance in Bengal and means one's own cultivated land and includes a permanent tenure.

A purchaser of a permanent tenure has the right to build permanent structures on the land comprised in the tenure.

Where the grant or refusal of an injunction depends upon findings of fact the High Court will not in second appeal interfere with an order granting or refusing the injunction. C KIRTIBASH DUBEY *v.* INDIAN IRON & STEEL CO., LTD. 480

——— *Rent-decree*, ex parte, *against executor, whether binding on legatee.*

An *ex parte* decree for rent obtained against the executor of an estate, which decides that the relationship of landlord and tenant subsists between the parties, is binding upon a legatee in the absence of proof of fraud, or of the fact that the estate was not properly represented by the executor in the previous suit on the ground that his capacity as an executor had come to an end before that suit was brought, or that there has been a change of circumstances subsequent to the decree which has made the decree ineffectual. C BIRENDRA NATH ROY *v.* ANADI PRASANNA DUTTA 416

——— *Suit for declaration of under-proprietary rights, dismissal of—Appeal by one of several claimants—Decree in appeal, operation of—Treatment as under-proprietors, effect of.*

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In 1870 certain holders of land brought a suit against the proprietor for a declaration that they were under-proprietors in respect of their holdings. The suits were decreed by the Assistant Settlement Officer but were dismissed on appeal by the Settlement Officer. Only one of the original claimants appealed to the Financial Commissioner and in his case the Financial Commissioner set aside the order of the Settlement Officer and restored that of the Assistant Settlement Officer. It was assumed, however, both by the Settlement Officers and by the parties that the decision of the Financial Commissioner had accorded the status of under-proprietors to all holders of land in the village who held under similar conditions to those which had been dealt with by the Financial Commissioner in his order, and on the basis of this assumption even those claimants whose suits had been dismissed by the Settlement Officer and who had not appealed to the Financial Commissioner were treated as under-proprietors in subsequent litigation with regard to the fixing of rent and in other respects:

Held, that although the order of the Financial Commissioner in the appeal preferred to him could not be said to have modified the Settlement Officer's decree dismissing the suits of the other claimants who had not appealed to the Financial Commissioner, yet as they were all treated in a manner as if that judgment governed their case also they must be held to have acquired the footing of under-proprietors. O BIPIN CHANDRA CHATERJI *v.* DAWAN SINGH, 2 O. W. N. 894; A. I. R. 1925 Oudh 732 121

——— *Tenancy by holding over, what constitutes.*

In order that a tenancy by holding over may be created or may exist, the tenant holding over after the expiry of the term of his lease must be both in possession of the land and paying rent to the landlord for the land. C EKABAR ALI SHA *v.* SHEIKH ALIM 312

——— *Transfer by tenant—Adverse possession, when begins.*

Limitation does not run against the landlord when the original tenant continues payment of rent after the transfer of the holding by him.

In order to make time run against the landlord there must be complete abandonment of the holding by the tenant and adverse possession by his transferee. C JNANENDRA NATH BISWAS *v.* JOGENDRA NATH PAL 191

Landlord and Tenant Procedure Act (VIII of 1869), s. 27—*Landlord and tenant—Suit for possession by tenant on basis of title—Denial of tenancy by landlord—Limitation.*

The summary remedy provided for a tenant in s. 27 of the Landlord and Tenant Procedure Act of 1869 corresponds to that provided in s. 9 of the Specific Relief Act for all classes of persons. It has no application to a case in which the plaintiff-tenant relies upon his title and seeks to recover possession upon the strength of that title and in which the defendant denies that title.

Where a tenant seeks to recover possession of a plot of land on the allegation that he is a tenant of the defendant in respect of that plot and the defendant denies such tenancy, the suit is governed by the ordinary Law of Limitation and not by s. 27 of the Landlord and Tenant Procedure Act of 1869. C GOBINDA CHANDRA CHAKRAVARTY *v.* PRAKASH NATH 677

Lease, *evidence of—Acceptance of rent, effect of—Rent collector, acceptance of rent by, value of.*

If an owner of land accepts money from a person who is in occupancy of that land as the rent of the

land knowing that it is paid to him as the rent of such land, such acceptance is good evidence that he has already given the payer a lease of that land or gives it to him at that moment and agrees that he shall be considered to have held it during the period for which the rent is paid. The acceptance of rent, however, by a person who is employed merely to collect rents and has no power to grant a lease is no evidence of the granting of a lease which would be binding on the landlord. **N** JAIRAM *v.* LAXMAN, 8 N. L. J. 211; A. I. R. 1926 Nag. 6 **971**

——— *for term of years—Covenant for renewal—Mortgage by lessee—Mortgagee, whether entitled to demand renewal.*

A lease for a term of years provided that after the expiry of the term the lessee would be entitled to a renewal of the lease for a further period or to a new lease on the terms set out in the renewal clause. Before the expiry of the term of the lease the lessee mortgaged his interest in the property and the mortgage empowered the mortgagee to sublet the property during the time that he was in possession as the mortgagor himself might have done and also to do all acts by using the name of the mortgagor without reference to him:

Held, that the mortgagee was not an assignee of the term created by the lease and that there was no privity of contract between him and the lessor and that consequently the mortgagee was not entitled to demand a renewal of the lease. **C** BENOY KRISHNA GAIN *v.* FANINDRA NATH ROY **501**

——— *of mineral rights—Lessee, failure of, to work mines, effect of—Constructive possession—Dispossession—Abandonment—Trespass, effect of—Injunction, suit for, maintainability of.*

The omission of an owner or lessee of mineral rights to work the mines does not show that he is not in possession of the mines. The person in whom the title to the mines rests must be deemed to be in constructive possession of the mines as an owner or lessee, as the case might be, and such constructive possession is a sufficient foundation for an action in trespass.

The mere failure by a lessee of mineral rights to work the mines does not amount to an abandonment of the lease. The mere fact that the lessor treats the lease as having been surrendered does not in any way operate to the prejudice of the lessee unless the lessor actually takes possession of the demised land and retains possession for the statutory period. Where a trespasser enters upon such land and after working the mine for a short period abandons possession, the lessee of the mines is restored to the same position in all respects which he occupied before the intrusion took place.

The refusal of the lessor to recognize the title of the lessee does not amount to the dispossession of the lessee from the land. What is wanted on the part of the lessor is a positive act of dispossession so as to enable him to invoke the doctrine as to lapse of time. In the absence of such positive act of dispossession the lessee may invoke the doctrine as to constructive possession. He may for a time be dispossessed; but when the trespasser abandons possession the lessee is in the same position in all respects as if no intrusion had taken place.

A permanent lessee of mineral rights in a certain piece of land is entitled to obtain an injunction against a trespasser, even if he is not himself in actual possession of the land, if he satisfies the Court

that the injury which is apprehended will be either continuous or frequently repeated or very serious. **Pat** MIDNAPUR ZEMINDARY CO. *v.* RAM KANAI SINGH DEO, (1925) Pat. 254; 7 P. L. T. 188; 5 Pat. 80; A. I. R. 1926 Pat. 130 **169**

——— *Plot included in lease, whether actually demised—Test—Intention.*

The mere fact that a certain plot of land which is in actual existence is comprised in an agreement of tenancy is not conclusive that there was a genuine letting of that plot or that it was the intention of the parties that the plot should be included in the demise. The real test in order to determine whether there was a demise of the plot is whether there was a genuine intention on the part of the lessor that the lessee should be put in possession of the plot as part of the demise. **C** COUNSELL *v.* SUKUMARI DEVI, 30 C. W. N. 114; A. I. R. 1926 Cal. 250; 53 C. 115 **417**

Letters Patent (Bom.), cl. 12—*Mortgage suit, whether suit for land—Mortgage land and residence of defendants outside limits of original jurisdiction—Suit, whether can be instituted on Original Side of High Court.*

A suit based on a mortgage of land outside the local limits of the ordinary original jurisdiction of the High Court, claiming the usual mortgage-decree for sale of the property in default of payment, is a suit for land within the meaning of cl. 12 of the Letters Patent of the Bombay High Court. If the defendants to such a suit reside outside the local limits of such jurisdiction, the suit cannot be instituted on the Original Side of the High Court. **B** INDIA SPINNING & WEAVING CO. LD. *v.* CLIMAX INDUSTRIAL SYNDICATE, 27 Bom. L. R. 1281; A. I. R. 1926 Bom. 1 **847**

Letters Patent (Cal.), cl. 10—*Solicitor—Professional misconduct—Detaching client from other Solicitor—Disciplinary jurisdiction.*

A Solicitor ought not to detach a client from another Solicitor during the period of his retainer.

It is not every reprehensible conduct on the part of a Solicitor that amounts to that professional misconduct, which entails the serious result of being struck off the roll of Solicitors, suspended, or otherwise dealt with by the High Court, and in respect of applications under s. 10 of the Letters Patent the Court cannot be too careful in scrutinizing the materials upon which the jurisdiction of the Court is invoked. At all times it is a serious matter and the machinery of the Court ought not to be set in motion, except upon the clearest evidence of professional misconduct. **C** *In the matter of* AN ATTORNEY, 52 C. 795; A. I. R. 1925 Cal. 1084 **142**

——— **cl. 15**—*Order setting aside* ex parte *decree whether judgment—Appeal, whether lies.*

The word "judgment" in cl. 15 of the Letters Patent of the Calcutta High Court does not include every order made or every decision given by a Judge, even though it may be accompanied by a statement of the reasons which actuated the Judge in arriving at the decision. Whenever the question arises whether a particular order is or is not a "judgment" within the meaning of cl. 15 of the Letters Patent, it must be decided with reference to the particular facts of the case and to the nature of the order.

An order setting aside an *ex parte* decree is not a "judgment" within the meaning of cl. 15 of the Letters Patent and is consequently not open to appeal. It is immaterial that the order further directs that

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all proceedings in execution taken in pursuance of the *ex parte* decree should be set aside and that the attachment should be withdrawn. **C** BALDEODAS LOHEA *v.* SHUBCHURNDAS GOENKA, 30 C. W. N. 104; A. I. R. 1926 Cal. 327 965

——— **cl. 36.** *See* C. P. C., 1908, s. 98 897

Letters Patent (Mad.), cl. 13. *See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, ss. 39, 40 751

——— **cl. 15**—*Order refusing to strike out allegations in written statement, whether judgment—Appeal, whether lies.*

An order by a Judge sitting on the Original Side of the High Court refusing to direct certain allegations in defendants' written statement to be struck out at the instance of the plaintiff, as being unnecessary and scandalous, is not a 'judgment' within the meaning of cl. 15 of the Letters Patent of the Madras High Court and consequently is not appealable. **M** SAVAN DURGA BAI AMMAL *v.* RAMANATHA RAO, (1925) M. W. N. 785; 49 M. L. J. 632; 22 L. W. 868; A. I. R. 1926 Mad. 64 566

——— **cl. 39**—*Civil Procedure Code (Act V of 1908), s. 109—Insolvency jurisdiction of High Court, order in—Appeal to Privy Council, whether lies.*

In an insolvency matter (original or appellate), an application for leave to appeal to Privy Council against an order of the High Court lies under cl. 39 of the Letters Patent even if no such application lies under s. 109 of the C. P. C.

The words "on appeal" in cl. 39 of the Letters Patent mean the same thing as "in appellate jurisdiction." **M** OFFICIAL ASSIGNEE OF RANGOON *v.* OFFICIAL ASSIGNEE OF MADRAS, A. I. R. 1925 Mad. 243; 22 L. W. 362; 35 M. L. T. 57 126

Lien. *See* TRANSFER OF PROPERTY ACT, 1882, s. 55 (4) (*b*) 917

Limitation.

See BENGAL TENANCY ACT, 1885, SCH. III, ART. 6 478

See TRUST 914

——— *Period of notice, deduction of—Civil Procedure Code (Act V of 1908), s. 80.*

In computing the period of limitation for a suit against the Government to recover assessment alleged to have been wrongly collected, the period of two months required for a notice under s. 80 of the C. P. C. must be deducted. **M** ECHIKAN CHARAKARA KELU NAIR *v.* SECRETARY OF STATE FOR INDIA, 49 M. L. J. 79; 48 M. 586; (1925) M. W. N. 815; 22 L. W. 762; A. I. R. 1925 Mad. 1134 82

Limitation Act (IX of 1908), s. 3. *See* C. P. C., 1908, O. XXXIII, R. 10 302

——— **s. 5.** *See* LIMITATION ACT, 1908, SCH. I, ART. 168 168

——— **s. 5**—*Appeal filed beyond time—Misconstruction of order by appellant—Extension of time—Sufficient cause.*

Where an appeal is filed after the expiry of the period of limitation owing to the deliberate misconstruction of the lower Court's order by the appellant, the appellant is not entitled to the indulgence of the Court under s. 5 of the Limitation Act. **O** HASIB-UN-NISA *v.* BISHNATH, A. I. R. 1926 Oudh 206; 13 O. L. J. 172 867

——— **ss. 5, 12**—*Appeal, delay in filing—Copies delivered late owing to mistake of office—Extension of time.*

Limitation Act—contd.

Where an appeal is filed beyond time owing to the fact that delivery of the necessary copies to the appellant is delayed as the result of the failure of the Copying Department to inform the appellant as to the date on which he must take delivery of the copies, the appellant is entitled to the indulgence of the Court under s. 5 of the Limitation Act. **L** MADAN SINGH *v.* PURAN SINGH, 2 L. C. 131; 7 L. L. J. 595; A. I. R. 1926 Lah. 84 6

——— **ss. 5, 14**—*Appeal, delay in filing—Extension of time—Delay, explanation of—Discretion of Court—Appeal, second, interference in.*

Where a party is entitled to the exclusion of a certain period under the provisions of s. 14 of the Limitation Act, it is not incumbent on him to explain any subsequent delay in instituting the proceeding provided that the proceeding is instituted within limitation after the exclusion of such period. Where, however, extension of limitation is prayed for under s. 5 of the Act on a ground analogous to that laid down in s. 14 of the Act, it is incumbent upon the party asking for the indulgence of the Court to explain the delay which has taken place between the termination of the period which is sought to be excluded and the presentation of the appeal or application.

Where discretion has been exercised one way or the other by an Appellate Court under s. 5 of the Limitation Act, the High Court will not interfere with the exercise of such discretion in second appeal. **A** RAM RUP AGRAHRI *v.* NAIK RAM 865

——— **s. 6.** *See* LIMITATION ACT, 1908, s. 29 563

——— **s. 6 (3).** *See* CONTRACT ACT, 1872, s. 64 758

——— **s. 10.** *See* TRUSTS ACT, 1882, s. 5 671

——— **s. 12**—*Time requisite for obtaining copies—Due diligence—Sum not legally payable, delay in payment of, effect of.*

In calculating the time requisite for obtaining a copy of the judgment or decree appealed against under s. 12 of the Limitation Act the Court has to consider whether the appellant has acted with due diligence, but by due diligence it should not be understood that a party should in order to obtain the necessary copies be ready and willing to pay any sums which are not legally leviable from him. **S** GANGARAM GHANSHAMDAS *v.* GIRDHARIMAL CHETANMAL 406

——— **s. 12**—*Wrong applicaion for copy of decree—Subsequent correct application—Time, exclusion of.*

Judgment in a case was passed on 13th of May. Copy was applied for on 26th May without mentioning the date of the judgment. It was returned on 29th with the unused stamp for the correct entry. Another application for copy was put in on 3rd of July with the same unused stamp, and the copy granted on 10th July. Appeal was filed on 24th July. The limitation for the appeal was 30 days:

Held, that the time taken for the preparation of the copy was clearly from the 3rd of July to 10th of July and not from 26th May to 10th July and the appeal was beyond time. **O** BABU LAL *v.* RAMPHER SINGH 425

——— **s. 14,** *application of—Hindu joint family—Partition suit—Claim for outstandings collected by one member—Previous litigation—Exclusion of time.*

N, a member of a Hindu family, brought a suit for partition on the footing that he was adopted by *R*, a deceased brother of his father. *S*, another brother, and his son *V* pleaded partition before *R*'s death, disputed the share claimed and set up the adoption

Limitation Act—contd.

of *V* to *R*. They also alleged that *A*, the father of *N*, had been wrongly collecting certain specified outstandings which in case of partition they insisted ought to be brought by *A* into the hotchpot. *A* denied the existence of the alleged outstandings. The Trial Court found against the adoption and dismissed the suit, though there was a finding that *A* had to account for a few of the items mentioned by *S* and *V*. *N* filed an appeal; *S* and *V* put in a memorandum of objections but relating only to costs. The appeal and memorandum of objections were, however, dismissed. In a later suit by *S* more than 6 years from the date of the dismissal of the suit and less than 3 years from the date of the decree of the Appellate Court, for partition of the family properties including the outstandings alleged to have been collected by *A*:

Held, (1) that when *A* denied his liability in respect of the outstandings alleged, there was a demand and refusal of the same by him from which time would have begun to run against the plaintiff but for the pendency of the suit;

(2) that during the pendency of the appeal by *N* and the memorandum of objections as to costs by *S* and *V*, the latter were not prosecuting any claims in respect of the outstandings within the meaning of s. 14 of the Limitation Act;

(3) that, therefore, the present suit, so far as the outstandings collected by *A* were concerned, was barred by limitation.

Limitation is not suspended in respect of a plaintiff's claim for the period during which he is engaged in litigation not in respect of the identical claim but about some connected matter. **M** MUDDANA ADENNA *v.* MUDDANA SUBBANNA, A. I. R. 1925 Mad. 922; (1925) M. W. N. 241 **202**

——— **s. 14.** *See* LIMITATION ACT, 1903, s. 5 **865**

——— **s. 14**—*Right litigated in prior suit—Extension of limitation.*

In order to determine whether a plaintiff is entitled to claim the benefit of s. 14 of the Limitation Act, the question to be considered is whether the right which is sought to be enforced in the subsequent suit is the same as that which was litigated in the prior suit. **M** ALAYIL KALATHIL KAMBIL ACHUTHAN *v.* KUNAMBRATH ABDU, 21 L. W. 593; (1925) M. W. N. 361; A. I. R. 1925 Mad. 675 **833**

——— **s. 19.** *See* STAMP ACT, 1899, SCH. I, ART. 1 **494**

——— **s. 19**—*Acknowledgment, whether must be addressed to creditor—Mortgage—Recital in sale-deed that mortgage subsists, effect of.*

An acknowledgment of liability under s. 19 of the Limitation Act need not be addressed to the creditor or to any one representing him.

A recital in a sale-deed that there is a mortgage subsisting on some of the properties comprised in the deed amounts to an acknowledgment of the mortgage within the meaning of s. 19 of the Limitation Act. **C** AZIZAR RAHMAN *v.* RAM CHANDRA PODDAR **461**

——— **s. 19**—*Acknowledgment by agent—Partial payment of debt—Endorsement signed by debtor on bond—Limitation, whether extended.*

Partial payment of a debt due under a bond accompanied by an endorsement signed by the debtor amounts to an acknowledgment of the liability under the bond and gives a fresh starting point for limitation under s. 19 of the Limitation Act.

Limitation Act—contd.

An acknowledgment by an agent cannot extend the period of limitation unless he is authorized by his principal to make it on his behalf. **N** RAGHOBA *v.* GOPI **402**

——— **s. 19**—*Acknowledgment—Statement that payment has not been made as accounts have not been settled, effect of.*

A statement by a lessee that arrears of rent have not been paid up for the sole reason that accounts have not been settled amounts to an acknowledgment of liability within the meaning of s. 19 of the Limitation Act so as to save the bar of limitation. **M** ARUNACHALAM CHETTIAR *v.* RAJESWARA SETHUPATI, 22 L. W. 195; A. I. R. 1925 Mad. 1260 **338**

——— **s. 19**—*Acknowledgment, what amounts to—Statement by judgment-debtor that decree had been passed against him, whether acknowledgment of subsisting liability.*

To constitute an acknowledgment within the meaning of s. 19 of the Limitation Act, it is not necessary that the legal consequences that may flow from the obligation acknowledged should be specified, but the acknowledgment must itself import that the person making the acknowledgment is then under an existing liability. Such liability cannot be read into the statement which is relied upon as an acknowledgment by proof *aliunde*.

A mere statement of fact by a judgment-debtor that a decree had been passed against him on a certain date for a certain amount, does not amount to an acknowledgment that the decree still subsists and is capable of execution, so as to extend the period of limitation for the execution of the decree under s. 19 of the Limitation Act. **M** ALAYIL KALATHIL KAMBIL ACHUTHAN *v.* KUNNAMBRATH ABDU, 21 L. W. 593; (1925) M. W. N. 361; A. I. R. 1925 Mad. 675 **833**

——— **s. 26**—*Easement, right of—Customary easement, proof of—Water of tank, user of, enjoyment of, for long period, effect of.*

The object of the provisions of s. 26 of the Limitation Act is to make more easy the establishment of rights of easement. The section is remedial and neither prohibitory nor exhaustive and does not exclude or interfere with the modes of acquiring easements.

It is open to a plaintiff in a suit for the establishment of an easement to show that he is entitled to a right which may be of the nature of an easement although not actually within the strict meaning of the term.

Per *Chakravarti, J.*—Where a tank has existed for a long time and the public have enjoyed the use of the water of such tank, it is open to the Court to presume that the water of such tank was dedicated by the owner for public use. **C** BHABADEB CHATTERJEE *v.* BHUSAN CHANDRA MUKHERJEE **712**

——— **s. 26**—*Easement—Onus.*

The onus of proving all the points which are necessary to establish an easement under s. 23 of the Limitation Act is on the person who asserts its existence. **L** RAJA RAM *v.* BRIJ LAL, 1 L. C. 456; 26 P. L. R. 42; A. I. R. 1925 Lah. 297 **485**

——— **s. 29**—Amendment of 1922, scope of, effect of. *See* LIMITATION ACT, 1908, s. 6 **563**

——— **ss. 29, 6**—*C. P. Land Revenue Act (II of 1917), s. 160—Suit for village profits—Minority of plaintiff—Extension of time.*

Limitation Act—contd.

Section 6 of the Limitation Act applies to a suit for share of village profits by a minor plaintiff as provided by s. 160 of the C. P. Land Revenue Act.
The amendment of s. 29 of the Limitation Act in 1922 did not restrict its scope but extended it. Under the old s. 29 none of the provisions of the Limitation Act were applicable unless they were expressly included by the special or local Act. Under the new s. 29 some of them are applicable without being expressly included unless they are expressly excluded the rest remain, as before, applicable only when they are expressly included. **N** MADHO RAO BHATATE *v.* BALAJI NARAYAN **563**

——— **Sch. I, Art. 11A**—*Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 103—Mortgage decree—Sale of property including shares of persons other than mortgagor—Application for delivery of possession, dismissal of—Suit to recover possession—Limitation.*

A mortgage-decree provided for the sale of the mortgagor's share in certain property. In execution of the decree, however, the whole of the property including the interest of the other co-sharers was sold, and was purchased by the decree-holder himself. The latter applied for delivery of possession but his application was dismissed. More than a year after the date of the dismissal of his application he instituted a suit to recover possession of the mortgagor's share in the property sold after effecting a partition of the property :

Held, (1) that inasmuch as at the execution sale the mortgagor's share alone passed to the decree-holder, the decree-holder's appliation for delivery of possession of the whole of the property which he purported to purchase at the sale was bound to be dismissed and that, therefore, it was not necessary for the decree-holder to have the order dismissing his application set aside within a year from the date of the order ;

(2) that the present suit was consequently not barred by the provisions of Art. 11A of Sch. I to the Limitation Act. **M** MUTHU PILLAI *v.* ALAGARSAMI PILLAI, 22 L. W. 663; (1926) M. W. N. 165; A. I. R. 1926 Mad. 232 **961**

——— **Art. 62.** *See* LIMITATION ACT, 1908, SCH. I, ART. 96 **151**

——— **Art. 89**—*Principal and agent—Date fixed for settlement of accounts—Accounts, suit for—Limitation, commencement of.*

Where a date is fixed between a principal and agent for the settlement of accounts, limitation for a suit for accounts by the principal against the agent begins to run from the date fixed and not from the date of the last transaction entered into by the agent on behalf of the principal. **L** LAKHMI CHAND *v.* FIRM CHAJJU MAL-RATAN LAL **487**

——— **Arts. 96, 62**—*Common mistake, money paid under—Limitation—Starting point.*

In a suit for damages for shortage in goods sold by the defendant to the plaintiff, the defendant cannot escape liability on the ground that the seller from whom he himself purchased the goods as being of full quantity had become insolvent, and that as he himself had lost his chance of getting compensation for shortage from his seller, he should not be called upon to pay for shortage to his buyer. **M** RAMIAH & Co. *v.* SADASIVA MUDALIAR, 49 M. L. J. 228; 22 L. W. 341; (1925) M. W. N. 688; A. I. R. 1925 Mad. 1255; 48 M. 925 **151**

Limitation Act—contd.

——— **Sch. I, Arts. 97, 120**—*Execution of decree—Rateable distribution—Property sold recovered by third person—Suit to recover amount paid out to decree-holder—Limitation, commencement of.*

Plaintiff obfoined a decree against one *C*, in execution of which he put up for sale certain properties as belonging to *C*. The properties were purchased by the plaintiff. Defendand, who had also obtained a decree for money against *C*, applied for rateable distribution of the sale-proceeds and obtained a certain portion of the purchase-money. *C*'s wife subsequently obtained a decree for possession of some of the properties which had been sold in execution of the plaintiff's decree on the ground that the properties belonged to her and not to *C*. In a suit by the plaintiff to recover from the defendant a proportionate share of the price paid by the plaintiff for the properties which had been recovered by *C*'s wife:

Held, that limitation for the suit began to run from the date of the decree in favour of *C*'s wife and not from the date on which possession of the properties was actually taken by her in execution of her decree from the plaintiff. **C** BIRAJ BOYED *v.* BEJOY SINHA DUDHURIA, 30 C. W. N. 79; A. I. R. 1926 Cal. 297 **768**

——— **Art. 116**—*Transfer of Property Act (IV of 1882), s. 55—Vendor and purchaser—Implied covenant for title—Decree against vendor by third person—Failure of consideration—Limitation, operation of—Appeal by vendor, effect of.*

A suit for compensation for breach of express or implied covenant for title and quiet enjoyment in respect of a sale-deed executed after coming into force of the Transfer of Property Act is governed by Art. 116 of Sch. I to the Limitation Act.

The statutory covenants under s. 55 (2), Transfer of Property Act, are attached to the transaction of the sale and not merely to the contract which precedes the sale. Therefore, contracts which are to be contained in a sale-deed or such terms of contract which the law imports into a sale are contracts within the meaning of Art. 116 of Sch. I to the Limitation Act.

Where the title of a vendor is found against him in a suit by a third person, the consideration for the sale fails and limitation runs against the purchaser from the date when the decree of the Court is given in favour of such third person. The date when the decree is confirmed in appeal and second appeal is immaterial. **M** SINGAMANI PANDITHAN *v.* MUNIBADRA NAINAR, 49 M L. J. 668; 22 L. W. 701; A. I. R. 1926 Mad. 255 **514**

——— **Arts. 116, 120.** *See* C. P. C., 1908, s. 47 **338**

——— **Art. 120.**

See LIMITATION ACT, 1908, SCH. I, ART. 97 **768**
See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, SCH. II, ART. 124 **1032**

——— **Art. 120**—*Declaration of title, suit for—Limitation, commencement of.*

Limitation for a suit for a declaration of title to a property commences from the date of the first denial of plaintiff's title. Any subsequent denial is only a reiteration of the denial and not a fresh invasion giving a fresh cause of action. **L** JAIMAL SINGH *v.* CHAND SINGH, 1 L. C. 422 **605**

——— **Art. 123,** *applicability of.*

Article 123 of Sch. I to the Limitation Act applies only to cases in which the property sought to be recovered is not only a legacy but is also sought to be

recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the Will or otherwise represents the estate of the testator. C SOURAB BIBI *v.* ABBAS ALI BISWAS, A. I. R. 1926 Cal. 480 **725**

——— **Sch. I, Art. 132**—*Transfer of Property Act (IV of 1882), s. 54—Mortgage of house—Sale of house—House pulled down and materials utilized by vendee—Sale, whether of immoveable property—Liability of vendee—Suit to enforce mortgage—Limitation.*

A house which is built on a site with foundations laid in it is "immoveable property" within the meaning of Art. 132 of Sch. I to the Limitation Act.

Where a house is sold for the purpose of enjoyment as a house with an option to pull it down if the vendee likes, the sale is a sale of immoveable property for the purposes of the Transfer of Property Act.

In order to determine whether a sale is of moveable or immoveable property the Court must see in what state the property sold was at the time of the sale. What the parties intended should be done with the property after the sale should not be taken into consideration in deciding whether the sale was of moveable property or of immoveable property.

The mere fact that mortgaged property exists in a different shape from that in which it was at the time of the mortgage would not extinguish the mortgagee's right against the property in its converted state, and if the person who has converted it has appropriated it to his own use, either in the shape of money, or in the shape of materials, he would still be liable as a mortgagor.

Where a vendee of a mortgaged house pulls down the house and utilizes the materials for other buildings or otherwise deals with them, he cannot escape his liability in respect of the mortgage as vendee of the mortgaged property and the period of limitation for the enforcement of such liability is the usual period of limitation applicable to the case of a mortgage. The proper Article applicable to such a case is Art. 132 of Sch. 1 to the Limitation Act. M KAKARAPARTI PUNNAYYA *v.* CHILAKALAPUDI VENKATAPPA **754**

——— **Arts. 132, 148**—*Mortgages, prior and subsequent—Suit by prior mortgagee without impleading puisne mortgagee—Decree—Purchase by prior mortgagee—Subsequent suit by puisne mortgagee without impleading prior mortgagee—Purchase by puisne mortgagee—Suit to recover possession from prior mortgagee—Limitation.*

A prior mortgagee brought a suit to enforce his mortgage without making a puisne mortgagee party to the suit and in execution of the decree obtained by him purchased the mortgaged property himself. The puisne mortgagee subsequently brought a suit to enforce his mortgage without making the prior mortgagee a party and in his turn purchased the mortgaged property in execution of his decree. He then brought a suit to recover possession of the mortgaged property from the prior mortgagee who held it as purchaser under his decree:

Held, that the suit was governed by Art. 132 and not by Art. 148 of Sch. I to the Limitation Act. C NIL MADHAB MAHAPATRA *v.* JOY GOPAL MAHANTI **719**

——— **Arts. 134, 144**—*Permanent lease of temple property—Suit by succeeding trustee—Article applicable—Starting point of limitation.*

A manager or trustee of a Hindu temple is not "a trustee to whom property has been conveyed in trust" within the meaning of Art. 134 of Sch. I to the Limitation Act.

A suit by a trustee of a Hindu temple to set aside a permanent lease of trust property by a preceding trustee is governed by Art. 144 of Sch. I to the Limitation Act and the period of limitation runs not from the date of the permanent lease but from the date of the accession of the plaintiff trustee to his office. M GOVINDA RAO AVERGAL *v.* CHINNATHAMBI PILLAI, 49 M. L. J. 649; (1925) M. W. N. 871; A. I. R. 1926 Mad. 193 **377**

——— **Sch. I, Art. 142**—*Ejectment suit based on dispossession—Limitation—Burden of proof.*

Article 142 of Sch. I to the Limitation Act applies to a suit in ejectment based on dispossession by the defendant. In such a case the burden lies on the plaintiff to prove that he was in possession of the property in dispute within 12 years before the date of the suit. M KUPPUSWAMI MUDALIAR *v.* CHOKKALINGA MUDALIAR, 49 M. L. J. 788; (1926) M. W. N. 31; 23 L. W. 175; A. I. R. 1926 Mad. 181 **454**

——— **Arts. 142, 144**—*Ejectment suit—Tenancy, allegation of, not established—Burden of proof.*

Where in a suit for ejectment on the allegation that the defendant took possession of the property in dispute as the plaintiff's tenant the allegation as to the tenancy of the defendant is not made good, the plaintiff is entitled to succeed on the strength of his title unless the defendant proves that he has been in adverse possession of the property for the statutory period. In such a case it is not necessary for the plaintiff to prove that he has been in actual possession of the property at some period within twelve years previous to the commencement of the suit. L SANTA SINGH *v.* NARAIN SINGH, 2 L. C. 177 **1047**

——— **Art. 148.** *See* LIMITATION ACT, 1908, SCH. I ART. 132 **719**

——— **Arts. 148, 134**—*Transfer of Property Act (IV of 1882), ss. 72, 76.*

When a mortgagee takes physical possession of the mortgaged property during the continuance of the mortgage, rightly or wrongly, with, without or even against the consent of the mortgagor, his act will not be allowed to limit the right of redemption and the law will treat his possession as that of a mortgagee. Limitation for a suit for redemption in such a case would still be 60 years under Art. 148 of Sch. I to the Limitation Act.

A suit by a mortgagor to recover possession of the mortgaged property from an alienee of the mortgagee who has taken with notice of the mortgage is governed by Art. 148 and not by Art. 134 of Sch. I to the Limitation Act.

Both ss. 72 and 76 of the Transfer of Property Act refer to a mortgagee coming into possession of the mortgaged property, not necessarily at the time of the mortgage but during its continuance, and affirm the duties and obligations resting on the mortgagee when he thus comes into possession of the mortgaged property. His possession is recognised as that of a mortgagee alone. S SULLEMAN *v.* ESSO **87**

——— **Art. 164.** *See* C. P. C., 1908, O. IX, R. 13 **798**

——— **Art. 168, ss. 5, 3**—*Civil Procedure Code (Act V of 1908), s. 151, O. XLI, rr. 17, 19—Appeal—Adjournment—Default of appearance on adjourned date—Dismissal for default—Application*

for re-admission filed beyond limitation—Extension of time—Inherent power of Court, exercise of.

Arguments were heard in an appeal by a District Judge and a date was fixed for announcement of judgment. Judgment was not, however, pronounced on the date fixed as it was represented to the Court that there was an appeal pending in the High Court the decision of which would be a determining factor in the case. The District Judge accordingly adjourned the case to another date. On that date the appeal was called on and in the absence of the parties was dismissed in default under O. XLI, r. 17 of the C. P. C. More than 30 days after the dismissal of the appeal the appellant filed an application under r. 19 of the Order asking for the re-admission of the appeal on the ground that he was not aware of the last date of hearing on which the appeal had been dismissed for default:

Held, (1) that the last date of hearing having been fixed in order to enable the Court and the parties to consider the effect of the decision of the High Court in the appeal pending before that Court, the parties were bound to appear on that date and that the Court was entitled to dismiss the appeal for default on the failure of the parties to appear;

(2) that s. 5 of the Limitation Act could not be resorted to for the purpose of extending the limitation prescribed by Art. 168 of Sch. I to the Limitation Act for an application to re-admit an appeal dismissed for default;

(3) that the Court would not in such a case exercise its inherent powers to help an appellant as this would be tantamount to overriding an express statutory provision enacted in s. 3 of the Limitation Act. **L** DEVI DAS *v.* ANANT RAM, 1 L. C. 27 **168**

——— **Sch. I, Arts. 180, 181**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 95—Execution of decree—Sale—Auction-purchaser, application by, for delivery of possession—Limitation—Order for delivery, whether can be treated as subsisting till actual delivery—Duty of Court.*

An application by the purchaser of immoveable property at a sale in execution of a decree for delivery of possession is governed by Art. 180 and not by Art. 181 of Sch. I to the Limitation Act.

Where on an auction-purchaser's application for delivery of possession of the property purchased by him the Court makes an order directing delivery of possession, but the order is not carried into effect owing to the default or laches of the auction-purchaser, the Court is justified in dismissing the auction-purchaser's application without giving any notice to him, and on such dismissal the order directing delivery of possession ceases to be operative. If the auction-purchaser thereafter wishes to obtain delivery of possession, he must make a fresh application, and this application will be governed by Art. 180 of Sch. I to the Limitation Act.

Rule 95 of O. XXI of the C. P. C. lays upon the Court the duty to make an order for delivery on an application by the auction-purchaser. Under that rule the Court is not bound to see that delivery is actually effected. **M** VADREVU VISWASUNDARA RAO *v.* VANNAMU PAIDIGADA, 50 M. L. J. 72; 23 L. W. 472 **485**

——— **Art. 182**—*Decree, assignment of—Proceedings for substitution of names—Application for summoning witnesses—Step-in-aid of execution.*

The words "step-in-aid of execution" in Art. 182 of Sch. I to the Limitation Act must be construed as meaning some step which is not of an incidental nature, but which of itself gives an independent and fresh start to, or marks a new and effective stage in, the execution proceedings.

An application for the summoning of witnesses to prove the assignment of a decree in course of proceedings for substitution of the name of the assignee in place of that of the assignor decree-holder is not a step-in-aid of execution. **N** SHRINIVAS *v.* JAGANNATH **1049**

——— **Sch. I, Art. 182 (2)**—*Decree obtained by several plaintiffs jointly—Appeal—Death of one respondent—Substitution, absence of—Consent decree passed by Appellate Court—Execution of decree by heirs of deceased respondent—Limitation, commencement of.*

A decree was obtained against the defendants by several plaintiffs jointly. The defendants appealed and during the pendency of the appeal one of the decree-holders respondents died and his legal representatives were not brought upon the record within the time allowed by law. At the hearing of the appeal the defendants filed an affidavit stating that they had settled the dispute out of Court with the heirs of the deceased respondent and eventually the Appellate Court passed a consent decree in the appeal reducing the amount due to the other respondents on the assumption that the judgment-debtors had settled with the heirs of the deceased respondent. In execution it turned out that no settlement had been made by the judgment-debtors with the heirs of the deceased decree-holder and the latter also applied for execution of the decree:

Held, that having regard to the wording of cl. (2) of Art. 182 of Sch. I to the Limitation Act, limitation for execution of the decree as against the heirs of the deceased respondent began to run from the date of the decree of the Appellate Court and not from the date of the decree of the Trial Court. **Pat** HIA LAL KUMAR *v.* GANU MAHTO, (1925) Pat. 224; A. I R. 1925 Pat. 585; 4 Pat. 844; 7 P. L. T. 209 **308**

Madras City Municipal Act (IV of 1919), s. 169, cl. (5)—*Standing Committee of Madras Corporation—Regulation of free supply of water.*

Under s. 169, cl. (5) of the Madras City Municipal Act, the Standing Committee of the Madras Corporation has power to determine what shall be the free supply of water to a house under varying conditions. The maximum fixed for a particular house need not be the same for all purposes. **M** SUPPUSWAMI IYER *v.* CORPORATION OF MADRAS, 22 L. W. 877; A. I. R. 1926 Mad. 281 **7**

——— **s. 355**—*Publication of regulations, meaning of.*

Where the Council of the Corporation decides to publish and accordingly publishes regulations generally in a particular manner, the provisions of s. 355 of the Madras City Municipal Act are complied with. It is not necessary that to every regulation should be appended the manner in which the Council determines to publish that particular regulation. **M** SUPPUSWAMI IYER *v.* CORPORATION OF MADRAS, 22 L. W. 877; A. I. R. 1926 Mad. 281 **7**

Madras District Municipalities Act (V of 1920), ss. 3 (25), 95—*Professional tax—Residence, meaning of—Person owning house and residing temporarily within Municipal limits, liability of.*

A person permanently residing outside the limits of a Municipality but having a house within such

Madras District Municipalities Act—contd.

limits, where he comes and spends a portion of his holidays in the year, must be deemed to be resident within the Municipal limits within the meaning of s. 3, cl. (25) of the Madras District Municipalities Act and is, therefore, liable to be assessed to professional tax under s. 95 of the Act. M KRISHNAMACHARI *v.* MUNICIPAL COUNCIL, SRIRANGAM, 50 M. L. J. 77 933

——— s. 80—*Absence of notification under s. 80—Levy and appropriation, legality of.*

A Municipal Council can levy a tax on Companies under s. 78 (1) (*b*) of the Madras District Municipalities Act only after publishing a notification under s. 80 of the Act. The provisions of that section are mandatory and the Council has no power to dispense with the notification therein provided for. M KRISHNA JUTE & COTTON MILLS CO., LD. *v.* MUNICIPAL COUNCIL, VIZIANAGARAM, 49 M. L. J. 542; 22 L. W. 619; A. I. R. 1926 Mad. 152 297

——— s. 95. *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s. 3 (25) 933

——— s. 354—*Professional tax, wrongful levy of—Suit for refund of amount paid—Plea of appropriation of amount towards Companies tax.*

A Municipal Council cannot impose charges upon private persons not authorised by the Act to which the Council owes its existence and then, when a suit is filed for the recovery of the amount thus illegally levied allot the amount to some demand alleged to be under the authority of the Act and plead under s. 354 of the Madras District Municipalities Act that no suit lies.

Where a tax is levied by a Municipal Council without the authority of the Act, the person aggrieved is entitled to a decree for refund. M KRISHNA JUTE & COTTON MILLS CO., LD. *v.* MUNICIPAL COUNCIL, VIZIANAGARAM, 49 M. L. J. 542; 22 L. W. 619; A. I. R. 1926 Mad. 152 297

——— s. 354, Sch. IV, cl. (28)—*Professional tax—Suit for refund of assessment, maintainability of.*

Section 354 (2) of the Madras District Municipalities Act read with cl. (28) of Sch. IV of the Act bars a suit for refund of professional tax imposed on a person who has not resided within the Municipal limits for the requisite period. In such a case the remedy of the aggrieved party is only by way of appeal to the Municipal Council. M KRISHNAMACHARI *v.* MUNICIPAL COUNCIL, SRIRANGAM, 50 M. L. J. 77 933

——— Sch. IV, cl. (28). *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s. 354 933

Madras Estates Land Act (I of 1908), s. 3 (2) (d)—Inam *excluded from Permanent Settlement, whether estate—Jurisdiction of Civil Courts—Burden of proof.*

An *inam*, which is not a *Darmila inam*, and which is excluded from the scope of the Permanent Settlement, whether enfranchised by the Inam Commissioner or not, can be governed by the Madras Estates Land Act only if it is a whole village and even then only if the conditions of s. 3 (2) (*d*) of the Act are satisfied, as to which the onus is on the person who seeks to oust the jurisdiction of the Civil Courts. M NARAYANA DOSS *v.* SANKARASUBBIER, 21 L. W. 692; (1925) M. W. N. 568; A. I. R. 1925 Mad. 1197 571

——— s. 3 (11)—"*Rent*," *meaning of—Land in river bed.*

Under the definition contained in s. 3 (11) of the Madras Estates Land Act 'rent' means whatever is lawfully payable to a land-holder for the use or occupation of land in his estate for the purpose of agriculture and, therefore, includes whatever is payable not merely on *ryoti* land or old waste or *kambatham* but on any land whatsoever, provided the land is used or occupied for the purpose of agriculture. M TRUSTEE OF VIZIANAGARAM ESTATE *v.* PAILA ACHANAH, 22 L. W. 522; (1925) M. W. N. 771; A. I. R. 1926 Mad. 140 280

——— s. 26—"*Bringing into cultivation*," *meaning of—Land lying fallow, whether "waste land."*

The expression "bringing into cultivation" in s. 26, Madras Estates Land Act, means cultivating land which had not previously been cultivated or at any rate had not been cultivated for a long period. The mere fact that land has been fallow for some years cannot constitute it as "waste land" within the meaning of that section. M GOVINDA RAO AVERGAL *v.* CHINNATHAMBI PILLAI, 49 M. L. J. 640; (1925) M. W. N. 871; A. I. R. 1926 Mad. 193 377

——— s. 46 (5)—Devasthanam—*Person improperly appointed manager, whether landholder—Occupancy rights, grant of, validity of.*

Where there is a proper manager or trustee of a *devasthanam*, a person who is appointed improperly in his place cannot be treated as the real trustee and allowed to validly represent the *devasthanam*. A person so appointed is not a land-holder who is the owner of the estate for the purposes of s. 46 (5) of the Madras Estates Land Act and a grant by him of occupancy rights in non-*ryoti* land belonging to the *devasthanam* is not valid and does not bind the institution. M NALAKAKKAN AMBALAM *v.* KALLALAGAR DEVASTHANAM, 49 M. L. J. 628; 22 L. W. 622; (1925) M. W. N. 865; A. I. R. 1926 Mad. 156 319

——— s. 111. *See* C. P. C., 1908, s. 115 576

——— s. 112—*Arrears of rent, payment of, by stranger—Acceptance by land-holder, effect of—Interest of person paying, whether can be questioned.*

A total stranger cannot, by depositing the amount of rent under s. 112 of the Madras Estates Land Act obtain a stoppage of the sale. He ought to possess an interest which will be affected by the sale.

Where, however, the land-holder accepts the amount deposited by a stranger, it must be taken that he accepts it, as if it was paid for rent due by the *raiyat* and if that is so, he cannot change his position afterwards and question the interest of the person paying it. M MAHARAJA OF JEYPORE *v.* SOBHA SUNDAR DALAI, 49 M. L. J. 540; A. I. R. 1926 Mad. 149 576

——— s. 125—*Mortgage by* ryot *without landlord's permission—Revenue sale—Suit on mortgage against purchaser—Sale, validity of—Burden of proof.*

Where a person purchased certain properties in a rent sale under the Madras Estates Land Act, in a suit on a mortgage executed prior to the sale by the *ryot* but without the landlord's permission, the plaintiff contended that the rent sale was vitiated by irregularities and was invalid:

Held, (1) that the mortgage effected without the landlord's permission was not binding on the purchaser in the revenue sale, unless the sale were held to be invalid;

(2) that the burden of proving the invalidity of the sale lay on the plaintiff.

The principle that the burden is on the landlord who relies on a special procedure to prove every condition necessary for the validity of the sale is inapplicable to such a case as the above where it is the purchaser and not the landlord whose rights are sought to be limited by imposing on him a mortgage to which he would not be liable if the sale had been properly

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conducted. M ARULANANDAM PILLAI *v.* MALAYA PILLAI NADAN 355

——— **ss. 131, 189**—*Landlord and tenant—Sale for arrears of rent—Fraud—Suit to set aside sale—Jurisdiction of Civil Courts.*

The right to set aside a revenue sale held under the provisions of the Madras Estates Land Act conferred by s. 131 of that Act does not take away the right of suit in the ordinary Civil Courts to set aside the sale on the ground of fraud. A suit, therefore, by a tenant to set aside a sale of his holding held under the provisions of the Madras Estates Land Act for arrears of rent, on the ground that the sale was brought about by fraud, is maintainable. M PAPAKANNU ERRAPPA REDDI *v.* MUTCHELI PEDDAMUNI SWAMI SETTI, 49 M. L. J. 560; A. I. R. 1926 Mad. 161; 23 L. W. 411; (1926) M. W. N. 325 264

——— **Sch. A, Art. 8**—*Rent, suit for, in respect of lands in river bed—Jurisdiction of Revenue Courts.*

All suits for recovery of rent except on *kambatham* land are covered by Art. 8 of the Schedule, Part A, Madras Estates Land Act, and are exclusively triable by a Revenue Court. M TRUSTEE OF VIJIANAGRAM ESTATE *v.* PAILA ACHANAH, 22 L. W. 522; (1925) M. W. N. 771; A. I. R. 1926 Mad. 140 280

Madras Insolvency Rules, r. 47. *See* PRESIDENCY TOWNS INSOLVENCY ACT, 1909, s. 11 127

Madras Local Boards Act (XIV of 1920), ss. 164, 221 (3)—*Encroachment—Penalty—Magistrate moved to recover penalty—Defence of no encroachment, whether competent.*

When a Local Board moves a Magistrate under s. 221 of the Madras Local Boards Act of 1920 to recover a penalty imposed for encroachment, the defaulting party cannot ventilate before the Magistrate his claim that there was no encroachment at all.

The question for decision under s. 221 (3) of the Madras Local Boards Act is as to the amount due or its apportionment and not whether the penalty is at all leviable.

Section 221 of the Madras Local Boards Act only applies to the manner of recovery of the penalty and does not re open the question whether the defaulter is "bound" to pay the penalty imposed. M RAMACHANDRAN SERVAI *v.* PRESIDENT, UNION BOARD, 49 M. L. J. 356; 22 L. W. 393; A. I. R. 1925 Mad. 1015; (1925) M. W. N. 743; 27 Cr. L. J. 97 529

Madras Religious Endowments Act (I of 1925), *retrospective operation of.*

The Madras Religious Endowments Act of 1925 is not retrospective in effect in respect of proceedings already instituted. M ARUMUGHA THAMBIRAN *v.* NAMASIVAYA PANDARA SANADHI, 22 L. W. 130; 49 M. L. J. 324; (1925) M. W. N 569; 48 M. 688; A. I. R. 1926 Mad. 162 109

Madras Revenue Recovery Act (II of 1864), s. 58—Ryotwari *land—Revenue Settlement—Enhanced revenue, imposition of, during currency of period of settlement, legality of—Suit for declaration, maintainability of—Jurisdiction of Civil Courts.*

The duration of a *ryotwari* land Revenue Settlement in Madras according to the declared intention of the Government of Madras is 30 years and the rate fixed at such Settlement cannot be increased during the period for which the Settlement is made.

Where the Government by a Notification issued at the time of a *ryotwari* land Revenue Settlement fixes a certain amount as being payable for certain kinds of lands, the act of the Government amount to a release, grant or an engagement, but by whatever word it may be described, the clear effect is that the Government irrevocably undertakes not to enhance the assessment during the currency of the settlement.

The proprietorship of a *ryotwari* holder in his holding in the Madras Presidency is subject to the prerogative which the Crown has according to the Common Law of India of imposing by an executive act assessment on land and varying it from time to time.

But in the actual exercise of this prerogative the Crown is not supposed to proceed without any regard to definite and well-established principles such as that the Crown is not entitled to more than a fixed share of the produce and that the usual Settlement period is 30 years.

Although by virtue of the provision contained in s. 58 of the Madras Revenue Recovery Act the Civil Courts are prohibited from deciding any question as to the rate of revenue or as to the amount of assessment, they have full jurisdiction to decide whether or not certain land is at all under any liability to be assessed to land revenue, and whether Government having entered into a binding engagement, by which the assessment is fixed at a certain rate for a certain period, they can alter the rate during that period. Section 58 of the Madras Revenue Recovery Act is not a bar to such a suit. M ECHIKAN CHARAKARA KELLU NAIR *v.* SECRETARY OF STATE FOR INDIA, 49 M. L. J. 79; 48 M. 586; (1925) M. W. N. 815; 22 L. W. 762; A. I. R. 1925 Mad. 1134 82

Malabar Law—Anubhavam *grant, nature of—*Anubhavam, *meaning of—Construction of deed—Subsequent conduct of parties, relevancy of.*

In Malabar the word '*anubhavam*' may be used with reference to tenure of land, and it will then *prima facie* import an irredeemable tenure, or it may be used with reference to specific money or grain rent charged on the land, and in that case it will not imply any tenure in favour of the grantee.

Where the remuneration mentioned in an *anubhavam* deed is a definite quantity of grain out of the produce of the lands, a strong presumption arises that only a rent charge was granted.

Although the circumstances attending the execution of a document may be looked at to construe its contents in order to ascertain the intention of the parties at the time, subsequent assertions by the parties with reference to that document cannot affect its meaning. M MARATH VEETIL KALLIANNI AMMA *v.* COCHIN SIRCAR, 22 L. W. 473; A. I. R. 1926 Mad. 143 316

——— Tarwad—Karnavan, *powers of—Suit by junior member in respect of* tarwad *property maintainability of.*

A *karnavan* is the controlling authority of a Malabar *tarwad* and all the powers of management are vested in him. Unless the *karnavan* himself is disabled from suing to recover possession of or obtain other reliefs regarding the *tarwad* property a junior member is not entitled to sue on behalf of the *tarwad* for a relief claimable by the *tarwad* in respect of the *tarwad* property. M VAYYAPRATH KUNNATH PACKI *v.* VAYYAPRATH KUNNATH MAHAMAD, 49 M. L. J. 513; A. I. R. 1926 Mad. 150 638

Malicious prosecution—*Damages, suit for—Reasonable and probable cause—Burden of proof.*
In a suit to recover damages for malicious prosecution the plaintiff must prove the absence of reasonable and probable cause. O NAND LAL *v.* DEBI DIN 223

Master and servant. *See* C. P. C., 1908, s. 99 525

——— *Gross incompetence of servant—Dismissal—Damages, suit for, maintainability of.*
An employer is entitled to dismiss an employee who is utterly incompetent to do the work for which he is employed and in such a case the employee is not entitled to maintain a suit for damages for wrongful dismissal. M MALABAR FORESTS & RUBBER CO. LD. *v.* MACLEOD, 22 L. W. 675; A. I. R. 1926 Mad. 270 615

Mortgage—*Hindu father, mortgage by—Suit for possession by mortgagee—Consideration challenged by sons—Procedure.*
A suit for possession by a mortgagee from a Hindu father was resisted by the sons on the ground that certain of the items of the consideration for the mortgage were not binding on them. The mortgagee contended that if any of the items was binding on the sons, he could not be refused possession under the mortgage-deed, and that the proper occasion for coming to a decision as to the amount for which the sons were liable under the deed would be when the question of paying the money arose:
Held, that it was necessary, or at least desirable, for the Court to define the plaintiff's right to possession, and in order to do this, it had to decide both as regards the *quantum* of the mortgaged property and as regards the sum for which that *quantum* must be held to be mortgaged, and that it was not a mere question of accounts. O BHARATH SINGH *v.* SHEODAT SHARMA 189

——— *Mortgagor and mortgagee*—Rajinama *and* kabuliyat, *effect of—Ownership in mortgaged land, whether transferred.*
The passing of a *rajinama* by a mortgagor of land in favour of the mortgagee, and of a corresponding *kabuliyat* to Government by the mor gagee, do not necessarily imply the extinction of the mortgage and a transfer of ownership in favour of the mortgagee. The question as to the effect of the *rajinama* and *kabuliyat* in each case must depend upon its own facts. The documents are evidence the effect of which must be weighed in each case on the merits. B RACHAPPA CHANBASAPPA *v.* NINGAPPA KASAPPA, 27 Bom. L. R. 1253; 49 B. 847; A. I. R. 1926 Bom. 40 349

——— *Redemption—Mortgagee releasing portion of mortgaged property from mortgage-debt—Owner of portion of equity of redemption, whether can sue for partial redemption—Equity—High Court, power of.*
The Transfer of Property Act is not exhaustive and a High Court, as a Court of Equity, is entitled to administer the principles of equity, as laid down in decided cases, which are not distinctly prohibited by Statute.
Where a mortgagee has acted in such a way as to release a portion of the mortgaged property from the mortgage-debt, a mortgagor who is the owner of a part of the equity of redemption is entitled to redeem that portion of the property in which he is interested. B MAYASHANKAR MULSHANKAR *v.* BURJORJI MERWANJI BATLIVALA, 27 Bom. L. R. 1449; A. I. R. 1926 Bom. 31 978

——— *Redemption suit—Mortgage-deed, proof of—Covenants contained in mortgage-deed, whether proved*

Mortgage—concld.

—Burden of proof—Interest, compound, whether penalty—Contract Act (IX of 1872), s. 74.
Where in a suit for redemption of a mortgage, the mortgage-deed is produced by the mortgagee and is duly proved, all the conditions contained in the mortgage-deed must be taken to have been proved. If either party wants to impugn any condition contained in the mortgage-deed it is his duty expressly to raise a plea to that effect and to establish that plea by evidence. In the absence of such a plea and evidence to support the plea, the plaintiff is bound to pay to the mortgagee the full amount which is recoverable on the basis of the mortgage-deed.
A covenant in a mortgage-deed providing for the payment of compound interest at the rate of Re. 1-8-3 per cent. per mensem does not by itself amount to a penalty. L RAM CHAND *v.* NANAK CHAND, A. I. R. 1925 Lah. 580; 7 L. L. J. 417 762

——— Suit for possession — Alternative relief—Simple money-decree. *See* PLEADINGS 6

——— Transfer by mortgagee—Transferee taking with notice of mortgage—Adverse possession—Limitation. *See* LIMITATION ACT, 1908, SCH. I, ART. 148 87

Muhammadan Law—Joint family—*Co-heir, suit by, to recover possession of his share—Possession of co-heirs, whether adverse—Ouster, proof of.*
Although the doctrine of joint family does not apply to a Muhammadan family, there is nothing to prevent the ordinary law of occupation applying to such a family. Where, therefore, it is found that certain Muhammadan co-heirs have been in possession of the property of a deceased person, the possession of the co-heirs must enure for the benefit of the other co-heirs unless it can be shown that there has been an ouster of the latter by the co-heirs in possession. C SOURAB BIBI *v.* ABBAS ALI BISWAS, A. I. R. 1926 Cal. 480 725

——— ——— *Muhammadan dealing with common property—Common benefit, presumption of—Co-tenant, whether trustee.*
Prima facie a Muhammadan dealing with property owned in common deals only with what he is entitled to deal with, *viz.*, his own share.
There is no provision in Muhammadan Law that the acquisitions of the several members are made for the benefit of the family jointly. M ABDUL SAMAD KHAN *v.* BIBIJAN, 49 M. L. J. 675; A. I. R. 1925 Mad. 1149; (1925) M. W. N. 543 618

———**Marriage**, *dissolution of—Impotency at time of marriage, proof of.*
Under the Muhammadan Law a wife cannot be granted a decree for dissolution of marriage on the ground of the impotency of the husband unless she proves that he was impotent at the time of the marriage. L FEROZE DIN *v.* WAZIR BEGUM, 2 L. C. 134 82

Municipal Election—Election Tribunal—Procedure. *See* ELECTION 450

Municipal tax, *non-collection of—Abrogation of tax.*
Where there is a valid rule duly framed by a Municipality and duly sanctioned for the levy of a certain tax, there can be no tacit or inferential abrogation of the tax, *e.g.*, by non-collection of the tax for a length of time, and so long as the rule is there it may be enforced at any time without further ceremony or without obtaining new sanction. S HYDERABAD MUNICIPALITY *v.* HAKUMAL 409

Negligence—*Damage caused by wrongful act strengthened by natural causes—Damages, calculation of, basis of—Nominal damages, when to be awarded.*

Nominal damages are intended to be awarded only where the plaintiff has sustained *damnum sine injuria*, that is, where a right of his has been infringed but not so as to cause any sensible damage.

Where the plaintiff has sustained damage by reason of the defendant's wrongful act, although such damage would not have been caused if the defendant's act had not been strengthened by natural causes, such as heavy rainfall, and it cannot be ascertained that any definite portion of the damage caused is due solely to the intervention of the natural cause, the plaintiff is entitled to recover damages calculated on the basis of the actual loss suffered by him. **M** GADEPALLI SEETHARAMASWAMI *v.* SECRETARY OF STATE FOR INDIA, 21 L. W. 449; (1925) M. W. N. 352; A. I. R. 1925 Mad. 682 **489**

Nuisance—*Temple or* mantapam, *building of, whether nuisance.*

In the absence of evidence it cannot be assumed that a temple, if built, would by itself amount to an actionable nuisance to the neighbours of the locality; much less can it be assumed that the building of a *mantapam* annexed to a temple would be such a nuisance.

If subsequently, however, in the way in which the temple authorities use the temple or the *mantapam* an actionable nuisance is committed by them, a cause of action may arise. **M** MUHAMMAD HUSSAIN *v.* BABA SAH **595**

Original Side Rules of Madras High Court. *See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, ss. 39, 40 **751**

Opium Act (I of 1878), s. 11—*Conveyance used for carrying opium—Confiscation—Notice to owner, necessity of.*

Under s. 11 of the Opium Act a conveyance used for the purpose of carrying opium is liable to confiscation, which means that the section leaves it to the discretion of the Tribunal which is trying the case to decide whether having regard to the facts of a particular case, the conveyance used in the carrying of the opium may be confiscated.

In a case where there is no improper conduct imputed to the owner of the conveyance, and, where during the course of the case nothing is proved to show improper conduct on the part of the owner, it would be advisable for the Magistrate who is trying the case to give the owner an opportunity of being heard before he comes to the conclusion whether the conveyance should be confiscated. **C** MOHAMAD KESHAB *v.* EMPEROR, A. I. R. 1925 Cal. 1021; 30 C. W. N. 240; 27 Cr. L. J. 127 **703**

Oudh Estates Act (I of 1869), s. 13A—*Oudh Estates (Amendment) Act (III of 1910), s. 6—Bequest in contravention of provisions of Act, effect of—Personal law, applicability of.*

Section 6 of the Oudh Estates (Amendment) Act of 1910 which adds s. 13-A to the Oudh Estates Act of 1869 is not retrospective and does not validate a bequest which had already failed.

Where a bequest of property which is subject to the provisions of the Oudh Estates Act of 1869 is made in contravention of the provisions of the Act and the devisee obtains the property under the bequest and acquires a title thereto, the property passes out of the purview of the Act and becomes subject to the personal law of the person acquiring it. **P C** MATA PRASAD *v.* NAGESHAR SAHAI, 3 O. W. N. 1; A. I. R. 1925 P. C. 272; L. R. 6 A. (P. C.) 195; 28 O. C. 352; 24 A. L. J. 1; 43 C. L. J. 51; (1926) M. W. N. 83; 47 A. 883; 50 M. L. J. 18; 13 O. L. J. 19; 52 I. A. 398 (P. C.) **370**

Oudh Laws Act (XVIII of 1876), ss. 10, 13—*Civil Procedure Code (Act V of 1908), s. 65—Auction-sale—Property, when vests in auction-purchaser—Sale between date of auction and confirmation—Pre-emption, right of—Notice, absence of, effect of.*

Property knocked down to an auction-purchaser at a Court-auction vests in the auction-purchaser from the date of the auction and not from the date of the confirmation of the sale. Such an auction-purchaser, therefore, becomes entitled to a notice under s. 10 of the Oudh Laws Act in respect of any sale which takes place subsequent to the date of the auction and before the date of confirmation and if such notice is not given to him he is entitled to pre-empt the sale. **O** ABDUL RAHMAN *v.* FATEH NARAIN DAS, A. I. R. 1926 Oudh 189 **1047**

Oudh Rent Act (XXII of 1886), s. 3 (10)—*Grove-holder, whether tenant—Dispossession by landlord—Suit by grove-holder to recover possession—Jurisdiction of Civil and Revenue Courts.*

A grove-holder cannot be regarded as a tenant until there is a contract between him and the landlord to pay rent. He is entitled to hold possession so long as the land retains the character of a grove and the mere fact that the land is liable to resumption or assessment of rent, if brought under cultivation, does not make the grove-holder a tenant liable to ejectment.

Where, therefore, a grove-holder is ejected illegally by the landlord, a suit by him to recover possession lies in the Civil Court and not in the Revenue Court. **O** SECRETARY OF STATE FOR INDIA *v.* HARCHARAN DASS, 3 O. W. N. 45; A. I. R. 1926 Oudh 98; 13 O. L. J. 115 **927**

——— **ss. 7A (5), 3 (17)**—*Execution of decree—Sale of* sir *land—Ex-proprietary rights—Auction-purchaser, rights of—Trees planted on* sir *land, effect of.*

A question of pure law which was raised but not pressed before the lower Court can be argued in second appeal.

Where *sir* land is sold at an auction sale in execution of a decree against the proprietor, the auction-purchaser acquires only the rights of the proprietor to recover rent from the ex-proprietary tenant and is not entitled to recover actual possession of the land.

All arrangements in contravention of the policy of the law which secures ex-proprietary rights in *sir* lands to the proprietor on a transfer of proprietary rights are contrary to law, illegal and void and cannot be enforced by the vendee in any Civil or Revenue Court.

The fact that trees are planted on *sir* land does not destroy the character of the land as *sir*. **O** CHANDRA SEN SINGH *v.* BHAGWAN SINGH, 3 O. W. N. 51; A. I. R. 1926 Oudh 177 **938**

——— **ss. 7 A (5), 3 (17)**—*Sale of* sir *lands—Covenant to relinquish ex-proprietary rights, validity of—Purchase-money, reduction in.*

The policy of sub-s. (5) of s. 7A of the Oudh Rent Act is not to be defeated by any ingenious devices, arrangements or agreements between a vendor and a vendee for the relinquishment by the vendor of his *sir* land or land which he has cultivated continuously for twelve years at the date of the transfer, for instance, by providing in the sale-deed for a reduction of the purchase-money in case of the vendor's failure or refusal to relinquish such lands in favour of the vendee. All such devices, arrangements and agreements are in contravention of the policy of the Act and are contrary to law, illegal and void and cannot be enforced by the vendee in any Civil or Revenue Court. The vendee cannot in such a case be relieved from his obligation to pay any portion of the purchase-money to the vendor on the ground that the vendor has broken his contract in respect of the relinquishment of his ex-proprietary rights in the *sir* lands included in the sale-deed. O HASAN BAQAR *v.* SHEO NARAIN SINGH, 3 O. W. N. 25; A. I. R. 1926 Oudh 81; 13 O. L. J. 178 **917**

Pardanashin lady, *compromise entered into by—Burden of proof.*

A person who relies upon a deed or power executed by a *pardanashin* lady must satisfy the Court that the deed or power was explained to and was understood by the lady. This doctrine applies also to agreements to compromise litigation, though it may be sufficient in such a case to show that the general result of the compromise as distinct from the details and legal technicalities involved was understood by the lady and that disinterested and competent persons with a fair understanding of the whole matter advised her to execute it. C ANANDA PRIYA BAISHNAVI *v.* BIJOY KRISHNA RAY **705**

——— *Compromise, when binding—Burden of proof.*

In order that a compromise entered into by a *pardanashin* lady should be held binding upon her it is sufficient to show that the general result of the compromise was understood by her and that people disinterested and competent to give advice with a fair understanding of the whole matter, advised the lady that the deed should be executed. O DHIRAJ KUNWAR *v.* CHANDRIKA PRASAD **1050**

Partition—*Decree directing payment in cash by one sharer to others, nature of—Charge, whether created —Procedure to enforce payment—Suit, separate, whether maintainable—Civil Procedure Code (Act V of 1908), s. 47—Transfer of Property Act (IV of 1882), s. 100—Partition Act (IV of 1893).*

A sale which a partition Court can make under the provisions of the Partition Act must be a sale of a complete share and implies the transfer of ownership of some definite and specified property.

A partition decree is a joint declaration of the rights of persons interested in the property of which partition is sought, and is a decree in favour of each sharer whether plaintiff or defendant.

Where in order to equalize the shares allotted to the different co-sharers under a partition decree, a certain sum of money is directed to be paid by one sharer to the others, the remedy of the sharers to whom the payment is to be made is by way of execution of the decree for partition. No charge in respect of the amount to be paid is created on the share allotted to the party who is required to make the payment and a suit to enforce the payment of the money by way of charge is not, therefore, maintainable.

Section 100 of the Transfer of Property Act, which defines the nature of a charge, requires both the specification of the property and that it should be made security for the payment of the money, there can be no charge unless the property concerned is reasonably certain. O CHOB SINGH *v.* WILLIAMS **1009**

——— *suit—Appeal—Parties, necessary, failure to implead, effect of.*

In a partition suit it is necessary for all persons interested in the property to be before the Court and this is equally necessary in the case of an appeal from the decision of the Trial Court in a partition suit. The mere fact that certain persons who were parties to the partition suit before the Trial Court would not, if made parties to the appeal, contest the appeal, is no ground for not impleading them as appellants or respondents to the appeal. Where any of the necessary parties to the suit are not made parties to the appeal, the appeal cannot proceed. C MOHAMMAD ABJAL *v.* HAFIZANNESSA KHATUN **567**

Partition Act (IV of 1893), ss. 2, 3, *scope of—Order for sale under s. 2—Subsequent application by party for purchase under s. 3, whether maintainable.*

The procedure laid down in s. 3 of the Partition Act cannot be applied after the Court has directed a sale of the property under s. 2 of the Act. The proper time for a party to apply under s. 3 to buy the property at a valuation fixed by the Court, is before the Court makes an order under s. 2 for sale, and after a request had been made by one of the parties that the property should be sold. Once a final order is made as between the parties that the property should be sold under s. 2, no order can be made under s. 3.

The share-holder who offers to buy the property and at whose instance a valuation is made by the Court is the person who is entitled to buy the property. The words "such share-holder" which occur in the latter part of cl. (1) of s. 3 necessarily mean the share-holder who applied for leave to buy. M ANGAMUTHU MUDALIAR *v.* RATNA MUDALIAR, 49 M. L. J. 411; 22 L. W. 323; (1925) M. W. N. 786; A. I. R. 1925 Mad. 1234; 48 M. 920 **516**

Patent, *infringement of—Damages, award of—Injunction to hand over infringing articles—Order, whether justified.*

Where in a suit relating to the infringement of a patent, the Court awards damages for loss caused to plaintiff, an order calling upon the defendant to hand over the infringing articles to the plaintiff is unjustified. The proper order would be to order the defendant to destroy those articles. O SHEO RATAN SINGH *v.* RAJINDRA SINGH, 2 O. W. N. 908; A. I. R. 1925 Oudh 652 **140**

Penal Code (Act XLV of 1860), s. 21—*P. W. D. lascar, whether public servant—Assault on public servant.*

The definition of a public servant in s. 21 of the Penal Code includes every officer in the service or pay of Government.

A P. W. D. lascar who is carried on the regular establishment of the Department and whose general duty is to carry out the orders of his superior officer, the local overseer, and who in the course of his duties

Penal Code—contd.

is carrying out a function of Government, namely, the distribution of water from public channels, is a public servant within s. 21 of the Penal Code. **M** PUBLIC PROSECUTOR, MADRAS *v.* KIMIDI ANNAM NAIDU, 21 L. W. 701; 49 M. L. J. 102; A. I. R. 1925 Mad 1093; 48 M. 867; 27 Cr. L. J. 81 **385**

——— **ss. 34, 325**—*Assault with* lathis—*Common intention—Grievous hurt.*

The causing of grievous hurt must be regarded as the intention of those who use *lathis* for the purposes of s. 34, Penal Code. **O** SHEO SHANKAR *v.* EMPEROR, 2 O. W. N. 862; 27 Cr. L. J. 62; A. I. R 1926 Oudh 148 **238**

——— **s. 64**—*Imprisonment in default of fine, whether incumbent on a Magistrate to inflict.*

It is not incumbent upon a Magistrate to impose a term of imprisonment in default of payment of fine. Section 64 of the Penal Code merely says that it is competent to the Court to pass such a direction, and if the Magistrate wants to avoid giving a second term of imprisonment in default of payment of fine, he can refrain from making a direction under that section. **B** EMPEROR *v.* SUBRAO SESHARAO, 27 Bom. L. R. 1351; 27 Cr. L. J. 111; A. I. R. 1926 Bom. 62 **543**

——— **ss. 65, 67**—*Bombay Prevention of Gambling Act (IV of 1887), s. 5—General Clauses Act (X of 1897), s. 25—Gambling—Sentence of fine—Imprisonment in lieu of fine, duration of.*

The provisions of ss. 65 and 67 of the Penal Code apply equally to punishments inflicted under a special law, like the Gambling Act and, therefore, the maximum term of imprisonment which can be awarded in lieu of fine in respect of an offence under s. 5 of the Gambling Act is one week only. **S** EMPEROR *v.* RADHO, 27 Cr. L. J. 90 **394**

——— **ss. 71, 149, 304, 325**—*Riot—Grievous hurt caused to several persons—Death resulting from grievous hurt—Conviction, separate, for grievous hurt and culpable homicide, legality of.*

Accused assaulted the party of the complainants and caused injuries to several members of that party. Some of the injuries were grievous and in one case they proved fatal. All the accused were convicted of offences under ss. 304/149 and 325/149 of the Penal Code and were awarded separate sentences in respect of each offence:

Held, that a conviction under ss. 325/149 was not legal in the face of the conviction under ss. 304/149 as the major offence included the minor. **L** QADIR BAKHSH *v.* EMPEROR, A. I. R. 1925 Lah 539; 7 L. L. J. 369; 27 Cr. L. J. 132 **804**

——— **s. 84**—*Murder by accused—Insanity, plea of—Unaccountable conduct—Absence of motive—Effect—Acquittal—Procedure—Criminal Procedure Code (Act V of 1898), s. 471.*

The accused on an evening followed two person who were returning from their work with two stones in his hand and attacked them and struck one of them on the head with those stones and inflicted serious wounds on him, with the result that he died. It appeared that just before the offence was committed, the accused was behaving in an extraordinary manner and had been muttering something to himself that some persons had ruined him. No apparent sane motive could be alleged for the attack which was really unaccountable. The accused was in normal condition at the time of trial :

Penal Code—contd.

Held, (1) that at the time when the accused attacked the two persons he was really suffering from an impulse of *homicidal mania* and as a result of it he commited these offences, and the case fell under s. 84, Penal Code and the accused ought to be acquitted;

(2) that as the accused was no longer suffering from insanity, he should be detained in the Jail where he already was, not as convict, but in safe custody unerd s. 471, Cr. P. C., pending further action by Government. **M** *In re* VODDE SUBBIGADU, (1925) M. W. N. 649; 22 L. W. 550; 49 M. L. J. 598; A. I. R. 1925 Md. 1238; 27 Cr. L. J. 46 **78**

——— **s. 97.** *See* PENAL CODE, 1860, s. 141 **540**

——— **ss. 99, 101, 302**—*Police Officer conducting search—Assault on member of household—Private defence, right of, whether arises—Death caused by blows from stick—Intention—Offence.*

Deceased who was a Sub-Inspector of Police while proceeding to make a search assaulted and insulted a female member of the household who occupied the house to be searched. Accused, who was a male member of the household, remonstrated with the deceased, the deceased resenting the conduct of the accused struck him with a cane whereupon the accused grappled with the deceased. A constable who was present thereupon struck the accused with a stick which he was carrying and two other constables also ran up to the spot. The accused snatched the stick from the hands of the constable who had struck him and delivered two blows with it on the Sub-Inspector's head which caused a fracture of his skull and resulted in his death :

Held, (1) that the Sub-Inspector was acting in excess of his authority in assaulting the woman and was not acting in good faith and that consequently the provisions of s. 99 of the Penal Code had no application to the case ;

(2) that the accused had a right to defend a female member of his household from assault and when he was subsequently assaulted himself both by the Sub-Inspector and by the constable he had a right to defend himself ;

(3) that in hitting the Sub-Inspector it could not be held that the accused intended either to cause the death of the Sub-Inspector or even grievous hurt and that the intention of the accused was merely to put a stop to the Sub-Inspector's illegal aggressions ;

(4) that the accused having acted in the exercise of the right of private defence and not having exceeded it was not guilty of any offence.

Per Boys, J.—The sections of the Penal Code dealing with the right of self-defence are very valuable in that they lay down general principles for the guidance of Courts, but they are principles which are only intended to afford a guide to the Courts as to what is to be held reasonable and what is to be held unreasonable and punishable by law. The test in each case is whether the action of the accused was unreasonable and unjustified. That is to say whether his acts were acts which in ordinary parlance he had no right to commit. **A** EMPEROR *v.* PARAM SUKH, L. R. 6 A. 173 Cr.; 23 A. L. J. 1037; 27 Cr. L. J. 11; A. I. R. 1926 All. 147 **43**

——— **ss. 99, 104, 149, 325**—*Unlawful assembly—Determination to enforce right by violence—Rioting—Grievous hurt—Right of private defence of property, whether available.*

M and *R* were throwing earth upon a narrow path of the *shamilat* and in so doing threw earth upon

certain fences with which the accused had formed an enclosure upon the *shamilat*. The accused, eight in number, thereupon made a combined attack upon *M* and *R* causing several injuries to them, one of which was inflicted on the head of *M* and proved fatal, the remaining being trifling:

Held, (1) that as the matter was not urgent, no serious loss of property was threatened, and there was ample time to have recourse to the authorities, the accused could not be said to have been acting in the exercise of the right of private defence of property;

(2) that the accused were members of an unlawful assembly being determined to resist by violence any attempt by *M* and *R* to repair the pathway and that it must have been within the knowledge of all the accused that grievous hurt was likely to be inflicted on the other side in the course of the fight;

(3) that, therefore, all the accused were guilty of an offence under s. 325 read with s. 149 of the Penal Code with regard to the fatal injury inflicted upon *M* and of an offence under s. 323 read with s. 149 of the Code with regard to the injuries inflicted upon *R*. **L** DATA RAM *v.* EMPEROR, 27 Cr. L. J. 7 **39**

——— **s. 100.** *See* PENAL CODE, 1860, s. 141 **540**

——— **ss. 103, 304**—*Burglar discovered in house at night—Death caused by blows on head—Right of private defence, whether exceeded—Offence.*

Accused was awakened in the middle of the night by the sound of movements in an enclosure adjoining the room where he was sleeping. On getting up he found a man inside the enclosure and in the scuffle which ensued he killed him by striking him on his head three times with his stick:

Held, (1) that although the deceased had been guilty of the offence of house trespass the offence had been completed once the deceased had effected his entry into the enclosure and the accused was not, therefore, entitled to the exercise of the right of private defence under the provisions of s. 103 (2) of the Penal Code;

(2) that accused having found a burglar in his house in the middle of the night in a dark room had every reason to suppose that the burglar had committed theft or was going to do so and that if he met him the burglar would presumably strike him and that inasmuch as the accused could not know in the dark whether the burglar was armed or not, it could not be said that he had exceeded his right of private defence by striking the burglar three times and rendering him incapable of doing any further injury to his person or property and that the act of the accused was covered by the provisions of cl. (4) of s. 103 of the Penal Code and he had consequently committed no offence. **L** ISMAIL *v.* EMPEROR, 6 L 463; A. I. R. 1926 Lah. 28; 27 Cr. L. J. 38 **70**

——— **s. 120B**—*Conspiracy, charge of—Single individual, whether can be convicted.*

Where a charge of conspiracy is based upon the fact that only three persons participated in the conspiracy, and two of those persons are acquitted of the charge, the third must necessarily be acquitted also, inasmuch as a charge of conspiracy cannot stand as against a single individual. **C** PRAFULLA KUMAR ROY *v.* EMPEROR, 30 C. W. N. 91; 27 Cr. L. J. 147; A. I. R. 1926 Cal. 345 **883**

——— **ss. 141, 147, 148, 323, 325**—*Rioting—Unlawful assembly—Common object—Sudden attack by numerous party—Injuries inflicted on former—Offence—Private defence, right of.*

For the purpose of establishing the offence of unlawful assembly which is a necessary element in the offence of rioting, it must be established that the unlawful assembly had a common object by means of criminal force or show of criminal force of doing any of the various things mentioned in s. 141 of the Penal Code, and the common intention of the unlawful assembly to use criminal force must be established as a fact by legal evidence.

There was a dispute between the Pallars and Kallars of a village in respect of the right to catch fish in an *oorani*. The Kallars armed and in large numbers went to the *oorani* to exercise their right and suddenly ran towards and attacked the Pallars, 20 or 30 in number, who were gathered 200 yards off and the latter in the course of the attack inflicted injuries on their assailants. They were convicted of offences under ss. 147, 148, 323 and 325 of the Penal Code:

Held, (1) that no common criminal intention having been established with regard to this assembly of Pallars, they were not members of any unlawful assembly and were not guilty of the offence of rioting;

(2) that in the course of their defending themselves against a sudden and virulent attack by a much larger body of Kallars, the Pallars were entitled to inflict such injuries as they had inflicted, and that consequently, they were not guilty of any offence. **M** RAMASWAMI *v.* EMPEROR, (1925) M. W. N 666; A. I. R. 1925 Mad. 1213; 27 Cr. L. J. 108 **540**

——— **ss. 149, 325.** *See* PENAL CODE, 1860, s. 99 **39**

——— **s. 173**—*Refusal to accept summons—Offence.*

The mere refusal to accept a summons does not amount to an offence under s. 173 of the Penal Code. **A** BANWARI *v.* EMPEROR, 27 Cr. L. J. 142; 24 A. L. J. 216 **814**

——— **s. 193**—*Affidavit, false statement in—Prosecution for perjury—Criminal Procedure Code (Act V of 1898), s. 342—Immunity.*

A false statement of an accused in an affidavit in support of his transfer application is not immune from prosecution and can be the subject-matter of a charge for perjury. **L** EMPEROR *v.* QADIR BAKHSH SHAH, 1 L. C. 475; A. I. R. 1925 Lah 312; 6 L. 34; 27 Cr. L. J. 98 **530**

——— **s. 197**—*Government Savings Banks Act (V of 1873), rules made under—Certificate within s. 197—Certificate by agent of female depositor that depositor alive and sane, whether covered.*

A certificate given under the Post Office rules in the case of a female depositor withdrawing a deposit by her authorized agent to the effect that the depositor is alive and sane, is not a certificate either prescribed by the Government Savings Banks Act or by statutory rules made thereunder, and is not, therefore, a certificate which falls within the purview of s. 197 of the Penal Code.

Per *Suhrawardy, J., Obiter dictum.*—The certificate contemplated in s. 197 of the Penal Code is a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of the administration of justice. **C** BIRENDRA NATH CHATTERJEE *v.* UMANANDA MUKHERJEE, 30 C. W. N 120; 42 C. L. J. 557; 27 Cr. L. J. 182; A. I. R. 1926 Cal. 258 **998**

——— **s. 201**. *application of.*

Section 201, Penal Code, applies merely to the person who screens the principal or actual offender

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and not to the principal or actual offender himself. L AHMAD *v.* EMPEROR, 1 L. C. 454; 27 Cr. L. J. 109 541

——— s. 201—*Causing disappearance of evidence of crime—Criminal himself, whether liable.*

Section 201 of the Penal Code does not apply to a criminal causing evidence of his own offence to disappear, but exclusively to *another* person who screens the actual offender.

When a person is said or believed to have himself committed an offence, he cannot be convicted of causing disappearance of the evidence of that offence, even though he cannot be convicted of the principal offence as well for want of sufficient evidence. N KUDAON *v.* EMPEROR, 21 N. L. R 86; A. I R. 1925 Nag. 407; 27 Cr. L. J. 60 236

——— ss. 211, 109. *See* CR. P. C., 1898, s. 476 36

——— s. 228—*Interruption to judicial proceeding, what amounts to.*

Obiter dictum :—For a conviction under s. 228 of the Penal Code there must be intentional interruption to the Court. The mere fact that two persons who are being jointly tried for the same offence consult together in Court before making their statement in Court does not amount to an interruption in the proceedings of the Court and is not, therefore, an offence under s. 228 of the Code. N MAHADEOSINGH *v.* EMPEROR, 8 N. L. J. 190; A. I. R 1925 Nag. 403; 27 Cr. L. J. 66; 22 N. L. R. 1 242

——— s. 290. *See* POLICE ACT, 1861, s. 34 883

——— s. 300—*Murder—Deliberation or previous preparation, whether essential.*

Section 300, Penal Code, says nothing about deliberation or previous preparation. It speaks only of intention and knowledge. If the act by which death is caused is done with the intention of causing death, the offence is murder, unless it falls within the exceptions. O SHEO SHANKAR *v.* EMPEROR, 2 O. W. N. 862; 27 Cr. L. J. 62; A. I. R. 1926 Oudh 148 238

——— ss. 300, Excep. I, 302—*Wife found by husband sitting with lover—Death caused by husband—Grave and sudden provocation—Offence.*

Accused's wife left her house after giving the accused his mid-day meal. She went to a grove and there met her lover. The accused after finishing his meal took up a *banka* and went in search of his wife. He found her sitting with her lover and killed her with the *banka* :

Held, that the provocation although grave was not sudden so as to deprive the accused of his self-control and that Excep. I to s. 300 of the Penal Code did not, therefore, apply and the accused was guilty of murder. O CHAINU *v.* EMPEROR, 27 Cr. L. J. 65 241

——— ss. 300, Excep. IV, 304—*Death caused by blows with knife—Injuries caused to accused person—Explanation, absence of—Sudden fight—Presumption—Offence.*

Accused inflicted four injuries on the person of the deceased with a clasp knife, one of them in the abdomen which proved fatal. The accused himself received numerous injuries, some of them on the head, in respect of which no explanation was given in the evidence for the prosecution. The accused had no motive for the deliberate murder of the deceased as it was not proved that he had any real grudge against him. It was found that the deceased at the time of the attack upon him was armed with a stick:

Held, (1) that under the circumstances it must be presumed that there was a sudden and unpremeditated fight between the accused and the deceased, but that the accused had exceeded his right of private defence in giving the deceased several injuries, one of them on a very vital part of the body;

(2) that the act of the accused fell within the provisions of the 4th Exception to s. 300 of the Penal Code and that he was, therefore, guilty of an offence under s. 304 part I of the Code. L FEROZE *v.* EMPEROR, 2 L. C. 109; 7 L. L. J. 533; A. I. R. 1925 Lah. 633; 27 Cr. L. J. 26 58

——— s. 304—*Death caused by beating—Offence.*

Accused, four in number, gave a severe beating to the deceased with blunt and sharp edged weapons as the result of which he died. The injuries caused to the deceased were numerous, but they were nearly all bruises and abrasions, mostly on the legs and arms and none of them individually amounted to more than simple hurt:

Held, that the accused were not guilty of murder but that they must be deemed to have known that by giving the deceased such a beating as they did they were likely to cause his death and that, therefore, they were guilty of an offence under s. 304, part II of the Penal Code. L BELI *v.* EMPEROR, 2 L. C. 111; 7 L. L. J. 524; A. I. R. 1925 Lah. 621; 27 Cr. L. J. 29 61

——— s. 304A—*Culpable rashness or negligence, what amounts to—Car driven slowly at night over road under repairs—Death caused of men sleeping on road—Offence.*

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross or culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to the individual in particular, which, having regerd to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

Culpable rashness is acting with the consciousness that mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening; the imputability arises from acting despite the consciousness. Culpable negligence is acting without consciousness that the illegal and mischievous act will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.

Each case must be judged in reference to the precautions, which in respect to it, the ordinary experience of man has found to be sufficient, though the use of special or extraordinary precautions might have prevented the particular accident which happened.

Accused was driving in an old and noisy motor car, at night, along a road which was under repairs, at a slow pace. The car ran over two coolies who happened to be sleeping on the road and caused their death :

Held, that it could not be said that the accused had been guilty of culpable rashness or negligence and that consequently he was not guilty of an offence under s. 304A of the Penal Code. C SMITH *v.* EMPEROR, 30 C. W. N. 66; 27 Cr. L. J. 153; A. I. R. 1926 Cal. 300 889

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——— **ss. 304, 325, 149.** *See* PENAL CODE, 1860, s. 149 804

——— **ss. 325, 149.** *See* PENAL PODE, 1860, ss. 99, 104 39

——— **ss. 339, 341**—*"Wrongful restraint," what amounts to—Obstructing person from proceeding in certain direction with bullocks—Offence.*

All that s. 339 of the Penal Code protects is the obstruction of any person. The section does not cover a case where a person is himself left free to proceed in a direction in which he has a right to proceed, but without any impediment (such as a cart) that he may have with him. The circumstances of each case must, however, be considered and if the obstruction to a person's taking a thing with him amounts to obstructing the person himself from going in a manner he has a right to go, there is "wrongful restraint" within the meaning of s. 339 of the Penal Code.

Accused prevented the complainant from using a *mot* to which he had yoked his bullocks on the slope of a well which existed for that purpose :

Held, that the accused having obstructed the complainant from proceeding with his bullocks in a direction in which he had a right to proceed with his bullocks were guilty of an offence under s. 341 of the Penal Code. **B** LAHANU MANAJI *v.* EMPEROR, 27 Bom. L. R. 1419; 27 Cr. L. J. 139; A. I. R. 1926 Bom. 118 811

——— **s. 352.** *See* PENAL CODE, 1860, s. 447 392

——— **ss. 363, 364, 365**—*Kidnapping in order to hold kidnapped person to ransom—Offence.*

Where two persons are kidnapped in the course of the same transaction, there are two distinct offences of kidnapping and it is lawful to award separate sentences for each offence although it is not necessary that the sentences should run consecutively. **L** SAMANDAR *v.* EMPEROR, 1 L. C. 17; 27 Cr. L. J. 64 240

——— **s. 379**—*Theft, what constitutes*—Bona fide *belief of legal right.*

The essence of the offence of theft is the dishonest taking of moveable property out of the possession of some person. In the absence of dishonest intention a charge of theft cannot be sustained.

Where a person removes property under a mistaken notion of law that the property is his and that he is entitled to retain it, he cannot be held to have committed theft of the property. **C** HAMID ALI BEPARI *v.* EMPEROR, 52 C. 1015; 27 Cr. L. J. 80; A. I. R. 1926 Cal. 256 149

——— **s. 379**—*Theft, essence of—Possession of accused, effect of.*

An offence under s. 379 of the Penal Code is an offence against possession, and a person cannot, therefore, be convicted of stealing something of which he was already in possession. **C** SHAIKH GARIB HAJI *v.* MUCHI RAM SHAU, A. I. R. 1925 Cal. 1020; 27 Cr. L. J. 133; 30 C. W. N. 359 805

——— **s. 394**—*Woman, with husband living, marrying another—Offence committed by the latter.*

If a woman having her husband living marries another person, the person to whom the woman is re-married is not guilty of the substantive offence of bigamy but is liable for abetment. **A** MUNIR *v.* EMPEROR, L. R. 6 A. 209 Cr.; 27 Cr. L. J. 101; 24 A. L. J. 155; A. I. R. 1926 All. 189 533

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——— **s. 396**—*Dacoity with murder—Several persons taking part—Facts to be proved.*

In a case under s. 396 of the Penal Code it is not necessary for the prosecution to prove that the murder was committed jointly by all the accused. It is enough if any one of the accused who are jointly concerned in the committing of the dacoity commits murder in the commission of the dacoity. It is not, therefore, necessary for a charge under this section to state that the murder was committed by all the accused persons jointly. **O** BHULAN *v.* EMPEROR, 27 Cr. L. J. 57 233

——— **s. 403**—*Criminal misappropriation—Stray bullock found by accused and sold after effort to discover owner—Offence.*

Accused took possession of a *la-waris* bullock, kept it for 20 days, advertised for the owner and nobody having turned up eventually sold it :

Held, that under the circumstances it could not be said that the accused was guilty of an offence under s. 403 of the Penal Code. **A** AMIR HASAN KHAN *v.* EMPEROR, 27 Cr. L. J. 5; A. I. R. 1926 All. 251 37

——— **s. 404**—*Misappropriating property of deceased person—Decree obtained against assets of deceased—Removal of property to cause loss to decree-holder—Offence.*

A suit was instituted against *D* as the legal representative of a deceased debtor in order to recover from him the debt due by the deceased out of the assets left by the deceased which were in the hands of *D*. *D* pleaded that *A* was the heir of the deceased and that he himself had nothing to do with the assets of the deceased. A decree was, however, passed against the assets of the deceased in the hands of *D*. While the decree was outstanding *D* and his son *S* removed certain rafters from the roof of the house left by the deceased :

Held, that *D* and *S* having removed the rafters from the house of the deceased in order to obtain a wrongful gain to the prejudice of the decree-holder whose decree was still outstanding, they were guilty of an offence under s. 404 of the Penal Code. **A** DAUD KHAN *v.* EMPEROR, A. I. R. 1925 All. 673; L. R. 6 A. 200 Cr.; 27 Cr. L. J. 17; 24 A. L. J. 153 49

——— **s. 411.** *See* CR. P. C., 1898, s. 234 64

——— **ss. 411, 414**—*Evidence Act (I of 1872), ss 9, 88, 114—Assisting in disposing of stolen property—Telegram informing Police of theft, whether admissible—Presumption—Ownership of stolen property, whether must be traced—Circumstantial evidence—Prosecution, duty of.*

In order to establish a charge under s. 414 of the Penal Code on circumstantial evidence, the prosecution must show that upon the facts admitted or proved the propositions that the property which is the subject-matter of the charge is stolen property, and that the accused had guilty knowledge are the only propositions which are consistent with the rest of the evidence. If, on the other hand, the accused can put forward any alternative hypothesis reasonably possible or even probable, he is entitled to the benefit of the doubt and the case against him must fail.

The Bombay Police received a telegram purporting to emanate from the Chief Commissioner of Police, Nyasaland, informing the Commissioner of Police, Bombay, that certain blank drafts in duplicate belonging to the Blantyre Branch of the Standard Bank on their London Office had been stolen and it was feared that signatures would be forged and negotiation

Penal Code—contd.

attempted in Bombay. The Bombay Police sent a telegram in reply to the Nyasaland Police making enquiries from the latter and received a second telegram in reply, whereupon the Commissioner of Police, Bombay, circulated the information contained in the telegrams to the Banks in Bombay. Accused cashed one of the drafts mentioned in the telegrams from Nyasaland at the French Bank in Bombay and obtained payment. Next day he presented and attempted to obtain payment of another of the drafts at the Eastern Bank of Bombay. The clerk to whom the draft was presented asked the accused to wait and informed his superiors who communicated with the Police and the latter arrested the accused. The accused was put upon his trial for offences under ss. 414 and 414/511 of the Penal Code in respect of the draft cashed by him and that attempted to be cashed :

Held, (1) that the telegrams purporting to be sent by the Nyasaland Police were relevant to explain the conduct of the clerk of the Eastern Bank and of the Bombay Police and were, therefore, admissible in evidence under s. 9 of the Evidence Act ;

(2) that in the circumstances of the case it was a reasonable presumption under s. 114 of the Evidence Act that the telegrams had emanated as they purported to do from the Nyasaland Police and that the Nyasaland Police had received information from the Standard Bank of Blantyre that the drafts mentioned in the telegrams were missing and that the Bank believed that they were stolen and feared that they might be forged and misused in Bombay ;

(3) that the telegrams being admissible in evidence could be considered along with the rest of the evidence in order to determine whether the drafts were stolen property ;

(4) that for the purposes of a conviction under s. 414 of the Penal Code it was not necessary to trace the ownership of the drafts and that it was sufficient if it was proved that the drafts were stolen property ;

(5) that as upon the evidence on the record read along with the explanation of the accused it was not possible to hold that the accused could have been in possession of the drafts honestly, the drafts must be held to be stolen property, and that the accused was guilty of the offences charged.

Per *Fawcett, J.*—There is no warrant for the proposition that a person who might be charged under s. 411 of the Penal Code cannot be charged and convicted under s. 414 of the Code.

Section 414 of the Penal Code requires that the accused should have assisted some one else in the disposal of the property and does not cover a case where a person receives and then disposes of the stolen property entirely on his own account. **B** EMPEROR *v.* ABDUL GANI BAHADURBHAI, 27 Bom. L. R. 1373; 49 B. 878; 27 Cr. L. J. 114; A. I. R. 1926 Bom. 71 **690**

——— **s. 412.** *See* EVIDENCE ACT, 1872, s. 114, Ill. (1) **544**

——— **s. 442**—*Enclosure forming part of house, whether building.*

An enclosure surrounded on all four sides by a wall, entrance and exit from which is effected through a gate which is kept locked at night, and which forms an indivisible part of a residential house is a "building" within the meaning of s. 442 of the Penal Code. **L** ISMAIL *v.* EMPEROR, 6 L. 463; A. I. R. 1926 Lah. 28; 27 Cr. L. J. 38 **70**

Penal Code—contd.

——— **ss. 447, 352**—*Purchase of land from ostensible owner—Possession under* bona fide *claim of right—Obstruction—Assault—Offence.*

Where a person who had an ostensible title to a piece of land sold it to another and the latter under a *bona fide* claim of right took possession of the land and ploughed it and in maintaining possession against a rival claimant assaulted the obstructor :

Held, that there being no certainty that the obstructor was the owner of the land, and the accused having acted under a *bona fide* claim of right, no offence either of trespass or assault was committed by him. **M** ABDUL ALI *v.* AMIRUDDIN, 27 Cr. L. J. 88; 23 L. W. 426 **392**

——— **s. 471**—*Fraudulently using forged document as genuine—Ingredients of offence—User, what amounts to—Document produced in compliance with order of Court, effect of.*

Whenever a person fraudulently or dishonestly presents a document to another person as being what it purports to be, or causes the same to be so presented, knowing or having reason to believe that the document is a forged document, the document is "used as genuine" within the meaning of s. 471 of the Penal Code. It is immaterial whether the document was presented by the accused himself or by his agent expressly authorized in that behalf or whether it was produced by the accused of his own motion or pursuant to the order of the Court, if in the event he uses it as genuine. Whether there has been a user or not must depend upon the circumstances of each case. If all that the accused has done is to swear that a forged document is a genuine document he has not "used" the document within the meaning of s. 471, but if the evidence discloses that the accused, when called upon to produce a document which he knew or had reason to believe was a forged document, fraudulently or dishonestly presented that document as being a genuine document, he cannot claim absolution for the fraudulent or dishonest use which he has made of the document merely because he has been served with a summons to produce the document. Such a summons neither compels nor entitles the person served to be a party to a fraud and if the person who has been served with the summons fails to disclose that he believes that the document has been forged, and fraudulently or dishonestly puts forward the document as being a genuine document, he is not acting involuntarily but is deliberately using the document for a criminal purpose.

Neither the acquisition nor the deprivation of property is an essential ingredient of an intent in an offence under s. 471 of the Penal Code. An offence is committed under s. 471 of the Penal Code whenever a document known or believed by the accused to have been forged is used as genuine with the intention that some person thereby should be deceived, and that by means of such deception either an advantage should accrue to the person so using the document, or injury should befall some other person or persons. **C** EMPEROR *v.* MOHIT KUMAR MUKERJEE, 52 C. 881; 27 Cr. L. J. 177; A. I. R. 1926 Cal. 89 **993**

——— **s. 494**—*Bigamy — Second marriage by woman abandoned by husband—Sentence.*

Where a woman who had been left largely to her fate by her husband and had been living in adultery

Penal Code—concld.

with a paramour marries that paramour, she is guilty only of a technical offence under s. 494 of the Penal Code and should be awarded only nominal punishment. **N** RITHA *v.* EMPEROR, 8 N. L. J. 178; 27 Cr. L. J. 74; A. I. R. 1926 Nag. 127 250

——— **s. 497**—*Adultery, prosecution for—Connivance of husband, meaning of.*

Connivance is a figurative expression meaning a voluntary blindness to some present act or conduct, to something going on before the eyes or something which is known to be going on without any protest or desire to disturb or interfere with it.

A person charged with the offence of adultery cannot escape liability by merely showing that the complainant connived at the immorality of his wife. He must prove his specific connivance at her adultery with himself. **A** MUNIR *v.* EMPEROR, L. R. 6 A. 209 Cr.; 27 Cr. L. J. 201; 24 A. L. J. 155; A. I. R. 1926 All. 189 533

——— **s. 498**—*Enticing away married woman—Wife neglected by husband—Sentence.*

Where in a case under s. 498 of the Penal Code it appears that the husband and wife have not been on good terms and that the husband did not care much about the wife and took no action in respect of the offence until several months after the date of its commission, a heavy sentence is not called for. **L** GAHRA *v.* EMPEROR, 27 Cr. L. J. 192; A. I. R. 1926 Lah. 176 1008

——— **s. 511.** *See* PENAL CODE, 1860, ss. 411, 414 690

Pleadings. *See* C. P. C., 1908, s. 91 728

——— *Easement, suit for—Plaintiff alleging easement in favour of himself and others—Easement established in favour of plaintiff alone—Plaintiff, whether entitled to decree.*

If a plaintiff comes into Court and says that he as well as other persons have acquired a right of easement over a certain land, and does not succeed in proving that the other persons have such right, there is nothing to prevent him from succeeding in his claim if he can prove that he has used the land in the way required by law for the purpose of acquisition of a right of easement. **C** MAMIN KHAN *v.* MOIZUDDIN KHAN 348

——— *Mortgage—Suit for possession—Alternative relief—Simple money-decree.*

Where a plaintiff prays for a decree for possession as a mortgagee and in the alternative for any equitable relief, the Court is bound to pass a simple money-decree on the failure of the mortgage for want of attestation. **O** BISRAM SINGH *v.* BHAGWANT SINGH, A. I. R. 1926 Oudh 201 6

——— *and practice—Point not raised by party, whether can be raised by Court—Issue, trial of.*

A Court should not make out a case for a party which that party has not set up in its pleadings.

Where, however, an issue can legitimately arise on the pleadings of the parties, it must be decided upon evidence properly recorded in the case. **L** JHANDA MAL *v.* GOPAL DAS, A. I. R. 1925 Lah. 571; 7 L. L. J. 405 784

Police Act (V of 1861), ss. 31, 32—*Evidence Act (I of 1872), s. 114, Ill. (e)—Toll imposed by District Magistrate for entry into certain grounds—Accused refusing to pay toll—Order by Police constable to pay toll or to turn back, disobedience of—Offence—Legality of toll—Presumption.*

Police Act—concld.

There is a presumption in favour of any order of an official being legal until the contrary is proved.

An order issued under s. 31 of the Police Act may be an oral order by a Police constable issued during the control of the public at any place of public resort.

A District Magistrate had issued orders for the levying of a certain amount of toll on animals and carriages sought to be admitted into a certain *mela* ground. Accused who wanted to drive into the *mela* ground in a bullock tonga was asked to pay toll in respect of it but he refused to do so. The Police constable on duty ordered the accused to pay the toll or to go back and the accused having disobeyed the order was prosecuted and convicted under s. 32 of the Police Act:

Held, that irrespective of the fact whether the toll had been imposed by the District Magistrate with or without jurisdiction, the Police constable was entitled to assume that the toll collector was acting rightfully in carrying out the orders of the District Magistrate, and the order to the accused to pay the toll or turn back was a lawful order given by the constable under s. 31 of the Police Act and the conviction of the accused for an offence under s. 32 of the Act was, therefore, perfectly legal. **A** SHAM SUNDER LAL *v.* EMPEROR, 27 Cr. L. J. 21; A. I. R. 1926 All. 264 56

——— **s. 34**—*Criminal Procedure Code (Act V of 1898), ss. 227, 237—Penal Code (Act XLV of 1860), s. 290—Obstruction to public, charge of—Nuisance conviction for, legality of—Alteration of charge—Procedure—Notice to accused—Power of Court.*

Section 227 of the Cr. P. C. deals with the alteration of a charge, but the alteration must be read and explained to the accused and the latter must know what he is charged with and what offence he has to answer. Section 237 of the Code must be read with s. 227, and a Court has no power to convict an accused person of an offence of which he has not been told anything.

Section 237 of the Cr. P. C. applies only to cases mentioned in s. 236 of the Code, which deals with cases in which an act is of such a nature that it is doubtful which of several offences the facts will constitute.

Accused was tried for an offence under s. 34 of the Police Act on the allegation that he had kept logs of wood in a public place and had thereby caused obstruction to the passers-by. The Magistrate in his judgment found that the act of the accused did not come within the purview of s. 34 of the Police Act but that it amounted to an offence under s. 290 of the Penal Code and convicted the accused of the latter offence, without having at any previous stage of the case explained to the accused that he would have to meet a charge under s. 290 of the Penal Code:

Held, that the conviction was illegal and must be set aside. **A** RAGHUNATH KANDU *v.* EMPEROR, 27 Cr. L. J. 152; 24 A. L. J. 168; A. I. R. 1926 All. 227 888

Possession, *suit for—Defendant holding land under plaintiff—Burden of proof.*

Because a defendant in a suit for the recovery of possession of land is found to be a tenant of some land under the plaintiff, the burden is not thereby cast upon the plaintiff to establish that the land he seeks to recover is outside the tenancy of the defendant. **C** RAFAT SHEIK *v.* SACHINDRA KUMAR LAHIRI 761

Practice—*Administration suit pending in one Court—Court, other, power of, to grant permission for sale of property—Rules of practice of High Court—Privy Council, interference by.*

When a suit for administration of an estate is before a Court competent to entertain it and to order that accounts should be taken in the suit, no other Court would ordinarily have power to grant permission for the sale of property which forms part of the estate.

Where, however, according to the rules of practice of a particular High Court in India, it appears that a Court other than the one before whom an administration suit is pending would have power to grant permission for the sale of property which forms part of the estate, the Privy Council will not interfere with the operation of such rule of practice. **P. C.** MA CHIT SU *v.* NATIONAL BANK OF INDIA, LTD., A. I. R. 1925 P. C. 261; L. R. 6 A. (P. C.) 185; (1925) M. W. N. 847; 23 L. W. 399 (P. C.) **432**

——— *Counter-cases, appeals arising out of, disposal of.*

It is always desirable that when there are cases and cross-cases the appeals arising from such cases should be posted before and tried by the same Bench. **M** RAMASWAMI *v.* EMPEROR, (1925) M. W. N. 666; A. I. R. 1925 Mad. 1213; 27 Cr. L. J. 198 **540**

——— *Criminal trial—Public Prosecutor, duty of.*

A Public Prosecutor must not during the examination of a witness make any remark which is likely to suggest to the witness that he has made a mistake and that he should amend his statement. **A** EMPEROR *v.* PARAM SUKH, L. R. 6 A. 173 Cr.; 23 A. L. J. 1037; 27 Cr. L. J. 11; A. I. R. 1926 All. 147 **43**

——— *Criminal trial—Sentence—Maximum sentence, imposition of—Reasons, whether must be recorded.*

Where a Court awards the maximum sentence provided by the law for an offence it should record its reasons for doing so. **L** HARNAM SINGH *v.* EMPEROR, 2 L. C. 161; 27 Cr. L. J. 186 **1002**

——— *Local investigation—Inspection note not recorded, effect of—Prejudice to parties—Decision, whether can be set aside.*

A Judge should not in a civil case himself hold a local investigation with a view to gather information which he might use as the foundation of his judgment, although he might inspect the locality with a view to enable him to understand the evidence. In the absence of prejudice to the parties the mere fact that a Judge has held a local investigation without recording a note thereof is not a sufficient ground for setting aside his decision. **C** RAM BALLAV MARWARI *v.* MRIGANKA LAL MOKHERJEE **715**

——— Procedure—Insolvency of plaintiff, during pendency of suit, whether suit can proceed. *See* INSOLVENCY **460**

——— *Procedure—Superior and inferior Court having jurisdiction to entertain application.*

Where an inferior Court has jurisdiction to entertain an application, the application must be made to that Court first and its order obtained thereon before a superior Court is asked to exercise such jurisdiction in the matter as it may think fit. **A** KAMLAPATI PUNTH *v.* EMPEROR, 23 A. L. J. 897; L. R. 6 A. 179 Cr.; A. I. R. 1926 All. 27; 27 Cr. L. J. 19; 48 A. 23 **51**

Pre-emption, *decree not complied with, effect of—Appeal, whether can be maintained by plaintiff.*

A plaintiff who obtains a decree for pre-emption but fails to pay the decretal amount within the time fixed by the Court loses his right of pre-emption and is not entitled to maintain an appeal against the decree. **O** UPADHIYA *v.* LALAY **130**

——— *Sale of under-proprietary plot—Vendee holder of other under-proprietary plots in village—Suit for pre-emption by superior proprietor—Equal rights—Procedure.*

An under-proprietary plot in a village was sold to the defendant who held under-proprietary rights in other plots of land in the village. Plaintiff, who was a superior proprietor in the village, brought a suit to pre-empt the sale:

Held, that the plaintiff and the defendant were equally entitled to pre-empt the sale and that the question as to who was entitled to the property should decided by drawing lots. **O** MASIH UDDIN AHMED *v.* MUNIR AHMAD, 13 O. L. J. 166 **1020**

Prescription. *See* ADVERSE POSSESSION.

Presidency Small Cause Courts Act (XV of 1882), ss. 39, 40—*Letters Patent (Mad.), cl. 13—Court Fees Act (VII of 1870), s. 4—Original Side Rules of Madras High Court—Suit of value less than Rs. 1,000 transferred to High Court—Court-fee payable.*

Suits below the value of Rs. 1,000 do not come within the purview of ss. 39 and 40 of the Presidency Small Cause Courts Act, and where such a suit is transferred to the High Court for trial the transfer must be treated as one under powers vested in the High Court under cl. 13 of the Letters Patent and the jurisdiction of the High Court to try such a suit would be its Extraordinary Original Jurisdiction conferred by the Letters Patent.

The fees rules framed by the Madras High Court apply only to cases coming before it in the exercise of its Ordinary Original Jurisdiction or of its Civil Jurisdiction, *viz.*, Admiralty, Vice-admiralty, Testamentary, Intestate and Matrimonial Jurisdiction. There are no rules framed by the High Court in respect of suits transferred to it for trial under its Extraordinary Original Jurisdiction under cl. 13 of the Letters Patent. To such cases, therefore, s. 4 of the Court Fees Act would be applicable and the fees payable in respect of such a suit would be the fees prescribed in the First and Second Schedules to the Court Fees Act. **M** VARADARAJA MUDALIAR *v.* ARUMUGAM PILLAI, 22 L. W. 15; A. I. R. 1925 Mad. 1216 **751**

Presidency Towns Insolvency Act (III of 1909), s. 9 (d) (iii)—*Partnership—Act of insolvency committed by managing partner—Partner, other, whether can be adjudicated insolvent.*

In order that a man may be made a bankrupt, the act of bankruptcy relied upon must be some act which can be definitely brought home to him.

It is impossible to state that there can be no case in which the act of an agent in closing down the business of principal and absconding from the creditors could be treated as an act of the principal. There might be cases in which a Court would be justified in certain circumstances in holding that the act of the agent in violation of s. 9 (*d*) (*iii*) of the Presidency Towns Insolvency Act might and should be treated as the act of the principal, and constitute the foundation for a petition in insolvency against the principal.

The question is, however, one for decision in each case whether on the facts of a particular case the agent occupies such a position that his principal must stand or fall by his acts for the purpose of bringing the case within the Statute of Insolvency.

Two persons traded together in partnership at Madras. One of them resided in Madras and managed the business. The other although ordinarily residing outside Madras used to come there to look into the accounts and see how the business was progressing. The business got into difficulties and the managing partner closed the business down and absconded in order to get out of the clutches of the creditors. On an application by the creditors to adjudicate both the partners as insolvents:

Held, that the circumstances were insufficient to hold that the act of the managing partner was necessarily in law the act also of the other partner, and that the latter could not, therefore, be adjudicated an insolvent. **M** GOPAL NAIDU *v.* MOHANLAL KANYALAL, 49 M. L. J. 709; A. I. R. 1926 Mad. 206; 49 M. 189 **874**

——— **s. 11 (d)**—*"Carrying on business," meaning of—Suit for partition against firm—Appointment of Receiver, whether bars adjudication—Firm, adjudication of, legality of—Madras Insolvency Rules, r. 47.*

So long as there are debts of the business being discharged and assets being got in, a business must be regarded as still being "carried on" within the meaning of s. 11 (*d*), Presidency Towns Insolvency Act.

Where in a suit for partition against a firm a Receiver is appointed by Court, the business does not cease to be "carried on" for the purposes of s. 11 (*d*), Presidency Towns Insolvency Act.

Rule 47 of the Insolvency Rules which says, that an order of adjudication shall be made against partners individually must not be understood to mean that an order of adjudication shall not also be made against the firm. **M** GOKULDOSS GOVERDHANADOSS *v.* DWARKA-DOSS GOVERDHANADOSS, 49 M. L. J. 457; 22 L. W. 411; (1925) M. W. N. 749; 48 M. 795; A. I. R. 1925 Mad. 1249 **127**

——— **ss. 18, 22.** *See* PRESIDENCY TOWNS INSOLVENCY ACT, 1909, s. 90 **160**

——— **ss. 25, 36**—*Protection order, refusal of, for failure of insolvent to produce books of account—Appeal—Interference by Appellate Court—Books in possession of Receiver appointed by Court—Duty of insolvent.*

Where the Registrar has refused to pass a protection order in favour of an insolvent on the ground that he has failed to produce the books relating to his business before the Official Assignee, the High Court will not interfere with the discretion exercised by the Registrar, unless it is convinced that the insolvent has himself taken all steps that were in his power to effect the production of the books before the Official Assignee. The mere fact that the books are in the possession of a Receiver appointed by the Court and that the Official Assignee himself or one of the creditors can apply to the Court under the provisions of s. 36 of the Presidency Towns Insolvency Act for an order that the books should be made over by the Receiver to the Official Assignee would not absolve the insolvent from taking proper steps to have the books produced before the Official Assignee. **C** *In the matter of* GOPAL DAS AUROBA, 30 C. W. N. 112; A. I. R. 1926 Cal. 260 **975**

——— **ss. 90, 18, 22**—*Civil Procedure Code (Act V of 1908), s. 24—Insolvency proceedings instituted in*

High Court—Stay of proceedings in subordinate Court.

The power of withdrawal conferred by s. 24 of the C. P. C. can be exercised by the High Court only on its Appellate Side and cannot be exercised by a Judge sitting on the Original Side of the High Court. The powers of the Insolvency Court given thereto by s. 90 of the Presidency Towns Insolvency Act, being only such powers as are exercised by the High Court in the exercise of its Ordinary Original Civil Jurisdiction, the power of transfer or withdrawal under s. 24 of the C. P. C. is consequently not a power which the High Court can exercise as an Insolvency Court.

The expression "any suit or other proceeding" in s. 18 of the Presidency Towns Insolvency Act means suit or other proceeding other than an insolvency proceeding. Insolvency proceedings are not included within the purview of that section.

Section 22 of the Presidency Towns Insolvency Act enables a Court to stay its own proceedings and does not empower it to order some other Court to stay proceedings.

The High Court exercising its jurisdiction as an Insolvency Court has, therefore, no power to stay insolvency proceedings pending in a Court subordinate to it. **B** *In re* NAGINLAL MAGANLAL JAICHAND, 27 Bom. L. R. 1207; 49 B. 788; A. I. R. 1925 Bom. 543 **160**

Privy Council, *appeal to—Accounts, examination of—Interference by Privy Council with findings of fact by High Courts—Practice.*

In an appeal from the decree of a High Court in India, in a suit which involves a prolonged examination of numerous items of advances and loans and of the evidence relating to them, those who impugn before the Privy Council the findings of fact arrived at by the High Court upon which it based its decree, must draw the attention of their Lordships to the material evidence which they suggest that the High Court misunderstood or failed to appreciate, and on which they contend that their Lordships should come to a conclusion different from that at which the High Court arrived. **P. C.** SOURENDRA MOHAN SINHA *v.* HARI PRASAD SINHA, A. I. R. 1925 P. C. 280; 42 C. L. J. 592; 24 A. L. J. 33; (1926) M. W. N. 49; 7 P. L. T. 97; 50 M. L. J. 1; 5 Pat. 135; 52 I. A. 418; 30 C. W. N. 482 (P. C.) **1033**

——— *judgments, authority of.*

It is not open to the Courts in India to question any principle enunciated by their Lordships of the Privy Council, although they have a right to examine the facts of a case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them, whether on account of "judicial dignity" or otherwise, to question a decision of their Lordships on any particular issue of fact. Any application for review of judgment on grounds permissible by law only lies to the Judicial Committee itself. **P. C.** MATA PRASAD *v.* NAGESHAR SAHAI, 3 O. W. N. 1; A. I. R. 1925 P. C. 272; L. R. 6 A. (P. C.) 195; 28 O. C. 352; 24 A. L. J. 1; 43 C. L. J. 51; (1926) M. W. N. 83; 47 A. 883; 50 M. L. J. 18; 13 O. L. J. 19; 52 I. A. 398 (P. C.) **370**

Promissory note, *executed by guardian of minor—Personal liability, whether excluded—Consideration.*

Promissory note—concld.

A person executing a negotiable instrument is personally liable upon it unless there is a clear indication in the document that he does not intend to incur personal liability but limits the recourse of the payee or holder to the person whom or the estate which he represents as trustee, executor, guardian or agent.

It is open to the guardian of a minor to undertake to pay personally a debt due by the minor's estate, and there is no want of consideration if the creditor agrees to accept the guardian's personal responsibility instead of having recourse against the estate **M** SABAPATHI MUDALIAR *v.* MANIKKAMMAL **879**

Provincial Insolvency Act (III of 1907), ss. 16 (2) (b)—*Adjudication, effect of—Leave to arrest insolvent, grant of—Discretion—Appeal—Interference by Appellate Court.*

The scheme of the Provincial Insolvency Act of 1907 is that when a petition for adjudication is filed and the debtor is adjudicated, the debtor automatically gets the equivalent of what is known as a protection order by virtue of the provisions of s. 16 (2) (*b*) of the Act.

Where a Judge in granting leave to arrest an insolvent under s. 16 (2) (*b*) of the Provincial Insolvency Act of 1907 does not give any reasons on which the Court of Appeal can say whether he has exercised his discretion properly, the Appellate Court should reverse the order and send the case back for fresh enquiry. **M** MULLAPALLI GOPALAN NAIR *v.* KOPPOTHIL GOPALAN NAIR, 22 L. W. 202; (1925) M. W. N. 612; A. I. R. 1925 Mad. 915 **31**

——— **s. 36**—*Mortgage executed by insolvent within two years prior to insolvency—Consideration, proof of—Burden of proof.*

Where a mortgage executed by a person who is subsequently adjudged an insolvent, within two years of the date of the mortgage, is questioned in the insolvency proceedings, the onus is on the mortgagee to prove that the mortgage was effected in good faith and for valuable consideration. **L** DURGA DAS *v.* KUNDAN LAL, 2 L. C. 128 **4**

——— **ss. 44**—*Discharge, refusal of—Fresh application, whether maintainable*

There is nothing in s. 44 of the Provincial Insolvency Act of 1907 to warrant the suggestion that an application for discharge when refused is refused for ever and that no later application or renewal of the former application can be made. **M** MULLAPALLI GOPALAN NAIR *v.* KOPPOTHIL GOPALAN NAIR, 22 L. W. 202; (1925) M. W. N. 612; A. I. R. 1925 Mad. 915 **31**

Provincial Insolvency Act (V of 1920), ss. 27, 4—*Debtor's petition for adjudication under old Act—New Act in force on date of disposal of petition—Procedure applicable—Time for applying for discharge—Failure to apply within time—Notice to creditors on annulment.*

In the case of a debtor filing a petition for being adjudicated an insolvent under the Provincial Insolvency Act (III of 1907), and the petition coming on for disposal after the new Act (V of 1920) coming into force, the procedure applicable is that under the new Act and not the old one. It is, therefore, competent to the Court on making an order of adjudication to fix a period within which the insolvent should apply for a discharge. Where he does not so apply within the prescribed time, it is competent to the Court to annul the order of adjudication.

It is not open to the insolvent to contend that an order of annulment of adjudication is invalid merely because of want of notice to the creditors. **M** KALLUKUTTY PARAMBATH *v.* PUTHEN PEETIKAKKAL KUTTIALI, 22 L. W. 542; 49 M. L. J. 595; A. I. R. 1926 Mad. 123. **144**

Provincial Insolvency Act—1920—contd.

——— **ss. 27, 43**—*Civil Procedure Code (Act V of 1908), s. 148—Adjudication—Failure of debtor to apply for discharge within time fixed—Adjudication, whether must be annulled—Extension of time.*

Per *Tyabji, A. J. C.*—Although the language of s. 43 (*a*) of the Provincial Insolvency Act is mandatory that if a debtor fails to apply for an order of discharge within the period specified by the Court in its order of adjudication the adjudication shall be annulled, the Court has, under s. 27 (2) of the Act, power to extend the period within which the debtor must apply for his discharge, even after the original period fixed for the purpose has expired, with a view to enable the insolvency proceedings to be carried through to completion.

Per *DeSouza, A. J. C.*—The words "shall be annulled" in s. 43 (*a*) of the Provincial Insolvency Act are directory and discretionary and not mandatory or peremptory and it is, therefore, within the discretion of the Court in the circumstances of a particular case, where the debtor has failed to apply for his discharge within the time originally fixed, whether to annul the adjudication or to extend the time within which the debtor must apply for his discharge. **S** SALIGRAM *v.* OFFICIAL RECEIVER **467**

——— **s. 41**—*Order of discharge, conditional—Creditor withdrawing money, whether can appeal—Discharge, when to be granted.*

The over-riding intention of the Legislature in all Insolvency Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood and having the ordinary inducements to industry. Sometimes it is not right that the insolvent should be free immediately; he must pass through a period of probation and theoretically there may be cases in which he ought not to be free at all, but *prima facie* he has to give up everything of his and on doing that he is to be a free man.

Where an order of discharge of an insolvent is made conditional on the insolvent making certain payments to his creditors, the mere fact that a creditor takes out moneys already paid by the insolvent which were available for distribution among the creditors would not debar him from preferring an appeal against the order of discharge. **C** SITARAM *v.* REDDEN, A. I. R. 1926 Cal. 529 **760**

——— **s. 43.** *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 27 **467**

——— **s. 54**—*Fraudulent preference, what amounts to—Intention to prefer—Threat of legal proceedings, whether amounts to pressure.*

The word "preference" as used in s. 54 of the Provincial Insolvency Act means the favouring of one creditor to the detriment of others. The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference but also on the state of mind of the person who made it, that is to say, whether the debtor was actuated by any feeling of bounty towards the creditor or whether he was doing what he did for his own benefit. In other words, the test is did the debtor execute the deed with a view to protect himself or with a view to benefit the creditor.

Provincial Insolvency Act—1920—concld.

What is fraudulent within the policy of the Provincial Insolvency Act is a voluntary act of preferring one creditor to another. Preference imports the act of a person who is free to do either the one thing or the other as he prefers. But if an advantage is given to one creditor under pressure, the act is not done voluntarily and there is no preference. Preference, however, is not voluntary not merely when there is pressure from fear of legal process but that pressure is not the less, because it is pressure upon the debtor's own mind and his own consciousness—from an apprehension of what will happen if bankruptcy takes place; not a pressure by threats of creditors to assert their rights.

Although a threat of legal proceedings against a debtor may be pressure, there are cases where such threats are of no importance and no terror and they may not constitute real pressure so as to validate a transfer by a debtor in insolvent circumstances. **M** ARUNACHALAM CHETTIAR *v.* OFFICIAL RECEIVER, 22 L. W. 134; (1925) M. W. N. 561; 49 M. L. J. 562; A. I. R. 1925 Mad. 1089 **522**

Provincial Small Cause Courts Act (IX of 1887), s. 25—*Revision—Question of fact—Interference by High Court.*

The phrase "according to law" in s. 25 of the Provincial Small Cause Courts Act does not exclude cases in which there has been a grossly erroneous decision of a question of fact. The High Court will not, however, under that section interfere in revision with questions of fact unless it can be shown that the conclusions of fact are so perverse as to lead to a conclusion that the Judge made no serious attempt to deduce them from the evidence before him or was utterly incapable of making such a deduction.

The failure of the Court to suggest an alteration in the frame of the suit does not amount to a material error of law or procedure so as to entitle the High Court to interfere with the decree in revision under s. 25 of the Provincial Small Cause Courts Act. **R** SIVA DASS DEY *v.* ASHABI, 3 R. 471; A. I. R. 1925 Rang. 310; 4 Bur. L. J. 127 **679**

——— **Sch. II, Art. 8**—*Landlord and tenant—Suit for rent coupled with claim for damages for use and occupation of excess lands, nature of—Jurisdiction of Small Cause Court.*

Where in a suit for rent compensation is claimed for the use and occupation of excess land, and the latter claim is treated as a claim for assessment and realization of rent for the excess lands, the suit is not triable by the Court of Small Causes. **C** PECHA MANDAL *v.* BHAIRABENDRA NARAYAN ROY, A. I. R. 1926 Cal. 541 **846**

——— ——— **Art. 15**—*Specific Relief Act (I of 1877), s. 21 (a)—Suit for recovery of silver and gold made over to defendant for making ornaments, nature of—Specific performance—Jurisdiction of Small Cause Court.*

A suit for the recovery of a certain weight of silver and of gold which the plaintiff alleges he had given to the defendant to make ornaments out of, is not a suit for specific performance of a contract, inasmuch as for the breach of such a contract there can be an adequate compensation in money and specific performance of such a contract cannot be enforced under s. 21 (*a*) of the Specific Relief Act. The suit does not fall, therefore, within the purview of Art. 15 of Sch. II to the Provincial Small Cause Courts Act and is not excluded from the cognizance of a Small Cause Court. Such a suit must be treated as one for the recovery of the value of the silver and the gold. **O** GURUCHARAN *v.* KHAGESAR 108

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——— **Sch. II, Art. 24**—*Limitation Act (IX of 1908), Sch. I, Art. 120—Suit to recover money payable under award, whether cognizable by Small Cause Court—Limitation.*

A suit to recover a sum of money directed to be paid to the plaintiff under an award is not a suit to contest an award within the meaning of Art. 24 of Sch. II to the Provincial Small Cause Courts Act and is, therefore, not excluded from the jurisdiction of a Small Cause Court.

Such a suit is governed by Art. 120 of Sch. I to the Limitation Act. **B** NANALAL LALLUBHAI *v.* CHHOTALAL NARSIDAS, 49 B. 693; A. I. R. 1925 Bom. 519 **1032**

——— **Art. 28**—*Suit by father to recover moveables belonging to deceased daughter, nature of—Jurisdiction of Small Cause Court.*

The question whether a suit is or is not cognizable by a Small Cause Court depends upon a construction of the plaint only. What the defence of the defendant in his written statement will be or what attitude the defendant assumed with reference to a demand made by the plaintiff prior to suit are irrelevant considerations for the determination of this question.

A suit by a father as heir of his deceased daughter for recovery of moveables belonging to her on the ground that her marriage was in the *asura* form falls within the purview of Art. 28 of Sch. II to the Provincial Small Cause Courts Act and is excluded from the cognizance of a Small Cause Court. **M** SAMU ASARI *v.* ANANCHI AMMAL, 22 L. W. 462; 49 M. L. J. 554; A. I. R. 1926 Mad. 37 **561**

——— **Art. 29 (b)**—*Suit by partner to recover his share of assets of partnership, nature of—Jurisdiction of Small Cause Court.*

A suit by a partner to recover from another partner his share of the partnership assets falls within the purview of Art. 29 (*b*) of Sch. II to the Provincial Small Cause Courts Act and is not, therefore, cognizable by a Court of Small Causes. **N** ATMARAM *v.* BHAGWAT, 8 N. L. J. 175; A. I. R. 1925 Nag. 447 **216**

——— ——— **Art. 43A**—*Suit to recover moveable property taken forcible possession of by defendant—Jurisdiction of Small Cause Court.*

A suit by a plaintiff to recover the value of certain sovereigns delivered by him to the first defendant and alleged to have been illegally, forcibly and fraudulently wrested from the latter by the second defendant with knowledge of plaintiff's title in them, and without any legal title or valid claim thereto falls within the purview of Art. 43A of Sch. II to the Provincial Small Cause Courts Act and is, therefore, excluded from the jurisdiction of a Small Cause Court. **M** SUNDARAPPIER *v.* KRISHNASAWAMY IYER, A. I. R. 1926 Mad. 320 **659**

Public Gambling Act (III of 1867), ss. 13, 13-A—*Game of skill played in public place—Offence.*

The playing of a game of mere skill for a stake or a prize in a public place amounts to gaming, but is not such gaming as falls within the purview of s. 13 of the Public Gambling Act. **A** PANNA LAL *v.* EMPEROR, L. R. 6 A. 205 Cr.; 27 Cr. L. J. 8; 24 A. L. J. 150; A. I. R. 1926 All. 187; 48 A. 220 **40**

Punjab Courts Act (VI of 1918), s. 41—*Appeal, second—Mercantile usage, question of—Certificate, whether necessary.*

The question whether a mercantile usage relied upon by one of the parties to a suit does or does not exist cannot be agitated in second appeal in the absence of a certificate granted in accordance with the provisions of s. 41 of the Punjab Courts Act. L FIRM GOBIND PRASAD-WAZIR SINGH *v.* FIRM MANGAL SINGH-DULI CHAND 506

Punjab Land Revenue Act (XVII of 1887), s. 117. *See* C. P. C., 1908, s. 11 528

Punjab Pre-emption Act (I of 1913), s. 15—Pre-emption, right of. *See* CUSTOM 443

Railway company—*Carriage of goods—Risk Note—Exemption from liability—Burden of proof—Wilful neglect, meaning of.*

If a Risk Note executed by a consignor exempts a Railway Company from all liability in respect of loss of the goods except in a certain special case, such as wilful neglect of the Railway Administration or theft by or due to the wilful neglect of the servants of the Railway Company, in case of the loss of goods, the burden lies on the consignor to prove that there was wilful neglect by the Railway Company or its servants or theft by its servants.

The term "wilful neglect" implies an intentional and purposeful omission to do a certain act. It is an even more extreme term than "gross and culpable negligence" implying that an individual deliberately refrains with his eyes open from doing an act or taking a step which it is his duty to take. N WALI MOHAMAD *v.* BENGAL NORTH-WESTERN RY. CO. 345

Railways Act (IX of 1890), s. 72. *See* CONTRACT ACT, 1872, s. 151 963

——— **s. 72 (2) (b)**—*Risk Note Form "B"—Liability of Railway Company—"Wilful neglect" and "unforeseen event or accident," meaning of.*

Negligence means the absence of such care or skill as it was the duty of the defendant to use towards the plaintiff.

"Wilful neglect" means that the neglect was on the part of a person who was not only a free agent but who was conscious of the consequences which were likely to ensue from his act or omission, or was recklessly indifferent as to such consequences and that if he had not been so indifferent, he would have known what the consequences would be.

What is negligence or the requisite absence of care in any particular case must depend on the circumstances of that case.

A Railway accident which is caused by the neglect or misconduct of the servants of the Railway Administration does not fall within the meaning of "an unforeseen event or accident" within the meaning of these words as used in Risk Note Form "B." S JAPAN TRADING CO. LD. *v.* SECRETARY OF STATE FOR INDIA, A. I. R. 1926 Sind 9 145

——— **s. 121**—*Obstructing or impeding Railway servant, what amounts to—Railway servant abused and assaulted when off duty—Offence.*

Before a person can be convicted of wilfully obstructing or impeding a Railway servant in the discharge of his duties within the meaning of s. 121 of the Railways Act, it must be shown that the obstruction or resistance was offered to such Railway servant in the discharge of his duties as authorized by law.

Complainant, a goods clerk at a Railway Station, demanded from the accused, a trader who wanted to book certain goods by the Railway for carriage, a rate of freight higher than that which the accused was willing to pay. Accused went away and on returning to the Railway Station shortly afterwards found the complainant sitting on the platform having closed his office. Complainant alleged that the accused then abused and assaulted him:

Held, that assuming that the abuse and the assault were proved it could not be said that the complainant was at the time when he was abused and assaulted exercising any of the duties imposed upon him as a Railway servant and, that, consequently, accused was not guilty of an offence under s. 121 of the Railways Act. L JOWANDA MAL *v.* EMPEROR, 6 L. 467; A. I. R. 1925 Lah. 650; 7 L. L. J. 622; 27 Cr. L. J. 1 33

Rangoon Municipal Act (VI of 1922), ss. 14, 199—*Civil Procedure Code (Act V of 1908), s. 115—Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Chief Judge, Rangoon Small Cause Court—Jurisdiction under s. 14—Court or* persona designata—*Revision—High Court, power of.*

When by an Act of the Legislature, a new authority is constituted for the purpose of determining questions concerning rights which are themselves the creations of the Act, and a Judge or Presiding Officer of a Court, as distinct from the Court itself is directed to perform the functions of the newly created authority, then it must be presumed, unless the contrary is expressly enacted or necessarily implied, that the intention of the Legislature was that the Judge or Presiding Officer should perform these functions as a *persona designata* and not as a Court. Such a presumption is stronger in the case of a Court like the Rangoon Small Cause Court which consists of a plurality of Judges when only one particular Judge is invested with the new powers.

The Chief Judge of the Rangoon Small Cause Court in performing the functions assigned to him by s. 14 of the Rangoon Municipal Act acts as a *persona designata* and not as a Court, and the High Court of Judicature at Rangoon has no power of interference in revision with his decisions either under s. 115 of the C. P. C. or under s. 107 of the Government of India Act. R MUNICIPAL CORPORATION RANGOON *v.* SHAKUR, 4 Bur. L. J. 202; 3 R. 560; A. I. R. 1926 Rang. 25 550

Rangoon Rent Act (II of 1920), s. 15—*Civil Procedure Code (Act V of 1908), s. 115—Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Rent Controller, Rangoon, whether Court—Refusal to certify standard rent—Revision, whether competent—Interference by High Court.*

Held, by the majority (*Robinson, C. J., dissenting*):—That the High Court has no jurisdiction to interfere in revision with an order passed by the Rent Controller, Rangoon, refusing to grant a certificate certifying the standard rent under s. 15 of the Rangoon Rent Act.

Per *Robinson, C. J.*—The expression "appellate jurisdiction" in s. 107 of the Government of India Act does not necessarily imply that there must be some right of appeal to the High Court against the decisions of the Court whose order is sought to be revised. The expression is used merely to indicate the limits of the jurisdiction of the High Court so as to cover the largest area over which its jurisdiction extends.

The Rent Controller, Rangoon, is a Court subordinate to the High Court and a refusal by him to exercise the jurisdiction conferred upon him amounts

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to the decision of a case within the meaning of s. 115 of the C. P. C., and it is open to the High Court, in a suitable case, to consider the correctness of that decision in the exercise of its powers of revision. In any case it is open to the High Court to revise such decision in the exercise of the general powers of superintendence conferred upon it by s. 107 of the Government of India Act. **R** MOHIDEEN *v.* BUKSHI RAM, 3 R. 410; A. I. R. 1926 Rang. 33 **627**

Registration Act (XVI of 1908), s. 2 (6)—*Standing trees, whether immoveable property.*

In order to determine whether a standing tree is or is not immoveable property within the meaning of the definition contained in s. 2 (6) of the Registration Act the intention of the purchaser must be taken into consideration. If the intention is sooner or later to sever the tree from the soil and to use its wood for industrial purpose, then it must be regarded as coming within the exception to the definition but not otherwise. **O** PIRTHI DIN *v.* RAM LAL, 2 O. W. N. 947; A. I. R. 1926 Oudh 136 **512**

——— **s. 17.** *See* CAUSE OF ACTION **618**

——— **s. 17**—*Mortgage—Agreement to re-convey—Registration, necessity of—Legal representatives of parties, whether bound—Contract Act (IX of 1872), ss. 37, 40—Construction of document.*

The predecessor-in-title of the plaintiff sold a certain house by a registered deed of sale to the predecessor-in-title of the defendant for Rs. 2,000. On the same day the vendee executed an unregistered agreement in favour of the vendor whereby he agreed to re-convey the house to the vendor provided the latter paid the purchase-money to him. The agreement contained the following recital :—"After 11 years if you pay Rs. 2,000 I shall re-convey the property. If you do not pay me in time Rs. 2,000 you have then no right for re-conveyance. There is no rent for the house and no interest for the sum. You should not require account for rent and I shall not require interest for money. I shall recover and enjoy rent in lieu of interest. You should pay me Rs. 2,000 as per term as loan without interest :"

Held, (1) that the agreement executed by the vendee in favour of the vendor was not in the nature of a mortgage but was merely an agreement to re-convey and fell within the purview of cl. (v) of sub-s. (2) of s. 17 of the Registration Act and, therefore, did not require registration ;

(2) that the legal representatives of the original parties to the agreement were bound by the terms of the agreement. **B** VAMAN TRIMBAK JOSHI *v.* CHANGI DAMODAR SHIMPI, 27 Bom. L. R. 1261; 49 B. 862; A. I. R. 1926 Bom. 97 **360**

——— **s. 17**—*Mortgage, equitable—Memorandum of terms—Registration, whether necessary—Transfer of Property Act (IV of 1882), s. 59.*

An equitable mortgage may be created by the mere deposit of title-deeds and without any writing being executed between the parties. Where, however, a writing is executed between the parties and is the sole repository of the terms of the bargain between the parties, the transaction can be proved only by proof of the writing and the writing would in such a case require to be registered under the provisions of s. 17 of the Registration Act. Where, however, an equitable mortgage is created by the deposit of title-deeds and a written memorandum of the terms of the deposit is subsequently obtained as a separate transaction altogether, the memorandum does not

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create the mortgage which has already come into existence and does not, therefore, require registration

An equitable mortgage to secure the re-payment of a sum of money lent on a promissory-note was completed simultaneously with the execution of the promissory note by handing over the title-deeds of certain property to the creditor. Some days afterwards a memorandum was drawn up which stated as follows :—"I beg to deposit with you the undermentioned securities and request you to hold the same or any other securities which I may from time to time deposit with you to my order subject to your lien thereon for any loan granted to us. You are hereby authorized to sell the said securities or any of them in any way which you may consider expedient :"

Held, that the equitable mortgage having been created before the memorandum was drawn up the memorandum did not constitute the bargain between the parties and did not require registration. **R** MA SEIN BYE *v.* S. R. M. M. R. M. CHETTY FIRM, 3 R. 443; A. I. R. 1926 Rang. 10 **663**

——— **s. 17 (1) (b)**—*Agreement between parties to suit to divide property after decision of suit—Arrangement for division of profits during pendency of suit—Registration, whether necessary—Transfer of Property Act (IV of 1882), s. 54.*

During the pendency of a suit the parties to the suit entered into an agreement that the litigation should pursue its full course and that whatever the result of the litigation might be the parties at the end of the litigation should divide the property in suit in a certain proportion. The agreement also provided for an arrangement with regard to the division of the profits during the pendency of the suit :

Held, (1) that the agreement to divide the property at the expiration of the litigation did not create any interest in the property under the provisions of s. 54 of the Transfer of Property Act ;

(2) that the temporary arrangement for the management of the property and the division of the profits during the litigation did not declare or create an interest in the property ;

(3) that, consequently, the agreement did not require registration. **B** RUPCHAND BALMUKUND *v.* JANKIBAI KANHYLAL, 27 Bom. L. R. 1441; A. I. R. 1926 Bom. 21 **817**

——— **ss. 17, 49**—*Lease—Unregistered document—Admission to prove collateral facts—Test—Perpetual lease deed—Premium, payment of, whether collateral fact.*

For an unregistered document to be admissible in evidence the collateral fact to be proved must be independent of or divisible from the purpose, to effect which the law requires registration.

Payment of the premium for a lease and the receipt of consideration therefor by the lessor are not collateral facts and an unregistered deed of perpetual lease is inadmissible to prove these facts. **N** PIRBAX *v.* NANHEBI **1044**

——— **ss. 17 (1) (b), 49**—*Gift—Transfer of Property Act (IV of 1882), s. 123—Gift, deed of, unregistered, whether admissible in evidence—Possession, evidence of.*

Although an unregistered deed of gift is not admissible in evidence to prove the *factum* of the gift, it is relevant for the collateral purpose of showing the continuous possession of the donee over the subject of the gift from the date of the gift and the character of such

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possession. O SECRETARY OF STATE FOR INDIA *v.* HARCHARAN DASS, 3 O. W. N. 45; A. I. R. 1926 Oudh 98: 13 O. L. J. 115 927

——— ss. 17 (1) (d), (2) (v), 49, 2 (7)—*Lease—Agreement to lease premises—Present demise—Intention of parties—Registration, whether necessary—Unregistered agreement, admissibility of—Oral evidence, whether can be adduced—Evidence Act (I of 1872), s. 91—Construction of document.*

In order to come within the purview of s. 17 (2) (v) of the Registration Act an agreement must at least be one under which the parties have agreed upon the terms which are to be included in the formal document by which, if and when it is executed, a transfer of an interest in the property will be effected. Otherwise the agreement will amount merely to a contract to enter into a contract as to the terms of which latter contract the parties are not already agreed, and such an agreement is not known to the law and is not recognized by it.

Although under an agreement to demise the term of the lease is to commence at a future date or a formal document is to be subsequently executed between the parties, it does not necessarily follow that the agreement will not operate as a present demise of the premises. Whether an agreement amounts to a present demise or not depends upon the intention of the parties which is to be gathered from the language in which the agreement is couched.

The plaintiff sent the following letter to the defendant :—"I do hereby agree to take by our personal settlement your house and premises No. 7, Bowbazar Street on a lease for 21 years under the following terms :—

(1) Four thousand rupees *salami.*

(2) Rent Rs. 400 per month.

(3) Both taxes, owner and occupier, should be paid by me.

(4) Thorough repair will be done every five years.

(5) The period of lease will be settled from 1st of December 1921." To this the defendant replied that he confirmed the plaintiff's letter and that all terms would be settled on the agreement. Neither of the letters was registered. Subsequently the defendant sold the premises to other persons and the latter served a notice on the plaintiff to vacate the premises. Plaintiff thereupon brought a suit for specific performance of the agreement to lease the premises to him contained in the two letters :

Held, (1) that the agreement contained in the letters amounted to a present demise of the premises and created an immediate interest therein and that the letters being unregistered were inadmissible in evidence by reason of the provisions of s. 49 of the Registration Act;

(2) that oral evidence of the terms of the agreement was barred by the provisions of s. 91 of the Evidence Act ;

(3) that the letters could not be admitted in evidence even for the purpose of proving the terms of the agreement in order to enable the plaintiff to claim specific performance of the agreement. C RAMJOO MAHOMED *v.* HARIDAS MULLICK, 52 C. 695; A. I. R. 1925 Cal. 1087 320

——— s. 28—*Place of registration—Transferor acquiring property in order to register document within particular district, effect of—Registration, validity of.*

Where a transferor does not actually own the property which he purports to transfer, a mere insertion in the deed of transfer of a description of such property will not legalize the registration of the deed in the registration district in which that property is situated. Where, however, in order to enable himself to register a deed within a particular registration district, a transferor first acquires property within that district and then includes that property in the deed of transfer, the registration of the deed within that district is perfectly valid. O PIRTHI DIN *v.* RAM LAL, 2 O. W. N. 947; A. I. R. 1926 Oudh 136 512

——— s. 28—*Sale-deed, registration of—Property situate in and outside jurisdiction of Registration Officer—Vendor having no title to property within jurisdiction—Non-transferable property included in sale-deed—Registration, validity of—Transfer of Property Act (IV of 1882), s. 54—Sale—Delivery of possession—Constructive possession.*

Registration of a sale-deed is invalid if the title of the vendor is found to be non-existent in the only item of the property sold that is situate within the jurisdiction of the Registration Officer.

In order to render registration a nullity, it is not necessary that the fraud practised on, or misrepresentation made to, the Registering Officer must be by both the parties in collusion. Any fraud or misrepresentation by one party alone is sufficient to render the registration a nullity.

For the purpose of registration, the Registering Officer is bound in normal cases to accept the description of the property given in the deed presented for registration before him and such registration is absolutely void if one of the properties described in the deed is on the face of it non-transferable, *viz.*, an occupancy field, irrespective of the fact whether it is really so or not.

For the purposes of s. 54 of the Transfer of Property Act in order that a sale of immoveable property worth below one hundred rupees should be valid, there must be a real delivery of the property, and merely some sort of constructive possession is not sufficient. N SARJA *v.* TULSI, A. I. R. 1926 Nag. 93 1018

——— s. 32 (c). *See* DOCUMENT, EXECUTION OF 209

——— ss. 32, 33, 38—*Presentation by unauthorized person—Admission of execution before officer not competent to accept presentation, effect of—Registration, validity of*—Pardanashin *lady, transfer by—Burden of proof.*

A person taking a conveyance of property from a *pardanashin* lady must show that the lady had advice and fully understood the terms and conditions of the conveyance and the results flowing from her actions.

A Registrar or Sub-Registrar has no jurisdiction to register a document unless he is moved to do so by a person who has executed or claims under the document, or by the representative or assign of such person or by an agent of such person, representative or assign duly authorized by a power-of-attorney executed and authenticated in the manner prescribed in s. 33 of the Registration Act.

The object of this provision is to make it difficult for persons to commit fraud by means of registration under the Act and it is the duty of the Courts not to allow the imperative provisions of the Act to be defeated.

Where a document is presented for registration by a person who is not authorized to do so, the defect cannot

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be cured by the executant's admission of execution made before an officer to whom a commission has been issued under s. 38 of the Registration Act, but who has no jurisdiction to accept the document for registration. R HALIMA BEE BEE *v.* KHAIRUNNISSA BEE BEE, 3 R. 398; A. I. R. 1926 Rang. 17 644

——— **s. 49.** *See* ALSO REGISTRATION ACT, 1908, s. 17.

——— **ss. 49, 17**—*Unregistered document showing nominal nature of prior sale-deed, admissibility of.*

An unregistered document which merely shows that a registered sale-deed executed previously in respect of certain immoveable property was only nominal in its nature is admissible in evidence inasmuch as it is not used as evidence of any transaction affecting immoveable property. M NAMULA RAMAYYA *v.* NADIPINENI APPAYYA, 23 L. W. 19; (1926) M. W. N. 135; A. I. R. 1926 Mad. 362 452

Religious Endowments Act (XX of 1863), s. 14—*Religious endowment*—Mutwalli, *alienation by*—*Suit by worshipper*—*Alienation, whether can be cancelled*—*Possession, whether can be decreed*—*Dedication, proof of*—*Assertion of dedication given effect to in judicial proceedings, effect of.*

In a suit brought under s. 14 of the Religious Endowments Act the Court cannot give any relief in the shape of the cancellation of any transfer effected by the *mutwalli*, nor can it grant possession to the plaintiff of property which the *mutwalli* is alleged to have alienated.

The question whether certain property has been dedicated to religious uses must, so far as possible, be decided upon the basis of such documentary evidence as is available. Oral evidence is apt to be unreliable in such cases.

The fact that an assertion that certain premises were used as a place of public worship was given effect to in the course of judicial proceedings several years prior to the institution of a suit in which the question of the nature of such premises arises, is a strong indication of the fact that the premises have been dedicated as a place of public worship, as also is the fact that a portion of the property in dispute was used as a sort of *dharmshala* or *musafirkhana* for the accommodation of persons who came to worship there. A MAHADEO SAHU *v.* SARJU PRASAD TIWARI, 24 A. L. J. 21; 48 A. 158 871

——— **s. 14**—*Suit for declaration that resolutions passed at certain meeting are invalid, nature of*—*Jurisdiction of Court.*

A suit brought by a member of a Committee constituted under the Religious Endowments Act, against the other members for a declaration that resolutions passed at a certain meeting were invalid on account of proper notice not having been given does not fall within the purview of s. 14 of the Act but is triable under the ordinary law. C FAIZUDDIN ALI *v.* IYAHIYA SIRAJI 352

Res judicata.
See EXECUTION OF DECREE 1017
See HINDU LAW—JOINT FAMILY 868

——— *Hindu Law*—*Widow*—*Reversioner, declaratory suit by, to set aside alienation by widow*—*Dismissal on finding against plaintiff's reversionary title*—*Suit for possession on widow's death, whether barred*—*Mutuality.*

Where a suit brought by a person alleging himself to be the nearest reversioner to the estate of a deceased Hindu for a declaration that an alienation by the widow of the deceased is not valid beyond her lifetime is dismissed on the ground that the plaintiff is not a reversioner at all, the decision operates as *res judicata* in a subsequent suit brought after the death of the widow for possession of the properties by a successor-in-interest of the alleged presumptive reversioner.

The fact that in dismissing an application in the first suit by the plaintiff to withdraw it with liberty to file a fresh suit, the Court made an observation that the order refusing permission would not affect plaintiff's right to bring a suit for possession after the widow's death, is immaterial where the Court actually proceeded to hear the case and dismissed the suit on its merits.

One test of *res judicata* is mutuality. A party will not be concluded against his contention by a former judgment unless he could have used it as a protection, had the judgment been the other way. M PALANI GOUNDAN *v.* SUPPIA GOUNDAN, 49 M. L. J. 143; 22 L. W. 170; (1925) M. W. N. 572; A. I. R. 1925 Mad. 1162 546

——— *U. P. Land Revenue Act (III of 1901), ss. 111, 112, 233 (k)*—*Partition proceedings*—*Objection not taken*—Res judicata.

The very nature of a claim for partition amongst all the co-sharers involves an enquiry into the share of every one of them whether the claim is made in a Revenue Court or in a Civil Court. What is material is that a person should be a party to the partition proceedings and it is immaterial whether he is an applicant for partition or is arrayed on the opposite side.

Section 111 of the U. P. Land Revenue Act imposes a duty upon each co-sharer to put forward any ground of claim or defence involving a question of proprietary title in the matter of the partition of a *mahal*. If a co-sharer omits to take any objection which he is required by law to take, it must be deemed that he has taken that objection and that under cl. (*c*) of sub-s. (1) of s. 111 of the Act the Collector has decided that objection against that co-sharer. To the decision of such a question the provisions of the rule of *res judicata* would extend and it would not be open to a person who was a party to the partition proceedings to agitate that question in a subsequent suit in the Civil Court. O BAIJ NATH SINGH *v.* BAHADUR SINGH, 2 O. W. N. 872; 12 O. L. J. 571; L. R. 6 A. (O.) 101; A. I. R. 1926 Oudh 101 583

——— *Widow, suit against*—*Reversioners, whether bound by decision*—*Widow not impleaded in representative character*—*Pleas in opposition to interests of reversioners*—*Jurisdiction to entertain subsequent suit, absence of, effect of.*

Where a Hindu widow in whom her husband's estate has vested represents the estate in a litigation to which she is a party, the decision in such litigation, fairly and honestly conducted, given for or against her will bind the reversioners, but this rule can be applied only if the widow does as a matter of fact, represent the estate in the litigation.

If, for instance, she litigates in assertion of an absolute right inconsistent with her representative character, she cannot in any sense of the word be

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said to represent the estate or the interest of the reversioners in such litigation, and a decision given therein upholding such contention of hers cannot be held to be binding on the reversioners. **M** ALLA VIRASWAMI *v.* POLAVARAPU NAIYUDAMMA, 22 L. W. 178; 49 M. L. J. 430; A. I. R. 1925 Mad. 1270 **497**

Revenue settlement—Enhanced revenue, imposition of, during currency of period of settlement, legality of. *See* MADRAS REVENUE RECOVERY ACT, 1864, s. 58 **82**

Sale of goods—*Contract, C. I. F.—Buyer's refusal to accept bills—Re-sale by vendor after delay and drop in prices—Goods tendered not in accordance with contract—Seller, right of, to claim loss incurred on re-sale.*

Plaintiffs undertook to supply the defendant with fireworks imported from Europe, the bills therefor to be accepted on presentation and paid for at maturity; in default, the plaintiffs were authorised to dispose of the goods by public sale or action. It was agreed that the goods should be supplied in 3 lots of 10 cases each, each lot containing a different design. The invoices forwarded did not show this and the defendant refused to accept the drafts. Plaintiffs thereupon, long after the season for fireworks was over and when prices had greatly dropped, sold the goods and sued for the loss incurred by them on such re-sale. It was proved that the goods consigned were all of one design and not of different designs as provided for in the agreement:

Held, that the plaintiffs' suit must fail inasmuch as, (*a*) they were not justified in re-selling the goods after an unreasonable delay, and (*b*) they had not shown that the goods which they purported to re-sell and had re-sold were goods which the defendants would have been obliged to take under the terms of the contract. **M** PARTHASARATHY CHETTY *v.* GAJAPATHI NAIDU, 49 M. L. J. 215; 22 L. W. 417; (1925) M. W. N. 756; 48 M. 787; A. I. R. 1925 Mad. 1258 **568**

Settlement Officer, Punjab—*Duties of.*

In the Punjab the Settlement Officer in the early days of British rule combined in his person both judicial and administrative functions. He had to investigate into the actual conditions of the occupation of lands in respect of which the settlement proceedings were instituted and to give effect to ascertained facts in accordance with the result of his enquiry whether the occupation was by virtue of any right or title. **P. C.** AHMAD KHAN *v.* CHANNI BIBI, A. I. R. 1925 P. C. 267; L. R. 6 A. (P. C.) 190; 5 L. 502; 3 O. W. N. 93; 52 I. A. 379; 30 C. W. N. 506 **455**

Soldiers (Indian) (Litigation) Act (IX of 1918), s. 11, *application of.*

Section 11 of the Indian Soldiers (Litigation) Act is applicable only to a plaintiff who is an Indian soldier at the time when he brings his suit. **L** SALIG RAM *v.* BAKHTAWAR, 1 L. C. 400; A. I. R. 1926 Lah. 187 **566**

Sonthal Parganas Justice Regulation (V of 1893). *See* SONTHAL PARGANAS SETTLEMENT REGULATION, 1872, ss. 5, 6 **1033**

Sonthal Parganas Settlement Regulation (III of 1872), ss. 5, 6—*Sonthal Parganas Justice Regulation (V of 1893)—Sonthal Parganas Settlement (Amendment) Regulation (III of 1908), s. 5—Mortgage suit relating to property situate within Sonthal Parganas—Interest, amount of, allowable.*

Sonthal Parganas Settlement Regulation—concld.

The effect of s. 5 of the Sonthal Parganas Regulation III of 1908, which replaced s. 5 of the Sonthal Parganas Settlement Regulation III of 1872, has been to exclude for the future the jurisdiction of Civil Courts to try cases relating to any lands in the Sonthal Parganas only during such period as the land should be under settlement, the period being reckoned from the time when the land is notified as under settlement to the time when the settlement is completed.

Where a suit is instituted in a Court outside the Sonthal Parganas with respect to property a part of which is situate within the Sonthal Parganas the Court in which the suit is instituted must be deemed to be one having jurisdiction in the Sonthal Parganas within the meaning of s. 6 of the Sonthal Parganas Settlement Regulation III of 1872 as amended by the Sonthal Parganas Justice Regulation V of 1893, and the Court in making a decree in such a suit is bound to comply with the provisions of that section which limits its powers. **P. C.** SOURENDRA MOHAN SINHA *v.* HARI PRASAD SINHA, A. I. R. 1925 P. C. 280; 42 C. L. J. 592; 24 A. L. J. 33; (1926) M. W. N. 49; 7 P. L. T. 97; 50 M. L. J. 1; 5 Pat. 125; 52 I. A. 418; 30 C. W. N. 482 **1033**

Sonthal Parganas Settlement (Amendment) Regulation (III of 1908), s. 5. *See* SONTHAL PARGANAS SETTLEMENT REGULATION, 1872, ss. 5, 6 **1033**

Specific Relief Act (I of 1877), ss. 15, 27—*Agreement for sale of immoveable property—Agreement by adult on behalf of himself and of minor co-owner—Specific performance with regard to share of adult, whether can be enforced—Subsequent transferee from vendor—Notice, proof of.*

Where a person agrees to sell his share in certain immoveable property along with the share of a minor co-owner on whose behalf he purports to act as a guardian, there is nothing to prevent the vendee from enforcing specific performance of the contract of sale so far as the interest of the vendor himself, which he was competent to transfer, is concerned. The provisions of s. 15 of the Specific Relief Act are applicable to such a case.

A suit for specific performance of a contract for the sale of immoveable property is liable to be dismissed as against a subsequent transferee from the vendor in the absence of proof that such subsequent transferee had purchased the property with notice of the contract in favour of the plaintiff. **C** PURNA CHANDRA MUKERJI *v.* GOPENDRA KRISHNA KUNDU **517**

——— **s. 21 (a).** *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, SCH. II, ART. 15 **108**

——— **s. 27.**

Where a later purchaser of a property claims priority over an earlier purchaser of the same property by virtue of a prior agreement, such agreement must be a completed one which could be specifically enforced under s. 27 of the Specific Relief Act. **M** GOVINDASWAMI PILLAI *v.* DORAISWAMI MUDALI, (1925) M. W. N. 609; A. I. R. 1926 Mad. 120 **181**

——— **s. 42**—*Criminal Procedure Code (Act V of 1898), s. 146—Suit for declaration—Property in possession of third person—Injunction, whether must be prayed for—Consequential relief, whether necessary.*

A plaintiff who seeks a declaration in respect of properties which are in the possession of a third person is not bound to ask for an injunction.

Though an injunction may be granted in a suit for

Specific Relief Act –concld

declaration if the plaintiff wants it, it cannot be regarded as a relief which the plaintiff is bound to ask when he does not feel any apprehension from the conduct of the defendant and when he does not feel it necessary to ask for it. In such a case the declaratory suit is not liable to dismissal on the ground that it is open to the plaintiff to ask for further relief. **M** GOVINDASAMI PILLAI *v.* RAMANATHAN CHETTIAR, 49 M L. J. 630; 22 L W. 666; A. I. R. 1926 Mad. 164; (1926) M. W. N. 167 **714**

Stamp Act (II of 1899), ss. 15, 35, 36. *See* C. P. C., 1908, s. 11 **772**

——— **ss. 36, 61**—*Unstamped document, admission of, by Trial Court—Appeal—Admission, whether can be questioned.*

Where an unstamped document has been admitted in evidence by the Trial Judge, the admission is not open to question in appeal which is merely a continuation of the same proceeding. The Appellate Court can only send the document on for the collection of the penalty, if any, payable in respect of the document. **M** NAGAPPA CHETTY *v.* V. A. A. R. FIRM, 22 L W. 12; (1925) M. W. N. 484; 49 M. L. J. 306; A. I. R. 1925 Mad. 1215 **494**

——— **s. 57**—*Reference to High Court, when can be made—No case pending—Reference, whether competent.*

A reference to the High Court under s. 57 (1) (*b*) of the Stamp Act can be made only when there is a case pending which is to be disposed of by the Revenue authority on receipt of the judgment of the High Court. A reference to the High Court on a mere abstract question when there is no case pending before the Revenue authority for disposal is not competent. **B** USUF DADABHAI *v.* CHAND MAHOMED, 27 Bom. L. R. 1273; A I. R. 1926 Bom. 51 **299**

——— **s. 61.** *See* STAMP ACT, 1899, s. 36 **494**

——— **Sch. I, Art. 1**—*Statement of correctness of accounts, whether liable to stamp duty.*

Where in reply to a letter sending a statement of accounts, the debtor states that the account sent is correct, the reply amounts to an acknowledgment within the meaning of s. 19 of the Limitation Act, but is not such an acknowledgment as is contemplated in Art. 1 of Sch. I to the Stamp Act and is not therefore, liable to stamp duty. **M** NAGAPPA CHETTY *v.* V. A. A. R. FIRM, 22 L. W. 12; (1925) M. W. N. 484; 49 M. L. J. 306; A. I. R. 1925 Mad. 1215 **494**

Statutory bodies, *duties of.*

Large powers are conferred upon local bodies under the Madras District Municipalities Act upon the strict understanding that they observe the conditions of the Statute to which they owe their origin, and they cannot be allowed to levy taxes upon private persons without strict compliance with the provisions of the Act and Courts have no power to relieve them from the statutory obligations imposed upon them. **M** KRISHNA JUTE & COTTON MILLS CO. LD. *v.* MUNICIPAL COUNCIL, VIZIANAGARAM, 49 M. L. J. 542; 22 L. W. 619; A. I. R. 1926 Mad. 152 **297**

Succession Act (X of 1865), ss. 179, 269—*"All the property of the deceased," meaning of—Property conveyed by administrator without sanction of Court—Conveyance, whether can be challenged.*

The expression "all the property of the deceased" in s. 179 of the Succession Act must be construed as meaning the actual property of the deceased, whether

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held by him for his own benefit or for the benefit of others

A disposal of property belonging to a deceased person by the administrator of the estate of the deceased without the previous permission of the Court is voidable at the instance of any other person interested in the property, that is to say, an objection to such a sale must proceed either from the heirs of the deceased or from those persons who have a beneficial interest in the property. **Pat** MIDNAPUR ZEMINDARI CO. *v.* RAM KANAI SINGH DEO, (1925) Pat. 254; 7 P. L. T. 188; 5 Pat. 80; A. I. R. 1926 Pat. 130 **169**

——— **ss. 234, 261.** *See* C. P. C., 1908, O. XLVII, R. 1 **509**

——— **s. 269**—*Executor, powers of, to dispose of property of deceased—Direction in Will to discontinue business—Mortgage by executor to raise money for purposes of business, validity of.*

The power of an executor or administrator under s. 269 of the Succession Act to dispose of the property of the deceased is unqualified.

Where a testator in his Will directed that his share in a certain partnership business should be realized and that the partnership should not be continued so far as he was concerned, but the executors continued the partnership business and in order to raise money for that purpose created an equitable mortgage over a portion of the estate of the deceased:

Held, that the mortgage was valid and was binding on the estate. **R** MA SEIN BYE *v.* S. R. M. M. R. M. CHETTY FIRM, 3 R. 443; A. I. R. 1926 Rang 10 **663**

Suits Valuation—Redemption suit. *See* COURT FEES ACT, 1870, s. 7, CL. ix **81**

Suits Valuation Act (VII of 1887), s. 11—Suit for possession and mesne profits—Decree, value of, in excess of Rs. 5,000—*Forum* of appeal. *See* APPEAL, CIVIL **9**

Surety—*Letter of guarantee drawn up in plural number signed only by one surety—Liability of surety—Stipulation that other surety must sign, effect of.*

A letter of guarantee drawn up in the plural number but signed by one surety only is binding on the surety who actually signs it, unless such surety expressly or impliedly stipulates that the other surety shall also sign, in which case the condition must be fulfilled before any liability will attach under the letter. **M** MANEM AYYAMMA *v.* PULAVAITH VBERABHADARAM, 22 L. W. 639; (1926) M. W. N. 66; A. I. R. 1926 Mad. 62 **771**

Transfer of Property Act (IV of 1882), applicability of, to Punjab. *See* C. P. C, 1908, s. 115 **778**

——— **s. 6**—*Hindu Law—Family arrangement—Division of deceased divided brother's properties between surviving brother and sons of predeceased brother during lifetime of widow—Transfer of* spes successionis*—Suit for possession by brother after widow's death, maintainability of.*

After the death of a divided brother, his properties were divided between his surviving brother and the sons of predeceased brother and were taken possession of by them without objection by the widow of the deceased who obtained a maintenance allowance under the arrangement. After the death of the widow the surviving brother brought a suit against his nephews for recovery of possession of the proper.

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ties in their possession claiming as reversioner of the deceased brother:

Held, (1) that what was dealt with by the plaintiff and the defendants under the arrangement was the property itself and not a mere *spes successionis*, since actual possession of the properties was taken by the respective parties;

(2) that the arrangement was binding on the plaintiff who was a party to it and that his suit was not, therefore, maintainable. **M** SOMI NAIDU *v.* SITARAMAYYA, 22 L. W. 716; A. I. R. 1926 Mad. 254 **359**

——— **s. 6 (e)**—*Revenue sale—Auction-purchaser, whether entitled to recover arrears of rent—Transfer of right to recover arrears of rent, validity of.*

Section 6 (e) of the Transfer of Property Act is no bar to the transfer of an estate with the right to recover arrears of rent due to the owner of the estate.

A purchaser at an auction-sale held under Bengal Land Revenue Sales Act is entitled to recover mesne profits from tenants whose tenancies were not annulled till the institution of the suit, such mesne profits being limited to the amount payable by the tenants as rent. **C** AHMAD ALI *v.* MALHIUL ALAM CHOUDHURY **474**

——— **s. 51**—*Sale by public auction—Delivery of excess land*—Bona fide *improvements—Suit in ejectment as to excess—Compensation, right to—General principles.*

The defendant purchased a large plot of land in public auction from a District Board. In being given possession of the land purchased, he was given 2 acres and odd of land more than what he purchased. But he was not aware there was any such mistake and took possession of the whole of the land as being the land that he had purchased and made improvements thereon. In a suit by the District Board to eject the defendant from the excess area of land:

Held, (1) that the defendant was a transferee of the property as a whole and he believed in good faith that he was absolutely entitled to the whole and made the improvements *bona fide* on the property, and s. 51, Transfer of Property Act, applied and the defendant on ejectment was entitled to be paid compensation for the improvements;

(2) that even apart from s. 51, on general principles of equity, the defendant's claim to improvements could be supported, especially since the plaintiff knowing that the defendant was making improvements on land did nothing to prevent it. **M** NATESA THEVAN *v.* DISTRICT BOARD OF TANJORE, A. I. R. 1926 Mad. 314 **1**

——— **s. 54.**

See LIMITATION ACT, 1908, s. 132 **754**
See REGISTRATION ACT, 1908, s. 17 (1) (*b*) **817**
See REGISTRATION ACT, 1908, s. 28 **1018**
See TRANSFER OF PROPERTY ACT, 1882, s. 59 **1021**

——— **s. 55.** *See* LIMITATION ACT, 1908, SCH. I, ART. 116 **514**

——— **s. 55 (4) (b)**—*Vendor and purchaser—Lien for unpaid purchase-money, whether can be enforced against transferee for value without notice.*

The lien which a vendor has as against the property sold for the amount of any portion of the purchase-money which remains unpaid is an equitable lien and cannot be enforced against a subsequent transferee of the property for value and without notice of the lien.

The rule of law laid down in cl. (*b*) of sub-s. (4) of s. 55 of the Transfer of Property Act is merely a statutory recognition of an old equitable principle, the limitations of which are well defined. **O** HASAN BAQAR *v.* SHEO NARAIN SINGH, 3 O. W. N. 25; A. I. R. 1926 Oudh 81; 13 O. L. J. 178 **917**

——— **s. 58.** *See* CONTRACT ACT, 1872, s. 35 **330**

——— **s. 59.** *See* REGISTRATION ACT, 1908, s. 17 **663**

——— **s. 59**—*Attestation of mortgage—Executant illiterate—Person writing name of executant, whether can attest—Scribe, when attesting witness.*

Where a person writes on a mortgage-deed the name of the executant who is illiterate and then his own name by way of attestation, there is no proper attestation of the deed as required by s. 59 of the Transfer of Property Act, as a person cannot be an attesting witness to his own act. The matter would be different if the executant puts a mark or thumb impression on the deed, for then it could be argued that the person attested to the mark or the impression.

A scribe may also assume the position of an attesting witness if he signs the document after seeing the document duly executed. But where the scribe signs as scribe before the execution of the document by the executant, he cannot be considered an attesting witness unless he again signs by way of attestation after witnessing the execution of the document. **O** RAMSAMUJH SINGH *v.* MAINATH KUER, 2 O. W. N. 853; A. I. R. 1925 Oudh 737 **176**

——— **ss. 59, 54**—*Construction of document—Transfer by* pyatpaing, *nature of—Redemption—Specific performance—Transferor, whether can recover possession.*

Plaintiff effected a transfer of certain property in favour of defendant by a *pyatpaing* but there was no registered instrument. Plaintiff brought a suit for redemption of the land alleging that the transaction was a mortgage and the defendant filed a counter suit for specific performance on the ground that the transaction was a sale. The Court arrived at the finding that the transaction was neither a sale nor a mortgage:

Held, (1) that on the finding no question of redemption or of specific performance could arise;

(2) that inasmuch as the transfer by *pyatpaing* did not transfer any interest in the property to the defendant the plaintiff was entitled to recover possession of the property. **R** MG. PO KIN *v.* MG. OH, 2 Bur. L. J. 4; A. I. R. 1923 Rang. 230 **1021**

——— **ss. 59, 100**—*Mortgage—Illiterate executant making mark on deed—Attestation by scribe, validity of—Contingent charge, validity of—Construction of document—Intention of parties—Mortgage-deed of one property, whether can operate as deed of further charge in respect of property previously mortgaged.*

Where an illiterate mortgagor purports to execute a mortgage-deed by making his mark on the deed and the scribe thereafter attaches an explanatory note to the mark and also attests the mark, the attestation is perfectly valid.

Deeds and contracts executed by the people of India ought to be liberally construed and where the intention of the parties is clear the form of words employed is immaterial.

In order to find that a document creates a charge upon immoveable property the Court need only be satisfied that the document shows an intention that the person in whose favour it is executed should have the benefit of the security of the land.

A contingent charge is not a charge within the meaning of s. 100 of the Transfer of Property Act,

Certain property was mortgaged by the plaintiff with the defendant and subsequently the plaintiff executed a mortgage-deed of some other property in favour of the defendant which contained a recital that if for any reason the mortgagee should lose possession of the property mortgaged with him under the deed or if there was any dispute as to the title of the mortgagor, the mortgagor would be liable to pay the money due under the deed before he could redeem the previous mortgage. The subsequent deed was described as a deed of further charge and the terms and conditions of the previous mortgage-deed were incorporated into the subsequent deed:

Held, that the subsequent deed operated as a deed of further charge with regard to the property previously mortgaged and that that property could not be redeemed without paying off the amount due under the subsequent deed. **O** RAJA RAM *v.* JAGANNATH **507**

——— **s. 72 (b).** *See* C. P. C., 1908, s. 110 **93**

——— **ss. 72, 76.** *See* C. P. C. 1908, O. XXXIV, R. 1 **87**

——— **s. 74**—*Mortgages, prior and subsequent—Mortgage decree paid off by puisne mortgagee—Liability of other puisne mortgagee not made party to suit*—Damdupat, *rule of, whether applicable.*

Under s. 74 of the Transfer of Property Act a puisne mortgagee who pays off a decree obtained by a prior mortgagee acquires the rights and powers of the prior mortgagee as determined by the decree.

The decree is not, however, binding on any other puisne mortgagee who was not made a party to the suit and the liability of such puisne mortgagee must be determined on the basis of the mortgage. Whatever may be the position under the decree, a puisne mortgagee who was not made a party to the suit is not liable under the rule of *damdupat* to pay more than double the amount of the principal secured under the prior mortgage. **N** DEVIDAS *v.* TRIMBAK, 21 N. L. R. 165; A. I. R. 1926 Nag. 214 **1010**

——— **ss. 74, 91**—*Subrogation—Mortgage by father for himself and son—Partition between father and son—Father undertaking discharge of mortgage—Mortgage, subsequent, by father—Part of consideration applied towards discharge of prior mortgage—Second mortgagee, whether entitled to be subrogated to first mortgagee's rights against son.*

A Hindu father executed a mortgage of certain properties on behalf of himself and his minor son. There was subsequently a partition between the father and the son, who had then attained majority by which the father undertook to discharge the mortgage and the properties comprised in the mortgage were allotted to the son. The father thereafter executed a second mortgage on the same properties on behalf of himself and another minor son subsequently born. Part of the consideration for the second mortgage went towards the discharge of the first mortgage. In a suit by the second mortgagee, after the death of the father against the sons:

Held, (1) that the doctrine of subrogation could not be availed of by the second mortgagee;

(2) that there was no presumption of an intention on the part of the parties to the second mortgage that the first mortgage should be kept alive after it was discharged as there was no intermediate encumbrance against which it might have served as a shield;

(3) that the plaintiff was not entitled by subrogation to bring to sale the properties of the son who

was divided from his father and was not a party to the second mortgage merely on account of the fact that part of the consideration for the second mortgage had gone towards the discharge of the debt due under the prior mortgage. **M** KANDASWAMI NAICKER *v.* VENKATA REDDIAR, 22 L. W. 238; A. I. R. 1925 Mad. 1219 **577**

——— **s. 76**—*Redemption suit—Mortgagee in possession—Liability to pay enhanced assessment—Costs.*

In the absence of a contract to the contrary, a mortgagee in possession is bound to pay enhanced assessment on the mortgaged property, apart altogether from the provisions of s. 76 of the Transfer of Property Act.

In a redemption suit the mortgagee would ordinarily be entitled to his costs but this is subject to the discretion of the Court where he raises questions which involve a denial of the mortgagor's right to redeem. **M** VASTEVA HOLLA *v.* MAHABALA RAO, A. I. R. 1926 Mad. 405 **943**

——— **s. 91.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 74 **577**

——— **s. 100.**

See PARTITION **1009**

See TRANSFER OF PROPERTY ACT, 1882, s. 59 **507**

——— **s. 107**—*Lease—Delivery of possession.*

Delivery of possession is essential to the completion of a lease under the Transfer of Property Act only where the lease has been made by oral agreement and a lease by oral agreement cannot be made where it is from year to year or for any term exceeding one year or reserving a yearly rent. Delivery of possession is not, therefore, necessary for the completion of a permanent lease under the Act. Such a lease can be created by a registered instrument.

By possession is meant possession of a character of which the thing to be possessed is susceptible, and for many purposes the law regards the right to possession as equivalent to possession; especially where the property is not in the actual possession of any one. **Pat** MIDNAPUR ZEMINDARY CO. *v.* RAM KANAI SINGH DEO, (1925) Pat. 254; 7 P. L. T. 188; 5 Pat. 80; A. A. I. R. 1926 Pat. 130 **169**

——— **s. 123.** *See* REGISTRATION ACT, 1908, s. 17 (1) (*b*) **927**

——— **s. 130**—Assignment of debt—Writing, whether necessary. *See* C. P. C., 1908, s. 115 **778**

Trespass *on Government land*—Patta, *absence of—Assessment, effect of—Ejectment suit*—Jus tertii, *plea of, when available—Third party impleaded as party to suit, effect of—Amendment of pleadings—Title subsequently acquired, whether can be put forward.*

When a person who has no *patta* and is, therefore, not a *raiyat* trespasses on land belonging to Government, and cultivates it, the Government sometimes imposes an assessment (somewhat heavier than the usual settlement assessment) called *sivajima* assessment. It amounts to a condoning of the act of trespass but does not amount to a recognition of any right or any undertaking on the part of the Government to permit the occupation for the future, though the occupation may go on for years, the trespass for each year being condoned for that year by the recovery of the assessment.

The principle that possession is good against all but the true owner (which is merely another way of stating that a plea of *jus tertii* is a good defence)

cannot avail the defendants where the third person whose title is set up is impleaded as a party to the suit and admits the plaintiff's title to the property in dispute.

There is no general rule that an amendment cannot be allowed so as to implead a title acquired after the date of the plaint.

When in a suit in ejectment the defendant pleads the title of the Government to the property in dispute, an application for the amendment of the plaint by the addition of the Government as a party for the purpose of attaining finality may be allowed. **M** BUDDALA GANGAYYA *v.* VENNAVALLI SATYANARAYANA, 22 L. W. 120; A. I. R. 1925 Mad. 1021 **503**

Trust, *creation of—Direction to pay money—Agreement to pay money to deceased brother's daughter—Trust or debt—Consideration—Limitation.*

To constitute a trust there must be a trustee with an express trust and an estate or interest in lands vested in the trustee, and which, therefore, the trust must affect.

If the terms upon which a person receives money are that he is bound to keep it separate, either in a Bank or elsewhere, and to handle that money so kept as a separate fund of the person entitled to it, then he is a trustee of that money, if, on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and can deal with it as he pleases, and when called upon to do so, he is to hand over an equivalent sum of money then, he is not a trustee of the money but merely a debtor.

Where no specific property is assigned in trust, but a sum of money is to be paid out of the whole family property of a person, no trust can be held to have been created.

Two Hindu brothers undertook at the time of the death of their undivided brother to pay out of a sum of money due from a debtor of the family the marriage expenses of the brother's daughter and hand over the balance to her on her attaining majority. In a suit by the daughter to recover the money, brought more than three years after her attaining majority :

Held, (1) that no trust was created in favour of the plaintiff ;

(2) that the agreement to pay plaintiff was purely voluntary, without any consideration therefor and was not legally binding on the brothers ;

(3) that in any case the plaintiff was a mere creditor and the suit was barred by limitation. **M** THAYAMMAL *v.* PERUMAL CHETTY, 49 M. L. J. 734; A. I. R. 1926 Mad. 284 **914**

——— Registered deed, when and whether necessary to create trust. *See* TRUSTS ACT, 1882, s. 5 **671**

——— *Trust property, alienation of—Alienation set aside—Alienee, whether entitled to recovery of benefit derived by trust from alienation—Costs—Interest.*

Where a sale of trust property is set aside and it is quite clear that the trust has had the benefit of the consideration for the sale which is set aside, the Court should make the trust pay back what it has gained by the sale which is held not to be binding on the trust. Where in such a case it is found that the transaction so far as the alienee of the trust property is concerned was a fair and *bona fide* one, the alienee is entitled to his costs and also to interest on the amount of the consideration which the

Court directs should be paid back to him. **M** MUNUSWAMY NAYAKAR *v.* ABDUL AZEEZ, 49 M. L. J. 557; A. I. R. 1926 Mad. 146 **724**

——— *Trustee—Executor de son tort—Trust funds, mixing of, by trustee with private funds—Accountability—Burden of proof.*

Where a trustee or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort*, by virtue of his intermeddling with the estate of a deceased person, is proved to have amalgamated monies of the testator with his own and especially if he can reasonably be suspected of having destroyed the evidence which would otherwise be available to separate the estates, he is liable to account for all the sums that he alleges to be his own and to prove his ownership in them.

Where there has been an amalgamation, the burden will shift from the person in the position of a *cestui que trust*, and will rest on the person responsible for confounding the two funds and thereby rendering identification difficult on the former's part. **M** LANKA TULASAMMA *v.* GUNTAPALLI VENKATASUBBIAH, 49 M. L. J. 220; (1925) M. W. N. 681; 48 M. 597; A. I. R. 1925 Mad. 1125 **120**

Trustee. *See* C. P. C., 1908, s. 92 **794**

Trusts Act (II of 1882), s. 5—*Limitation Act (IX of 1908), s. 10—Funds entrusted to relation to carry on money-lending business for benefit of owner—Trust, whether created—Mortgage securities acquired with trust funds—Registered deed, whether necessary to create trust—Change in purpose of trust—Suit by beneficiary for account of trust funds—Limitation.*

P and his brother, who were carrying on a money-lending business, purchased a house and gave it to their brother-in-law, *S*, to live in, free of rent, and transferred their funds to him and got him to transact their business on their behalf in his own name keeping separate account for the same. *S* was to render accounts and hand over the moneys and profits when demanded. *P*'s brother subsequently divided off from him and obtained from *S* his half share in those moneys and in the house, but *S* continued to act for *P* till the latter's death. Just before his death, *P* instructed *S* to continue the business as before and hold the moneys for the benefit of his wife and daughter. *S* also died shortly after and just before his death he told his son, the defendant, to continue the arrangement and pay the monies to the ladies when wanted. The properties originally entrusted to *S* consisted of bonds and notes but had subsequently been converted into mortgage-bonds in the name of *S* or his son the defendant. In a suit brought by *P*'s daughter, after her mother's death, against the son of *S* for an account of all monies belonging to her father which the defendant had collected and had not hitherto accounted for and for payment over :

Held, (1) that *S* was an express trustee in whom moneys had been vested by plaintiff's father for the specific purpose of carrying on his money-lending business, improving the estate and handing over the capital and profits to him on demand ;

(2) that it was open to the plaintiff's father to change the purpose of the trust into a similar one in favour of his wife and daughter ;

(3) that s. 10 of the Limitation Act was, therefore, applicable to the case ;

ists Act—concld.

(1) that as it was not shown that at the time the funds were vested in *S* any portion of them consisted of mortgage securities, no registered instrument was required to create a trust and that it was immaterial that subsequently mortgage-bonds were taken in the name of *S* or the defendant.

Per *Phillips, J.*—There being no immoveable property at the time of the entrustment, no registered instrument of transfer would be necessary; and the property would vest in *S* by the mere transfer of possession coupled with the intention of the parties that such delivery of possession should vest the property. The subsequent direction by *P* that the property should be held for the benefit of his wife and daughter was merely an alteration of the purpose of the trust; in both cases the property would have been held for a specific purpose.

The word "vesting" in s. 10 of the Limitation Act means merely "properly having control of the property." M PACHIAPPA CHETTY *v.* SIVAKAMI AMMAL, 49 M. L. J. 468; A. I. R. 1926 Mad. 109; 23 L. W. 161 671

Union Board—*Meeting—Quorum, what constitutes—Members present but not taking part in meeting, position of—Appeal—Question of fact, whether can be raised for first time.*

A question of fact which has not been raised in the Court of first instance ought not to be allowed to be raised for the first time in appeal.

Where a member of a body after joining a meeting of that body does not want to remain a member of the meeting, the easiest and usual course for him is to leave the place of meeting. Merely taking no active part in the meeting does not make him absent from the meeting when, as a matter of fact, he is there. Many members may join in a meeting and refrain from voting or taking any active part in it, but for the purposes of a quorum such persons cannot be regarded as absent from the meeting. If the number fixed for a quorum is actually present, the meeting is perfectly valid and the proceedings of the meeting cannot be questioned on the ground that some of the members present took no part in the business of the meeting. C DWARKA NATH DUTTA *v.* CHANDRA MOHUN ROY 642

U. P. Land Revenue Act (III of 1901), s. 32—Khewat, *entry in, value of—Presumption.*

Neither mutation of names nor an entry in the *khewat* confers title on the person in whose favour the entry is made, but the entry furnishes *prima facie* proof of the matters to which it relates by virtue of the provisions of s. 32 of the U. P. Land Revenue Act. O BISHESHAR *v.* SHADI LAL 984

——— **ss. 111, 112, 233 (k).** *See* RES JUDICATA 583

U. P. Village Panchayat Act (VI of 1920), ss. 53, 71—*Criminal Procedure Code (Act V of 1898), s. 439—Order passed by Collector under s. 71—Revision, whether competent*—Panchayat, *whether Court.*

A village *panchayat* constituted and held under the U. P. Village Panchayat Act of 1920 is a "Court" and when it is dealing with a case in regard to an "offence" it is a Criminal Court.

There is no provision in the U. P. Village Panchayat Act declaring that the Collector's order made under s. 71 of the Act in criminal proceedings should be final.

Semble.—The High Court has jurisdiction to interfere in revision with an order passed by the Collector under s. 71 of the U. P. Village Panchayat Act in a criminal proceeding. A KAMLAPATI PUNTH *v.* EMPEROR 23 A. L. J. 897; L. R. 6 A. 179 Cr; A. I. R. 1926 All. 27; 27 Cr. L. J. 19; 48 A. 23 51

Vakalatnamah—Appeal filed by Vakil—*Vakalatnamah* signed by appellant and Vakil—Omission to state name of appellant and Vakil in body of *vakalatnamah*, effect of. *See* C. P. C., 1908, O. XLI, R. 1 865

——— *See* C. P. C., 1908, O. III, R. 4 30

Vendor and purchaser—*Consideration—Admission of receipt of consideration, value of.*

An admission by a vendor of the receipt of a portion of the consideration for the sale contained in the sale-deed is of great weight and must prevail unless the effect of the admission is negatived by the evidence or other circumstances appearing in the case. O HASAN BAQAR *v.* SHEO NARAIN SINGH, 3 O. W. N. 25; A. I. R. 1926 Oudh 81; 13 O. L. J. 178 917

——— *Purchase of silver—Time, whether of essence of contract—Custom at variance with terms of contract*—Pournami *day fixed for delivery—Delivery when to be made.*

In contracts for the purchase of silver, an article the price of which varies not only from day to day, but from hour to hour, time is of the essence of the contract.

Where an alleged custom put forward by a party is a custom at variance with the actual terms of a contract, the custom must be definitely pleaded and proved.

There is no custom in the Madras market that when the date fixed for delivery under a contract for the purchase of silver is the *pournami* day, delivery need not be made until some days subsequently. M BALARAM PARAMSUKDASS FIRM *v.* GUDIYATAM GOVINDA CHETTY, 49 M. L. J. 200; A. I. R. 1925 Mad. 1232 257

——— *Sale—Declaratory suit by reversioner—Consideration partly not found for necessity—Vendee, suit by, to recover amount from vendor—Actual loss, proof of.*

A part of the consideration for a sale was found not to be for necessity on the declaratory suit of a reversioner of the vendor. The vendee, who was in possession of the property, thereupon sued the vendor for recovery of the amount not found for necessity. The vendor had adopted the son of the vendee:

Held, that the suit must fail, as no loss had yet been suffered by the vendee, and it was quite possible that he would not suffer any in future as well, as the adopted son, who would succeed the vendor, was not likely to enforce the declaratory decree against his own natural father. L MUHAMMAD TUFAIL *v.* ABDUL MUNIM, 1 L. C. 386 441

——— *Shortage in goods delivered—Damages, suit for, by purchaser—Defendant unable to recover compensation from his own seller—Liability of defendant, whether affected.*

Where in a contract of sale of goods by bales, both the vendor and the purchaser believe that the bales contain a particular quantity of goods, but it is subsequently found that there is a mistake, the bales containing only a lesser quantity, the excess price paid is clearly money paid by mistake, and Art. 96 of Sch. I to the Limitation Act applies. The starting point of limitation in such a case is not the date of delivery but the date when the mistake was discovered.

Per *Coutts-Trotter, C. J.*—In all cases where something turns upon a mistake, or concealment of fact by

Vendor and purchaser—concld.

the fraud or deceit of the other side, the time from which limitation must be taken to run is always the time when it was brought to the plaintiff's knowledge that there had been a mistake or a fraud. **M** RAMIAH & Co. *v.* SADASIVA MUDALIAR, 49 M. L. J. 228; 22 L. W. 341; (1925) M. W. N. 688; A. I. R. 1925 Mad. 1255; 48 M. 925 **151**

Wajib-ul-arz, entry in, value of.
See APPEAL (SECOND) **942**
See CUSTOM **583**

Will, *construction of—Identification of property—Appeal, second—Question of fact.*

Where the words of a devise are plain and the only question is as to the identification of the property referred to, the question is not one of the construction of a document, and cannot be argued in second appeal.

A Will recited that certain rooms on the northern and southern side of a particular building were set apart for the residence of the servants in connection with the library and the servants in connection with the *baithakkhana*:

Held, that the northern and southern rooms were assigned for the joint use of the servants of the library and the *baithakkhana*, and that it was not the intention of the testator to assign the northern rooms for the use of the servants of the library and the southern rooms for the use of the servants of the *baithakkhana*. **C** MONOHAR MUKHERJEE *v.* SURESH CHANDRA MUKHERJEE **423**

Will—concld.

——— *Fraud—Flattery.*

If a legatee by flattery succeeds in persuading a testator to make a Will in his favour, that will cannot be upheld unless it is tainted with fraud.

When a person makes false allegations to his uncle about the unchastity of the latter's wife, and thus induces him to make a Will in his own favour, the Will is tainted with misrepresentation and fraud and cannot be upheld. **O** PARBATI *v.* SHEO BALI **159**

——— *Unsigned document, whether effective as Will.*

An unsigned document can be effective as a Will only where there is evidence of the witnesses who were present when it was drawn up that the Will was drawn up according to the instructions of the testator, and that he signified in their presence his assent thereto, in which case the document would be good evidence of an oral Will. **M** THAYAMMAL *v.* PERUMAL CHETTY, 49 M. L. J. 734; A. I. R. 1926 Mad. 284 **914**

Witness, *credibility of—Appellate Court.*

The question of the credibility of a witness is eminently one for the Court of Trial before whom the witness appears. An Appellate Court is not in an equally good position to pronounce on the matter. **O** BHULAN *v.* EMPEROR, 27 Cr. L. J. 57 **233**

Workman's Breach of Contract Act (XIII of 1859), s. 1—*Elephant driver, whether workman or labourer.*

An elephant driver is a workman or labourer within the meaning of s. 1 of the Workman's Breach of Contract Act. **B** KUTTA BELLA RAVAT *v.* EMPEROR, 27 Bom. L. R. 1415; 27 Cr. L. J. 160; A. I. R. 1926 Bom. 80 **896**

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